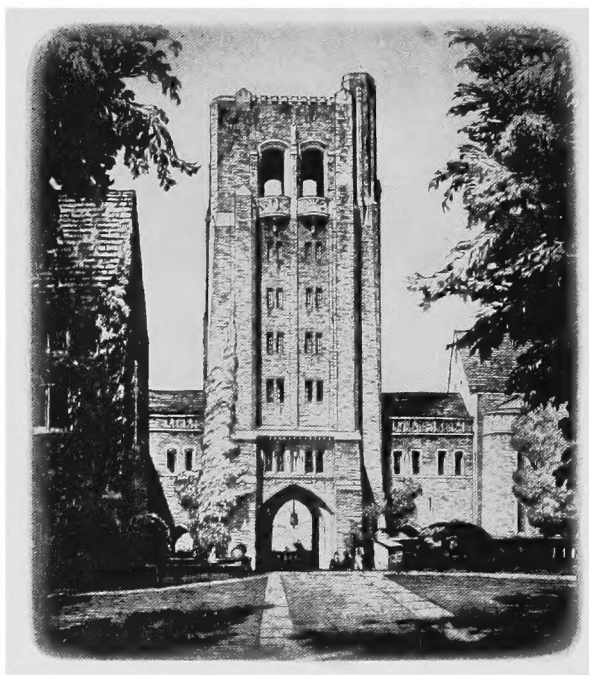




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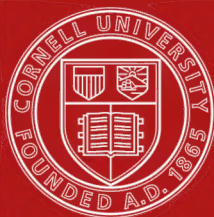
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THE LAW OF CONTRACTS

BY

WILLIAM HERBERT PAGE

[of the Columbus, Ohio, Bar. Professor of Law in the Ohio State University.
Author of Page on Wills].

VOLUME 1

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TO THE MEMORY OF MY FATHER
ROBERT STUART PAGE
THIS BOOK IS DEDICATED

PREFACE.

THE following work began in the author's preparation of notes for use in a course on the Law of Contracts given by him in the College of Law of the Ohio State University. His investigation for that purpose convinced him of the necessity of a work which should be a thorough presentation of the elements of the law of contracts, worked out from American cases, and making full use of the wealth of material contained in the reports of this country — material which is valuable because of the development in detail therein of the underlying principles of contract law, and the excellence of the illustrations of these principles given in the recent American cases; and much of which is available only by independent research. To state the law of contracts as it exists to-day in America is therefore the object of this work. At the same time no statement of that law can be complete if the original Common Law theory of contracts, and the gradual modification of that theory by the English courts is omitted. The general principles of the early Common Law have been gradually transformed in English law, by judicial action, in a constant attempt to re-adjust them to the existing conditions of life; and this modified law has in turn been transplanted to a different country; and under new surroundings and conditions has undergone still further modification and development. It is impossible to understand the present working of a system of law which like ours is the result of long growth without understanding something of its earlier stages. Accordingly the development of the Common Law of contracts has been considered wherever it appeared necessary to an understanding of its present form.

As the subject developed it was found that no complete presentation even of the elements of contract law was possible

within the limits originally set. Indeed, brevity of treatment and an elimination of collateral subjects has been found necessary to keep the work within the limits of three volumes.

The general outline of the subject, inherent in its very nature, which was worked out in its most popular and convincing form by Sir William Anson, has been followed in this work. The subject of contracts has been presented under the topics of Formation, Construction, Operation, and Discharge. No change in this outline has been made from desire for novelty of treatment. The nature of American law, the divergence between the views of American and English courts on many important matters, and the limitations existing in this country upon the power of the legislature have made modifications and additions necessary to a logical discussion of this subject from the American standpoint.

The author hopes that this work may be of value to the legal profession, that it may make the lawyer's unremitting toil somewhat lighter, and that it may, even in a slight degree, tend to what should be the ultimate goal of every sincere writer on legal subjects — that is, to place our American jurisprudence on a broad, scientific and national basis.

WM. HERBERT PAGE.

*Columbus, Ohio,
January, 1905.*

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PART I.

INTRODUCTORY.

PAGE ON CONTRACTS.

CHAPTER I.

HISTORY OF THE LAW OF CONTRACT.

§1. Characteristics of primitive law affecting contract.

Primitive law presents two characteristics. It is based entirely upon procedure, and it is intensely formal. Many of the legal ideas which we regard as rational and logical seem unknown in early jurisprudence. At primitive law rights are not based on an orderly and logical system of legal principles. They are limited to those cases where the rigid and formal procedure of the law gives a remedy. Their enforcement depends not on the merits of the case, but on compliance with archaic formalities. Those who administer the law seem incapable of thinking of a right apart from the remedy for enforcing it and the formalities whereby such remedy may be obtained. Abstract ideas, as might be expected, were scarcely known; and while certain classes of rights in corporeal property were recognized and protected, contracts, that is, executory enforceable promises, were practically non-existent.

Contract was recognized at the outset therefore, only in so far as it had created some right to corporeal property. When it began to be recognized as an incorporeal right, it took some symbolical form, often that of a sale. This symbolism sometimes developed into a formal contract; under other circumstances, the form, which was felt to be so essential to the primitive contract, was created in other ways. Not infrequently the form was religious in its origin. In any case, from whatever source the form came, formal promises were recognized and

enforced long before any general theory of what we now term contract was worked out.

If the society in which these rules of law have become established is a progressive one, there will sooner or later be a conflict between the needs of the advancing community and the archaic forms of law which have ceased to represent the thought and feeling of the average mass of the community. If a revolution is to be averted there must be some adjustment of law to the facts of life. What happens then depends on the relative force of the contending ideas. On the one hand the forces of repression and conservatism may be strong enough to check all progress until the pressure of advance reaches the breaking point. Then there is a cataclysm of some sort, great or small: a revolution, whether attended with bloodshed or not, since advance is made not by developing the pre-existing law, but by breaking with it. On the other hand the forces that make for progress may at the outset be stronger or better organized; and those that make for conservatism and repression may have better political instinct. In such cases the pre-existing law may be developed by a gradual piece-meal improvement, never losing touch with advance completely and never completely breaking with the old. In such a community law will often be uncertain, but revolutions will be few and far between. It has been the strength of the English-speaking peoples that they have generally chosen the second of these methods of developing their law and their institutions. The uncertainty of the law occasionally thus produced is a mark of the strength and rapid growth of the people; not of the inferiority of the law. If our civilization ever becomes stationary it will not be long before our law will become as fixed and certain as Justinian's code: and as dead.

§2. Evolution of contract at Roman Law.

The Roman Law furnishes, in its development, an interesting illustration of these principles, which may here be briefly noted. The earliest contract known to Roman Law was the *nexum*, the contract *per aes et libram*, by means of the money and the

scales. The transaction took the form of a symbolic sale, before five witnesses, and the *libripens*, who held the official scales. A formal dialogue between promisor and promisee took place, during which the scales were struck with the piece of money, probably as a symbol of weighing the copper. The absence of any of these formalities vitiated the contract. A later contract, though a primitive one, was the *stipulatio*. This was a formal, but not a symbolic, contract. It consisted in formal question and answer; a variance from the prescribed form of which vitiated the contract. These contracts were in one sense narrower than contracts at modern law, since they had to be entered into in strict accordance with form. In another sense they were broader, for such questions as consideration did not exist, and they included all promises, if made in the form required.

Before Roman Law reached its complete development it had evolved a theory of informal contract, and had then gradually dispensed with all requirements of form, finally losing all idea of the peculiarity of the formal contract as distinguished from the informal. In these respects, it furnishes a close parallel to English Law.

§3. Contract in early English Law.

Our knowledge of contract in the pre-Norman, Norman and early Angevin periods of English Law, is slight. We find, as we would expect, that there were means of transferring title to property by transactions which we should to-day class as executed contracts, but it may well be doubted whether these transactions were, at that period, classed as contracts at all.¹ There is, indeed, a strongly marked tendency, running through the whole of our law, to class rights, growing out of a contract executed on one side, as property rights, without reference to the contract in which they originated.²

Of the transactions which we would class as executory contracts, we find little mention in the law of this period. This

¹ Pollock and Maitland, History of English Law (2nd ed.), Vol. II., 185, 205; Glanville, Book X.; Black, Com. III., 154.

² Pollock and Maitland, History of

may be due to any one or more of three causes: first, our knowledge of the law of that period, taken as a whole, is very scanty and meager; and second, we probably know least about the remedies and procedure given by the local courts; and it seems to have been in the local courts that most actions on contract had to be brought.³ Third, the idea, that a right, properly so called, exists only when the state in its official capacity is ready to enforce it in some way, is comparatively recent. In the Norman period there was no incongruity in the idea of a right enforceable only in local courts, or in church tribunals by the sanctions of religion, with which the king's courts would have nothing to do. The church during this period was ready by its ecclesiastical courts and the discipline enforced thereby, to enforce the observation of promises of many kinds. The promises thus enforced undoubtedly included many which our courts of law would not think of enforcing to-day as contracts. But in any event, practical enforcement of some contracts seems to have been left to the ecclesiastical courts, to the exclusion of the jurisdiction of the Common Law courts.

§4. Jurisdictional importance of writs.

The chief characteristic of the English Common Law in its growth and development was, that rights which we now term substantive were grouped in accordance with the form of action by which a violation of such right might be redressed. The modern theory of law is that, the substantive rights being stated fully and exhaustively, it at once appears whether on the facts of the case there has been any invasion of such substantive right; and that in case there is an invasion, the law gives a remedy by an appropriate proceeding as a matter of course. The Common Law view was exactly opposed to this. A certain number of writs were allowed by the law. Each of these writs could be given in certain specified cases. If the particular case in question did not present such a state of facts as would justify the issuing of one of the known writs, no remedy could be given. This tendency of the Common Law is in part a charac-

³ Glanville, Book X., ch. 8, ch. 18.

teristic which as we have seen ¹ belongs to every system of primitive law. It was further strengthened and intensified by the method in which the Common Law was built up. The reasons for the peculiar force of this idea in English Law are therefore, in part, historical. The Common Law, as we know it, is the law recognized and applied in England by the royal courts. The law generally in force in England in the local or baronial courts in the reign of Henry II. is of great importance since it furnished by far the greater part of the materials from which the royal courts built up their new jurisprudence; but it is as a source of material and not as a rival jurisprudence that it is of marked interest to us.² The permanent establishing of the royal courts by Henry II. is therefore one of the great crises in the development of our law, and marks the nearest approach to a break in the continuity of its development. The reforming influence in mediæval law was likely to proceed from the king. The nobility were satisfied with the existing order of things: the lower classes had no means of expressing their grievances except by occasional rebellions. The middle class was just beginning to exist. Henry II., whatever his personal faults, was a great legal reformer. He found justice in England local or feudal. By establishing royal courts and giving to them jurisdiction over certain classes of cases, he took the first steps which were to make justice in English-speaking countries first royal, and eventually national. In determining what jurisdiction his court should have, Henry II. was probably not controlled by philosophical theories. He seems to have asserted for his court as wide a jurisdiction as he dared. The limits thus set were probably determined by his power rather than by consistent legal theories. In any event the royal court was one of a limited jurisdiction. From the first, it could only hear cases which were brought before it by certain specified forms of writs. The natural tendency of early law to formalism was thus intensified in England by the fact that in the court

¹ See § 1.

² Thus according to the sub-title Glanville purports to treat of "those laws and customs only, according to

which pleas are determined in the King's Court, the Exchequer, and before the Justices, wheresoever they may be."

which was really making the Common Law, these forms were jurisdictional in character. The development of the Common Law including the law of contracts is therefore intimately associated with the development of the writs and the various forms of action. These must, therefore, be considered separately.

§5. Debt.

The propositions already laid down may be illustrated by a reference to the earliest work on the Common Law during the Angevin period: that which bears the name of Ranulph de Glanville, Justiciar of England.¹ Glanville, writing toward the end of the reign of Henry II., devotes Book 10 to a discussion "of the debts of the laity, arising from different kinds of contracts, namely: from sale, purchase, gift, loan, borrowing, letting out and hiring; and the pledges and gages, whether movable or immovable; and of charters concerning debts." An examination of this chapter shows that as a rule Glanville is treating of contracts which are executed upon the one side, and the remedy sought by the person who has thus executed the contract is to compel payment. His right is thought of as substantially a right to certain property, whether he is seeking to recover specific property, or to recover payment under the contract. The writ which Glanville gives as the proper one to issue when the plaintiff complains to the King's Court concerning a debt that is due him is as follows: "The King to the Sheriff, Health. Command N. that justly and without delay he render to R. one hundred marks which he owes him, as he says, and of which he complains that he has unjustly deforced him. And, unless he does so, summon him, by good Summoners, that he be before me or my Justices at Westminster in fifteen days from the Pentecost, to shew wherefore he has not done it. And have there the summoners and this writ. Witness, &c."² The debt is looked upon as property of which the defendant is deforced, as we to-day look upon wrongful detention of specific personal

¹ Who wrote this work or how he spelled his name are questions not involved here. The author will, for

convenience, be referred to as "Glanville."

² Glanville, Book X., ch. 2.

property.³ We find therefore that by the year 1188 A. D. at the latest, the action of debt was thoroughly established. "Pleas concerning the Debts of the Laity also belong to the King's Crown and Dignity."⁴ Even the fact that the debtor had pledged his faith could not shake off the jurisdiction of the King's Court, whatever claims the ecclesiastical courts might make. "Pleas of debt due under pledge of faith or without pledge of faith are to be in the king's justice."⁵ Debt shows its primitive origin in the fact that wager of law is a defence. The commonest form of the wager of law consisted in the defendant's swearing that he did not owe the debt; and a certain number of other witnesses (often twelve) swearing that they believed him. They were practically character witnesses only. Another form of wager of law was defendant's making the oath with certain additional solemnities, often in a certain number of churches. That such defenses were allowed shows that the action of debt is so old that the mode of proof which is characteristic of early Germanic jurisprudence could attach to it and become an inseparable part of it. In later times a forced and artificial attempt to rationalize this method of proof was made. It was said that the plaintiff had voluntarily given credit to the defendant and had thus vouched for his credibility. This late and insufficient explanation was probably not thought of for generations after the wager of law became a defence in the action of debt. Debt lay from the first, as we have seen, for a fixed and liquidated sum of money due and owing from the defendant to the plaintiff.⁶ It was an action in one sense much narrower than contract, for it omitted all executory agreements. In another sense it was much wider, for it provided a means of recovering a liquidated sum which might be due for some reason outside of contract: such as a penalty imposed by statute.

The contracts enforceable in the King's Courts, which were most nearly like our executory contracts, were contracts of

³ Pollock and Maitland, *History of English Law* (2nd ed.), Vol. II, 204, 205.

⁴ Glanville, Book X., ch. 1.

⁵ Constitution of Clarendon, ch.

15; Translation Sel. Doc. Eng. Const. Hist., Adams & Stephens.

⁶ Pollock and Maitland, *History of English Law* (2nd ed.), Vol II., 210; Black, Com. III., 154.

warranty, for which a remedy was given.⁷ Glanville tells us that a solemn pledge of the faith of the defendant will not be received as any proof in the King's Court, though breach of contract with a violation of faith, may be proceeded for in the Court Christian;⁸ other proof is necessary; and this other proof may be by a proper witness, by the duel, or by a charter.⁹

Apart from this casual reference to sealed instruments as evidence in an action of debt, or in some cases as underlying a warranty, Glanville makes no allusion to the action which was subsequently known as covenant, and based upon an instrument under seal.

The remaining kinds of contracts appear to have been outside of the jurisdiction of the King's Court. Thus Glanville tells us that if there is a contract for a pledge, and the debtor after having received the loan should not give the pledge, the King's Court is not in the habit of giving protection to private agreements of this description made out of court, or even in any other court than that of the King; and therefore, if such compacts are not observed, the King's Court does not interfere.¹⁰ So, after a meager outline of letting and hiring, Glanville tells us that he passes briefly over the foregoing contracts, because the King's Court does not usually take cognizance of them.¹¹ Glanville therefore recognizes an action for a fixed and liquidated debt and for certain breaches of warranty, but not for a mere promise however solemn or for breaches of ordinary contract.

It seems clear, from this chapter of Glanville, that many rights were left to the local courts, or the ecclesiastical courts. If the material for writing a complete history of the English Law of Contract should ever be gathered, it may be found that during the early Angevin period, the King's Court selected certain rights to enforce, leaving others to the ecclesiastical and local courts: as the law administered by the courts of the King came to be looked upon as the Common Law, the law of the other courts dwindled to local custom, and thus passed to obliv-

⁷ Glanville, Book X., ch. 15.

⁸ Glanville, Book X., ch. 12.

⁹ Glanville, Book X., ch. 12.

¹⁰ Glanville, Book X., ch. 8.

¹¹ Glanville, Book X., ch. 18.

ion, or was transferred to the realm of religion which we look upon as being outside of law; and that by this means a great mass of rights which once were enforceable in some way, and in some court, became obsolete, and that the subsequent development of the Law of Contract has been in a great measure a gradual winning back by the Common Law, as developed by the King's Courts and the other courts following their precedents, of the ground thus lost.

§6. Covenant.

We consider elsewhere the gradual extension of the use of the seal as a means of authenticating instruments. With the adoption by the lower strata of free men of a form which had once been characteristic of the great men of the realm¹ we find an increasing disposition to recognize the new form of instrument as creating a distinct class of rights. When Glanville wrote the sealed charter was only one kind of evidence, though often the most satisfactory kind, of proving the debt sued for. Soon after Glanville wrote, it appears from the records of the courts that they were beginning to allow a special form of writ for formal written instruments. This is the writ of covenant. Pollock and Maitland² give examples of the writ of covenant of the dates of 1194 A. D. and 1201 A. D. By the time of Bracton the action of covenant is in general use, though he uses language which seems to imply that the courts exercised a rather arbitrary discretion in deciding what contracts they would enforce, and that they were on the whole averse to enforcing contracts made out of court. In speaking of stipulations he refers to the: "Conventional which is drawn up on the agreement of each party, and not by order of the judge or of the prætor, and of which there are as many kinds as there are penalties for contracts, with which the court of the king does not interfere at all except as a matter of grace."³ "Although it is not allowable for any of the parties to recede

¹ See § 555.

³ Bracton, f. 100; Twiss's edition.

² History of English Law (2nd ed.), Vol. II., p. 117.

ed.), Vol. II., 216.

from covenants it is not usual at any time for a necessity to be imposed on the court of our lord the king to discuss private covenants of this kind. But nevertheless if anyone recedes from a covenant the other party is aided by an action on the covenant, according as will be explained below.”⁴ During the century following Glanville the action of covenant became firmly established as a means of enforcing formal contracts.⁵ For some time the courts seem to have hesitated over the question whether a seal was necessary to a formal contract, or whether a written contract, or even an oral contract made in some solemn form would not be sufficient.⁶ By the reign of Edward I. it was settled that a sealed instrument was necessary to prove a covenant. While this is stating substantive law in terms of evidence, it is only doing what is done in our law to this day. The action of covenant then, became restricted to the sealed contract.

After covenant developed as a separate action, it seems that for several centuries covenant and debt were mutually exclusive; it was not until the seventeenth century that either debt or covenant could be brought where a fixed and liquidated sum of money was owing under a sealed instrument.⁷ Since the Common Law could enforce a contract only by means of a writ, it follows from the foregoing facts that in the twelfth and a greater part of the thirteenth century, the Common Law Courts recognized and enforced only two classes of contracts; those under seal, and those resulting in a fixed and liquidated indebtedness. For the numerous and varied contracts of other classes, no remedy was given, and under our view of what law is, we may say that no such right was recognized by the courts of the king. It must further be observed that debt and covenant were not limited to contracts as we understand them.

⁴ Bracton, f. 34; Twiss's edition, Vol. I., p. 267.

⁵ Pollock and Maitland, History of English Law (2nd ed.), Vol. II., 216.

⁶ Pollock and Maitland, History of English Law (2nd ed.), Vol. II., 219, 220.

⁷ Pollock and Maitland, History of English Law (2nd ed.), Vol. II., 219. By the eighteenth century either action could be brought if a fixed sum was due on a sealed instrument; but owing to wager of law, covenant was preferred. Black Com., III., p. 154-156.

Debt especially would lie for many cases which are now outside the pale of contract law, such as statutory penalties, amercements, forfeitures and the like.⁸

§7. The Statute In Consimili Casu.

During the latter part of the twelfth and the early part of the thirteenth centuries the Common Law courts began to arrest the natural development of the Common Law by refusing to allow new writs to be framed for the purpose of meeting new cases as they arose. As we have seen already,¹ this tendency characterizes all legal systems of primitive type. In a nation which is progressing in a social and economic development, an irrepressible conflict ensues between legal theories and the facts of life. A nation thoroughly alive will not remain fettered by a rigid system of law based on an obsolete theory of society. In England relief came from the legislature.² Undoubtedly this legal reform originated with the king, Edward I., and its adoption by Parliament was due to his initiative. The Statute 13 Edw. I., ch. 24, passed in 1284 A. D., is known from the place where Parliament convened as the Statute of Westminster second. From its characteristic words this section of the statute is known as *in consimili casu*. This section provides that "Whensoever from henceforth it shall fortune in chancery that in one case a writ is found, and in like case falling under like law and requiring like remedy is found none, the clerks of chancery shall agree in making the writ; or the plaintiffs may adjourn it until the next parliament, and let the cases be written in which they cannot agree, and let them refer themselves (them) until the next parliament (and) by consent of men learned in the law a writ shall be made (let a writ be made) lest it might happen after that the court should long time fail to minister justice unto complainants."³ This statute marks a turning point in the history of English Law. If the

⁸ See §§ 11, 14, 771. Pollock and Maitland, History of English Law (2nd ed.), Vol. II., 210, 211.

¹ See § 1.

² This was only one means of de-

velopment. Legal fictions and equity worked with legislation to keep the law abreast of national life.

³ Translation from English Statutes at Large, by Danby Pickering.

courts had refused to extend their jurisdiction by taking advantage of this statute, equity would have so developed as to overshadow Common Law. If the courts had promptly enforced the statute in the spirit in which it was passed, equity would have had but a limited field for its operations. As it was, the courts compromised. Slowly, and with evident reluctance, they took a partial and limited advantage of this statute; leaving equity room to develop side by side with the Common Law.

§8. Development of assumpsit.

In enlarging their jurisdiction under this statute the Common Law Courts did not approach contract as a separate subject in its nature distinct from other rights; but they treated breaches of contract as wrongs, in principle indistinguishable from non-contract wrongs. To find breach of contract classed as a tort is in some respects startling. It may help us to realize the Common Law standpoint to note that breach of contract is classed under private wrongs or torts by Professor Robinson,¹ in making which classification he follows Blackstone.² The idea that breach of contract is a kind of a tort is, therefore, one which cannot be said to have become obsolete for centuries after the passage of 13 Edw. I. It originated undoubtedly in the period when assumpsit, the last and broadest of the contract actions was developing. The crying need for a new form of action was not at the outset in the domain of contract; but in tort. Under the statute, *in consimili casu*, the class of cases which first seem to have impressed the courts as being in like case and requiring like remedy with existing forms of action were those in which a wrongful act had been done, which caused damage and yet could not support an action of trespass because the wrongful act did not involve the direct application of force to the person or property injured. Negligence is a typical example of wrongs of this class. To meet such cases, an extension of the writ of trespass known as trespass on the case was devised. This writ was at first allowed in cases which we should

¹ Robinson's Elementary Law, § 228. ² Black. Com. III., 153, *et seq.*

class as pure tort. The question which however soon came up for discussion was this. If negligence is actionable and trespass on the case will lie, why should it be the less actionable because the transaction by means of which negligence and resulting damages were possible, originated in the agreement of the parties. To this the courts promptly replied that trespass on the case would lie on such facts. Accordingly where a blacksmith shod a horse and negligently drove a nail into the horse's hoof, thereby laming him, it was held that trespass on the case would lie.³ So if one undertook to carry a horse safely across a river, and overloaded the boat, by reason of which the horse was killed, it was held that trespass on the case would lie.⁴ This form of action was allowed against the specific objection that it should have either been in trespass, or on the agreement. The latter objection, though in form a mere matter of procedure really raised a question of substantive law; for if on contract, the action must have been covenant, since the damages were unliquidated, and no recovery could then be had as the contract was not under seal. Accordingly where suit was brought for undertaking to cure a horse and performing so negligently that the horse died, it was held that the action need not be covenant, but that trespass on the case would lie.⁵ In the cases thus far discussed, the defendant attempted performance but performed in a negligent manner. The question was then further presented whether if the agreement was not under seal this form of trespass on the case would lie against one who had done nothing towards performance. The courts were at first strongly set against allowing this action in such cases. The reason was possibly in part that given by Reeves. "It was thought somewhat harsh to give the name of trespass to a thing which was never *done*; it took therefore, some time, and needed the concurrent force of some strong motives, to induce the court to admit these new writs."⁶ In the reign of Henry IV. suit was brought against a carpenter for not building or causing to be built cer-

³ Y. B. 46, Ed. III., 19 (Trinity Term), pl. 19.

⁴ Y. B. 22, Liber Assisarum, pl. 41, fol. 94.

⁵ Y. B. 43, Ed. III., 33, pl. 38 (Michaelmas Term).

⁶ Reeves (Finlason), III., 434, 435.

tain houses which he had agreed to build. The objection was made that the plaintiff was really counting on a covenant while he failed to show a sealed contract. This objection was sustained by the court, it being suggested in *obiter* that perhaps it would have been otherwise if it had been averred that the work was begun and by negligence left unfinished.⁷ This decision while outwardly on a question of procedure necessarily involved the idea that an executory contract could not be enforced in case of mere non-performance unless under seal. The same decision was rendered a little later in the same reign.⁸ Apparently contract law had reached its limit of development at the Common Law. It seemed that without aid from the legislature the Common Law would abandon the purely executory contract. The bar did not, however, seem satisfied with this decision as a finality. In the reign of Henry VI.⁹ the attempt to enforce executory contracts by the action of trespass on the case was renewed. An action was brought for breach of a contract to build a mill. It was not alleged that the contract was under seal, or that the defendant had done anything thereunder. The question presented was therefore the same as that presented in the earlier cases. Two out of the three judges, however, held that the action of trespass on the case would lie. The third judge dissented on the ground that if this kind of action would lie in such a case, it would lie on every broken agreement. This was, of course, the real question. Historically the dissenting judge was right. The majority decision was a departure from precedent. It was a departure, however, which settled the law; and it forms the leading case on the elementary proposition that an executory contract, not under seal, is enforceable.

§9. Assumpsit ultimately separated from trespass on the case.

The next step in the development of assumpsit was to differentiate it from the other forms of trespass on the case. This was a slow process. At one time the courts seemed inclined

⁷ Y. B. 2 Hen. IV., 3 b. and 4, pl. 9.

⁸ Y. B. 11 Hen. IV., 33, pl. 60.

⁹ Y. B. 3 Hen. VI., 36, pl. 33.

even to take the position that *assumpsit* was not a contract.¹ After *assumpsits* were regarded as contracts there was a lingering tendency to treat the action as a special form of trespass on the case. Blackstone refers to "an action on the case for what is called the *assumpsit* or undertaking of the defendant."² The effect of this tendency was twofold. First, the inclination of the courts to classify *assumpsit* as a form of trespass on the case led to the anomaly, already noted of classifying breach of contract as a form of tort.³ This very fact, however, made it possible for *assumpsit*, on ultimately freeing itself from trespass on the case to take shape as a means of enforcing all breaches of enforceable agreements not already provided for by the actions of debt and covenant. After *assumpsit* became an established and distinct form of action, there was nothing in the technicalities of actions or procedure to prevent the enforcement by the courts of any promises which the law might hold enforceable. Second: the tendency of the courts to treat *assumpsit* as a form of trespass in the case, and the further fact that it finally took definite shape before rights were grouped on the basis of their inherent nature, led to the result that *assumpsit* was extended to many classes of cases which we do not class as contract at modern law. The promise in such cases was merely a legal fiction which had to be pleaded but need not be proved. Even some forms of tort might be sued in *assumpsit* by alleging the fictitious promise. These questions are subsequently discussed in detail.⁴

§10. Contract at Modern Law.

The great change in Modern Law affecting contract has been the abolition of forms of action. In many jurisdictions forms of action have been completely abolished and the civil action substituted therefor. In other jurisdictions, the old forms

¹ *Sidenham and Worlington's Case*, 2 Leon. 224. An additional action, for trying property rights in personal property, the action of *trover*, developed out of case. This was classed with the actions in tort

as was case, while *assumpsit* has been classed as an action *ex contractu*.

² Black, Com. III., 157.

³ See § 8.

⁴ See §§ 11, 14, 771.

have been retained, but simplified and with a freedom of amendment that makes the distinction between the different actions of much less importance than under the old system. The effect of this change in procedure has re-acted on the law of contract, as it has on other branches of substantive law. Some classification of law is necessary. The old system of classifying on a basis of procedure is practically obsolete; and we are driven to a more rational and logical but more difficult classification upon the basis of the inherent principles of substantive law. Instead of classing as contract everything for which debt, covenant or assumpsit would lie, we now endeavor to classify rights of action in accordance with their inherent principles. The result is that certain rights of action which have always been classed as contract because enforced by one of the actions *ex contractu* are now seen to be distinct from contract. If still classed with contract it will be for reasons purely historical.¹ The change in social customs during the past seven centuries has produced a corresponding change in the relative importance of the different branches of substantive law. The law of contract has gained at the expense of most of the other branches. Thus in Glanville's book, about nine per cent of his space is devoted to contract; in Blackstone's, about two per cent; while it is perhaps not too much to say that of Modern Law books, about one-half, outside of the subject of procedure, is devoted to contract. It may be said, therefore, as a summary, that the law of contract has been of late and retarded development. Down to a comparatively recent period in the development of our law there has been no general or comprehensive theory of contract. This has on the one hand prevented the law from becoming fixed with certainty, but on the other hand it has spared us that premature development that results in rigidity and loss of power to meet the needs of progress. From its very insignificance, the law of contract was not elaborated in the early Common Law, as, for example, the law of Real Property was. It was therefore left in a rudimentary state, and for that very reason, far more free to expand on its substantive side into

¹ See §§ 11, 14, 771.

a rational and harmonious system, in sympathy with the scope and spirit of the completed Roman law, than it would have been had its principles been developed in detail at an early stage of growth.

CHAPTER II.

NATURE AND CLASSES OF CONTRACTS.

§11. Theory of contract at Common Law.

From the foregoing historical discussion of the development of the law of contract¹ it can be seen that it is impossible to formulate a statement of the theory of contract which will apply alike to the early Common Law, to the Common Law in its classic form, and to Modern Law. Each of these periods must be considered separately. At Common Law rights were classed as contracts if enforceable by some form of action *ex contractu* irrespective of their inherent nature. Conversely contracts at Common Law might be defined as those rights which could be enforced by some action *ex contractu*. In making this statement, however, we are attempting a generalization which was assumed by those who administered the law, but which was rarely stated. We have seen already that the idea of contract at first entertained by the King's Court at first included whatever resulted in a fixed and liquidated indebtedness: and nothing else.² By the reign of Henry III. the idea of contract also took in sealed promises.³ By the reign of Henry VI. the idea of contract had expanded beyond these limits.⁴ The question of the extent of contract depended then upon the growth of assumpsit and the classes of cases in which it would give relief. Passing to the classic period of the Common Law, as summed up for example by Blackstone, we find that contracts were divided into two great classes; the formal, and the informal or the simple contract. Formal contracts were divided into contracts of record and contracts under seal, or specialties.⁵ Contracts of record were divided into judg-

¹ See ch. 1.

² See § 5.

³ See § 6.

⁴ See § 8.

⁵ Whether "specialty" can be used as including contracts of record, see § 545.

ments, recognizances, statutes merchant, statutes staple, and recognizances in the nature of statutes staple. Simple contracts were divided into express and implied contracts. Express contracts were those in which the agreement was entered into by the parties in so many words. An implied contract was one in which the agreement was not entered into in so many words, but was inferred from the facts and circumstances of the case. As used at Common Law, this included two distinct classes of rights. The first class consisted of those rights which grew out of a genuine agreement between the parties, in which the parties arrived at such agreement by means of conduct, acts, gestures and the like, without expressing their agreement in the form of words. The second class consisted of those rights which did not grow out of any real agreement between the parties, but which the law enforced by the action of *assumpsit*.

§12. Theory of contract at Modern Law.

No general theory of contract was developed or attempted during the early period of the Common Law. This made it possible to develop such a theory at Modern Law free from the restraint of archaic form and imbued with modern ideas. In this development Roman Law has been freely borrowed; and its general spirit and method have been controlling factors. Occasional confusion necessarily results from imposing Modern Law with its strong tendency toward Roman principles upon a foundation of early Common Law; and from attempting to harmonize the two. It is however useless to ignore this peculiarity of development or to regret it. On the one hand we must acknowledge that our present principles cannot be applied to the early Common Law; and on the other hand, we must also acknowledge that many of the peculiar principles of the early Common Law either are obsolete or are arrested in development and that modern contract law owes part of its ideas to the gradual infusion of Roman Law and part to the original stock of the Common Law.

Contract in its modern sense may be said to involve two distinct ideas. It must originate in agreement;¹ which is to say,

¹ See ch. 4.

contract liability is assumed only by one whose intention, as ascertained in the manner prescribed by law, is to assume such liability. Without such intention, so expressed, no liability in contract exists. Accordingly a liability imposed by statute and not assumed by the voluntary agreement of the parties is not a contract even if it is a liability on which the action of debt could have been maintained at Common Law.² Whether a judgment is to be classed as a contract is subsequently discussed.³ However as within constitutional limits the legislature may provide for the validity, effect and consequences of contracts, it may provide that certain liabilities follow from entering in certain kinds of contracts; and such agreements are contractual in their character. Thus it is generally held that the liability of a stockholder in a corporation to the creditors thereof, imposed by statute and resulting from his ownership of stock is contractual in character.⁴

To amount to a contract this agreement must result in obligation; that is, it must be of such a nature that the law will give some remedy for a breach thereof. Another form of expressing the same idea is to say that a contract is an agreement enforceable at law. A contract at modern law is usually said to consist of four elements: parties competent to contract; a consideration, such as the law will recognize; a subject matter such as the law will allow; and agreement, or meeting of the minds, by offer on the one hand and acceptance on the other.

² "A statute liability wants all the elements of a contract, consideration and mutuality, as well as assent of the party." *McCoun v. R. R.*, 50 N. Y. 176, 180; quoted in *Morley v. Ry.*, 146 U. S. 162.

³ See ch. XXXII.

⁴ *Flash v. Conn* 109 U. S. 371; *Paine v. Stewart*, 33 Conn. 516; *Bell v. Farwell*, 176 Ill. 489; 68 Am. St. Rep. 194; 42 L. R. A. 804; 52 N. E. 346; *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102; 38 Am. St. Rep. 229; 64 Pac. 984; *Abbey v. Dry Goods Co.*, 44 Kan. 415; 24 Pac.

426; *Pulsifer v. Greene*, 96 Me. 438; 52 Atl. 921; *Foster v. Row*, 120 Mich. 1; 77 Am. St. Rep. 565; 79 N. W. 696; *Blair v. Newbegin*, 65 O. S. 425; 58 L. R. A. 644; 62 N. E. 1040; *Kulp v. Fleming*, 65 O. S. 321; 87 Am. St. Rep. 611; 62 N. E. 334. *Contra*, *Crippen v. Loughton*, 69 N. H. 540; 76 Am. St. Rep. 192; 46 L. R. A. 467; 44 Atl. 538; *Marshall v. Sherman*, 148 N. Y. 9; 51 Am. St. Rep. 654; 34 L. R. A. 757; 42 N. E. 419; *Hancock National Bank v. Farnum*, 20 R. I. 466; 40 Atl. 341.

These elements are considered in detail in the following chapters.⁵

§13. Effect of modern theory on Common Law classification.

The modern theory that contract is an agreement enforceable at law has disarranged Common Law classifications based on the form of action. However, since the Common Law classification went back to the beginning of the Common Law itself, it survives to this day, though the original reason for its existence has long since vanished. The simple contract, though the last to be developed, is now looked upon at Modern Law as the contract *par excellence*. It is the representative type of contract at Modern Law, and possesses all the elements requisite therefor, since it is an agreement which by reason of its consideration, the law will enforce. Whether the simple contract is express or implied makes no difference except as to the evidence by which it is to be proved, as long as it is a genuine agreement. Contracts under seal are genuine contracts since they are agreements which, by reason of their form, are enforceable at law. They do not possess the same elements as simple contracts; for they require form, which simple contracts do not; and do not require consideration, which simple contracts do; but they are included under the definition of contract. By reason of the abolition of private seals in many jurisdictions, and the requirement of a consideration even in contracts under seal, this class of contracts has lost its original importance. A discussion of the peculiarities of sealed contracts is for this reason reserved until after the elements of simple contracts have been treated.¹

§14. Quasi contract.

If we take the Common Law classification of contracts, and strike out the contracts which are recognized at Common Law as genuine contracts, we have left two classes. These are (1) the contracts of record and (2) the second class of the so-called

⁵ See chs. III. to L.

¹ See ch. XXXIII.

implied contracts, consisting of rights enforceable at Common Law by the action of *assumpsit*, and hence classed as contract; but not originating in the voluntary agreement of the parties, and hence excluded from the modern classification of contract. There is a strong tendency at Modern Law to separate these rights entirely from genuine contract and to class them as quasi-contract or as constructive contracts. The historical classification of the Common Law has resisted this tendency to a great extent. Out of deference to the traditional classification, therefore, constructive contracts or quasi-contracts are discussed hereafter, and their present relation to contract is here outlined.¹

§15. Classification and arrangement of topics.

While from an historical standpoint, the contracts creating debt and the formal contracts preceded the ordinary simple contract, it is easier at Modern Law, in discussing the details of the law of contracts, to treat the simple contract as the general type, and to discuss the formal contract as a modification thereof. This plan will accordingly be adopted in this work. The formation of the simple contract as the normal type of genuine contract will first be considered, and the other classes of contract at the Common Law will be treated as variations from this normal type. The forms of written contract will be considered as special types of the simple contract. The subject of parties will be postponed until after a discussion of the Common Law classes of contract, since so much of the law of the contracts of parties of abnormal status involves questions of quasi-contract. The construction, operation and discharge of the contract will then be considered in detail. Finally a group of topics involving the place of contract in American law will be considered. Logically this group might come first; but it will be easier to discuss it after treating of the formation, construction, operation and discharge of contract.

§16. Forms of agreement.

Agreement originates, as will be discussed in detail here-

¹ See ch. XXXVII.

after¹ in offer and acceptance. Since a contract involves the idea of an outstanding and enforceable promise we must consider briefly the methods in which such an agreement may come into existence. (1) A may make a promise and B may accept it. If A's promise does not require B to do or forbear any right we have here a promise but no contract since no consideration exists.² (2) A may make a promise conditioned on B's making a promise in return. B may make such promise. We have here a contract.³ Each party has an outstanding executory promise enforceable against himself. The only exception to this is the formal contract.⁴ (3) A may make a promise conditioned on B's doing a specified act. B cannot accept this promise in any way other than by doing such act. If he does such act there is no outstanding promise enforceable against B. The only liability existing is against A. This, however, comes within the modern idea of a contract. (4) A may tender an act to be done if B will make a promise. If B accepts by making such promise, there is no outstanding executory liability enforceable against A. The only executory promise is that of B. This, too, comes within the modern idea of a contract. (5) A may tender an act to be performed if B performs an act in return. B cannot accept in any way except by performing such act. If he does so accept, no outstanding executory promise exists against either party. This does not fall within the modern idea of a contract.

§17. Unilateral contracts.

The name "unilateral" has been suggested for contracts executed on one side and executory on the other, or at least for such contracts of this class as are created by performing the act required for acceptance of the offer;¹ that is, for classes 3 and 4, referred to in the preceding section. A distinctive name for a contract of this sort is undoubtedly to be desired; and the term "unilateral" is satisfactory enough as far as derivation

¹ See ch. 3.

² See §§ 303-307.

³ See § 296.

⁴ See ch. XXXII. and ch. XXXIII.

¹ See §§ 48, 50.

is concerned. The objection to it is that it is already used too much, with too many meanings. It is used in equity to denote contracts which cannot be enforced specifically against one of the parties; and, according to some authorities, will not for this reason be enforced specifically against the other.² The term "unilateral" is also used to denote a promise which has not been so accepted by the promisee* as to impose any liability upon him; or which does not by its terms purport to impose any liability upon him.³ It is therefore not a contract at all. An ideal nomenclature does not use the same term for two distinct ideas, and while our legal nomenclature is far from perfect, no innovation should be attempted which confuses established legal terms. The term "bilateral" has been suggested for contracts which are executory on both sides.⁴ The only objection to this term is that it is scarcely used at all outside of academic discussion of the law.

§18. Executed and executory contracts.

From the standpoint of performance contracts have been divided into two classes, the executed and the executory. An executed contract is one in which both parties have fully performed the terms of the contract by them to be performed. An executory contract is one in which the parties have not yet performed the terms of the contract by them to be performed.¹ It

² So employed of a contract to convey to a married woman. *Richards v. Green*, 23 N. J. Eq. 536. See §§ 1612—1618.

³ *Johnson v. Staenglen*, 85 Fed. 603; *Hardwick v. McClurg*, — Colo. App. —; 65 Pac. 405; *Harrison v. Lumber Co.*, — Ga. —; 45 S. E. 730; *Plumb v. Campbell*, 129 Ill. 101; 18 N. E. 790; *Hughes v. Lansing*, 34 Or. 118; 75 Am. St. Rep. 574; 55 Pac. 95; *Abba v. Smyth*, 21 Utah 109; 59 Pac. 756. In some of these cases the contract in question

is said not to be unilateral, because supported by a valuable consideration.

⁴ Thus the court speaks of a "bilateral executory" contract in *Thomas v. Barnes*, 156 Mass. 581; 31 N. E. 683.

¹ "An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both parties." *Farrington v. United States*, 95 U. S. 679, 683.

consists of mutual outstanding promises.² A contract may of course be performed by one party and executory as to the other; or it may be partly performed on one or both sides.

§19. Place of executed contract in law.

An executed contract has transferred title to property, conferred the benefit of services and the like. Whether it can properly be classed as a contract or not is questionable, since a contract is an agreement which results in obligation, an enforceable promise, and in executed contracts there is no outstanding promise to be enforced. It was a contract; but is it still one? Whenever this question has arisen in such form that the courts were called upon to pass on it, inconsistent answers have been given. From the nature of the case, no action can be brought upon it; hence questions as to the form of action, the remedy, and the period of limitations cannot arise. The provision of the Statute of Frauds, that no action shall be maintained on certain kinds of contract, does not of course apply to executed contracts.¹ On the other hand, the constitutional provisions forbidding a state to impair the obligation of contracts apply to executed contracts.² Personal disqualifications which make a contract voidable apply as well to an executed contract as to an executory contract;³ but those which make a contract void have been held not to apply.⁴ Defects in agreements, such as misrepresentation, mistake, fraud, duress and undue influence apply to an executed contract as well as to an executory, and constitute grounds for rescission in proper cases.⁵ Lack of consideration has no effect on the validity of an executed contract, in the absence of mistake, fraud, and the like;⁶ since a

² "An executory contract is one in which a party binds himself to do or not to do a particular thing; * * *. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant." *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 136; quoted in *Mettel*

v. Gales, 12 S. D. 632; 82 N. W. 181.

¹ See § 737.

² See 1752.

³ See Ch. XXXVII-L.

⁴ See Ch. XLI.

⁵ See Ch. IV-XIII.

⁶ *Knight v. Tripp*, 121 Cal. 674; 54 Pac. 267; *Pierce v. Bank*, 129

gift, on delivery is irrevocable.⁷ Illegality of object has, as a rule, no effect on the validity of an executed contract, except where the legislature has specifically provided the contrary.⁸ The actual decisions are therefore not uniform as to whether an executed contract possesses the elements of a genuine contract. On principle, it may be said that an executed contract should be rather subject to the rules of conveyances than of contracts.

§20. Classes of contract as to validity.

From the standpoint of validity, contracts may be divided into the valid, the voidable and the void. A valid contract is one which either party thereto may enforce, neither party having any right of avoiding liability. In a precise and technical sense there is no such thing as a void contract, since if there is a contract, the transaction cannot properly be termed void; and if the transaction is void, no contract is thereby created. The expression "void contract," is, however, often used to denote that the parties to the transaction have gone through the form of making a contract; but that no contract has been made in law, by reason of a lack of some essential element of a contract.¹ A void contract therefore creates no legal rights of any kind; either party thereto may ignore it at his pleasure as far as it is executory; and third parties may take advantage of its invalidity whenever their interests will be prejudiced otherwise. Usually a void contract being an absolute nullity is held to be

Mass. 425; 37 Am. Rep. 371; Tarbox v. Grant, 56 N. J. Eq. 199; 39 Atl. 378; Ridden v. Thrall, 125 N. Y. 572; 21 Am. St. Rep. 758; 11 L. R. A. 684; 26 N. E. 627; Polley v. Hicks, 58 O. S. 218; 41 L. R. A. 858; 50 N. E. 809; McNally v. McAndrew, 98 Wis. 62; 73 N. W. 315.

⁸ See § 273.

¹ Ewell v. Daggs, 108 U. S. 143; Fairbanks v. Snow, 145 Mass. 153;

1 Am. St. Rep. 446; 13 N. E. 596; Rodliff v. Dallinger, 141 Mass. 1; 55 Am. Rep. 439; 4 N. E. 805; Allis v. Billings, 6 Met. (Mass.) 415; 39 Am. Dec. 744; Denny v. McCown, 34 Or. 47; 54 Pac. 952; Pearsoll v. Chapin, 44 Pa. St. 9; Rocks v. Cornell, 21 R. I. 532; 45 Atl. 552; Brown v. Bank, 88 Tex. 265; 33 L. R. A. 359; 31 S. W. 285; Cummings v. Powell, 8 Tex. 80.

incapable of ratification.² A voidable contract is one in which one party has the privilege of making the contract either valid or void at his pleasure.³ The party to whom the law gives this choice possesses a right in the nature of an equitable election; and upon asserting the right, and making the contract either void or valid, the right is exhausted and cannot afterwards be exercised even if the party wishes to change his mind and to take a different attitude in respect to the validity of the contract. Ratification prevents subsequent disaffirmance,⁴ and disaffirmance prevents subsequent ratification.⁵ Before passing on to the further discussion of these words, it may here be noted that while the authorities and definitions generally limit voidable contracts to those in which one party may exercise his right of repudiating his liability, no reason appears why there may not be a voidable contract in which each party has on grounds peculiar to himself a right of avoiding the contract.⁶

The use of the terms void and voidable as indicating an accurate and reliable classification of contracts is always unsatisfactory and often misleading. In the first place the two words are often misused, being employed indiscriminately. The word void is the more frequently misused. In statutes, decisions and sometimes even in text-books, a contract is said to be void, when the context shows that it is merely voidable; that is, that one party to it may avoid it or make it valid at his option, but that the other party and all third persons are alike bound by it if the party having the right to avoid it sees fit not to do

² In *Brown v. Bank*, 88 Tex. 265; 33 L. R. A. 359; 31 S. W. 285, in an obiter it was said that a void contract might be "a mere moral obligation, serviceable only as a consideration to support a ratification thereof after majority."

³ *Van Shaack v. Robbins*, 36 Ia. 201; *Barlow v. Robinson*, 174 Ill. 317; 51 N. E. 1045; *Gist v. Smith*, 78 Ky. 367; *McDonald v. Sargent*, 171 Mass. 492; 51 N. E. 17; *Englebert v. Troxwell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852; *Hicks v. Beam*, 112

N. Car. 642; 34 Am. St. Rep. 521; 17 S. E. 490; *Dolph v. Hand*, 156 Pa. St. 91; 36 Am. St. Rep. 25; 27 Atl. 114; *Cummings v. Powell*, 8 Tex. 80; *Blankenship v. Ry. Co.*, 43 W. Va. 135; 27 S. E. 355; *Johnson v. Insurance Co.*, 93 Wis. 223; 67 N. W. 416.

⁴ *Hastings v. Dollarhide*, 24 Cal. 195.

⁵ *McCarty v. Iron Co.*, 92 Ala. 463; 12 L. R. A. 136; 8 So. 417.

⁶ *Drude v. Curtis*, 183 Mass. 317; 62 L. R. A. 755; 67 N. E. 317.

so.⁷ In the second place, even where the two terms are not confused, neither is accurate as to the ultimate effect of the transaction. A void contract may be simply ineffective for all purposes. On the other hand, title to property may pass as a part of the transaction. In this case the practical question is usually whether the former owner can recover his property or whether the law will leave the parties in the situation in which they have voluntarily placed themselves. A voidable contract may also have different meanings according to its legal effect. In some contracts, the party may avoid without restoring any part of the consideration received which has been lost, wasted or squandered. In others he can avoid only upon restoring everything which he has received under the contract. For these reasons we are often obliged to distinguish between contracts which are merely void and those which are illegal.⁸ It must further be observed that there is such a thing as a contract valid in itself which may on account of special circumstances be unenforceable.⁹ Illustrations of contracts of this type will be given later. Most of such contracts fall within the terms of the Statute of Frauds.¹⁰ The term "unenforceable" is therefore wider than "void" since it includes all void contracts and some valid ones. So the term "void" is wider than "illegal": since all illegal contracts are void; while many are void that are not illegal.

§21. Nomenclature of the law.

It may be added that in one sense accuracy of nomenclature is very important. Since ideas are expressed by words, misuse of words is likely to result in confusion of thought. In another sense it is of no importance. If the idea to be con-

⁷ Ewell v. Daggs, 108 U. S. 143; Bennett v. Mattingly, 110 Ind. 197; 10 N. E. 299; 11 N. E. 792; Van Shaack v. Robbins, 36 Ia. 201; Green v. Kemp, 13 Mass. 515; 7 Am. Dec. 169; Kearney v. Vaughan, 50 Mo. 284; Mutual etc. Ins. Co. v. Winne, 20 Mont. 20; 49 Pac. 446; Brown

v. Brown, 50 N. H. 538; Anderson v. Roberts, 18 Johns. (N. Y.) 515; 9 Am. Dec. 235; Pearsall v. Chapin, 44 Pa. St. 9; Bromley v. Goodrich, 40 Wis. 131; 22 Am. Rep. 685.

⁸ See § 506 *et seq.*

⁹ See § 740.

¹⁰ See § 740.

voiced is clearly understood, discussion of the language in which it should be expressed usually involves time and energy that might be better employed. It must be confessed that the nomenclature of our law is defective. Such technical terms as it has are for the most part borrowed from popular language. It is, therefore, rare to find them possessed of that accuracy of meaning that the more artificial terms of science enjoy. Still, as the courts are unwilling to accept suggestions for a more artificial and accurate nomenclature, we must strive to use the terms actually employed with such accuracy as is possible.

PART II.

THE FORMATION OF THE SIMPLE CONTRACT
[EXCLUDING PARTIES].

CHAPTER III.

OFFER AND ACCEPTANCE.

§22. Agreement essential element of contract.

Since a contract is an agreement resulting in obligation and enforceable at law,¹ agreement is an essential element of every genuine contract.² This proposition is true of all contracts properly so called, though it has no application to those liabilities which arise without any agreement but which are classed with contracts for the historical reason that they were enforced at Common Law by an action in *assumpsit*.³ It is so true that it might be dismissed as a truism but for peculiarities in its application to particular states of fact.

§23. Offer and acceptance.

Agreement is usually reached by some form of offer on the one side and acceptance on the other, and thus it is often said

¹ See § 12.

² *Sweeny v. Supply Co.*, 121 Ala. 454; 25 So. 575; *Campbell v. Heney*, 128 Cal. 109; 60 Pac. 532; *Harris v. Lumber Co.*, 97 Ga. 465; 25 S. E. 519; *Newlin v. Prevo*, 90 Ill. App. 515; *Hogue v. Mackey*, 44 Kan. 277; 24 Pac. 477; *Heiland v. Ertel*, 4 Kan. App. 516; 44 Pac. 1005; *Mayer v. Sparks*, 3 Kan. App. 602; 45 Pac. 249; *Pittsburgh, etc., Co. v. Slack & Co.*, 42 La. Ann. 107; 7 So. 230; *Graves v. Dill*, 159 Mass. 74; 34 N. E. 336; *Sheridan v. Bank*, 116 Mich. 545; 74 N. W. 874; *Moore v. R. R.*, 116 Mich. 196; 74 N. W. 497; *Hanson v. Nelson*, 82 Minn. 220; 84 N. W. 742; *Stong v. Lane*, 66 Minn. 94; 68 N. W. 765; *Ames, etc., Co.*

v. Smith, 65 Minn. 304; 67 N. W. 999; *Alexander v. Telegraph Co.*, 67 Miss. 386; 7 So. 280; *Hammond v. Beeson*, 112 Mo. 190; 20 S. W. 474; *Sutter v. Raeder*, 149 Mo. 297; 50 S. W. 813; *Melick v. Kelley*, 53 Neb. 509; 73 N. W. 945; *Krum v. Chamberlain*, 57 Neb. 220; 77 N. W. 665; *McGavock v. Morton*, 57 Neb. 385; 77 N. W. 785; *Shaw v. Glass Works*, 52 N. J. L. 7; 18 Atl. 696; *Columbus, etc., Ry. v. Gaffney*, 65 O. S. 104; 61 N. E. 152; *Wallingford v. Columbia, etc., R. R. Co.*, 26 S. Car. 258; 7 S. E. 19; *Lawrence v. Ry. Co.*, 84 Wis. 427; 54 N. W. 797; *Lewis v. Newton*, 93 Wis. 405; 67 N. W. 724.

³ See §§ 11, 14, 771.

that agreement can be reached only in this way.¹ Agreement may probably be reached in other ways. Pollock's illustration of a suggestion made by a third party and acquiesced in at the same time by the two adversary parties to the contract is undoubtedly a correct example of an agreement which does not originate in offer and acceptance.² Still it is true that the great majority of contracts consist of enforceable agreements which originate in offer and acceptance, though in many cases an offer and acceptance which are not consciously formulated by the parties, and which must be artificially deduced from prolonged negotiations, but which really form both logically and legally the method of reaching the agreement. For practical purposes, therefore, agreement in contract law may be considered as created solely by offer and acceptance.

§24. Nature of offer — must purport creation of legal liability.

The offer which by acceptance can become an agreement, as the term is used in law, must possess certain qualities differentiating it from the general class of offers commonly so called. First. It must purport to create liabilities which are legally enforceable. Thus it is often said that offers purely social or religious in their nature cannot form the basis of a contract even if all the other elements are present.¹ So a mere declaration of non-liability in a railroad ticket not purporting to be a part of the contract of transportation is not treated as a term thereof.²

§25. Must show intention to assume liability.

Second. The offer must be so made as to indicate a real intention to assume liability. An offer made in jest and known to be made in jest by the party accepting it, cannot be the basis

¹ See the cases cited in the second note to the preceding section.

² Wald's Pollock on Contracts, 5, 6.

¹ Wald's Pollock on Contracts, 3; Anson on Contracts, 3. Cases on this point naturally are not abun-

dant in courts of last resort.

² Kansas etc. R. R. v. Rodebaugh, 38 Kan. 45; 5 Am. St. Rep. 715; 15 Pac. 899. For the effect of such provisions when purporting to be contractual see ch. XVIII.

of any legal liability. Thus a marriage ceremony intended by both parties as a jest,¹ or the giving of a check for three hundred dollars for a watch worth fifteen, both parties intending the transaction as a joke and neither intending a sale of the watch,² are both without legal effect. However, both parties must understand such a joke. An offer made in jest is enforceable by one who accepts it *bona fide* as a serious proposition.³ So a statement, made in anger and so understood, cannot be treated as a technical offer.⁴

Further, a mere statement of intention to act in a certain manner, not showing any intent to incur a legal liability so to act, is not an offer in this sense.⁵ Thus a statement of intention to recompense one by will for services rendered;⁶ a letter by a devisee stating that he is willing that another devisee should keep the land;⁷ a statement made before marriage by the prospective husband to the effect that he expected to keep control of certain premises as a home for their joint lives and for the life of his wife if she survives him;⁸ a statement by a lessor of a gas well that he would rather reduce the rental than have the well pulled;⁹ a city ordinance, for the protection of the city, which imposes on trustees of gas works the obligation of paying money into the sinking fund;¹⁰ a vote of a council that certain

¹ McClurg v. Terry, 21 N. J. Eq. 225.

² Keller v. Holderman, 11 Mich. 248; 83 Am. Dec. 737 (though the watch was not returned until the trial).

³ Plate v. Durst, 42 W. Va. 63; 32 L. R. A. 404; 24 S. E. 580.

⁴ Higgins v. Lessig, 49 Ill. App. 459. (Where A.'s harness, worth about \$15, had been stolen, and A. in anger said that he would give \$100 to any person who would find the thief and \$100 to a lawyer for prosecuting him.)

⁵ Pollock v. San Diego, 118 Cal. 593; 50 Pac. 769; Wellington v. Apthorp, 145 Mass. 69; 13 N. E. 10; State v. Noyes, 25 Nev. 31; 56 Pac. 946.

⁶ Louder v. Hart, 52 Mo. App. 377; McTague v. Finnegan, 54 N. J. Eq. 454; 35 Atl. 542; Murphy v. Corrigan, 161 Pa. St. 59; 28 Atl. 947; Miller's Estate, 136 Pa. St. 239; 20 Atl. 796; Callum v. Rice, 35 S. Car. 551; 15 S. E. 268. To the same effect see Joyce v. Hamilton, 111 Ind. 163; 12 N. E. 294; Ulrich v. Arnold, 120 Pa. St. 170; 13 Atl. 831.

⁷ Patterson's Appeal, 116 Pa. St. 8; 11 Atl. 70.

⁸ Adams v. Adams, 17 Or. 247; 20 Pac. 633.

⁹ McClane v. People's etc. Co., 178 Pa. St. 424; 35 Atl. 812.

¹⁰ Baily v. Philadelphia, 184 Pa. St. 594; 63 Am. St. Rep. 812; 39 L. R. A. 837; 39 Atl. 494.

lots owned by the city be sold; the purchasers being required to agree to build houses of a certain value on such lots within a certain time;¹¹ an ordinance passed by council appropriating funds and employing an attorney, which is vetoed by the mayor;¹² a resolution of a city council recommending the acceptance of an offer concerning the dissolution of an injunction;¹³ a resolution of a board authorizing their chairman to purchase certain land;¹⁴ a statute forbidding county courts from licensing ferries within half a mile of an established ferry;¹⁵ are none of them offers and cannot be so accepted as to become agreements.¹⁶ So a statement by a military officer that the government would probably give a reward for the return of certain Indians is not an offer.¹⁷

A communication between principal and agent, not intended on its face as an offer to a third person to enter into legal relations with him, cannot be accepted by him on learning of its existence, so as to become an agreement.¹⁸ Thus a report of a town committee appointed to consider a claim against the town, which fixes the amount of the claim, and which is accepted by the town;¹⁹ or a vote of a town instructing its selectmen to pay a certain alleged claim,²⁰ are not offers in the technical sense.

§26. Invitations to negotiate.

Third. The offer must be one which is intended of itself to

¹¹ Ball v. Nashua, 61 N. H. 403. (At least a purchaser cannot enforce such contract specifically.)

¹² It cannot be considered a resolution for employment alone, and hence not subject to veto. Pollock v. San Diego, 118 Cal. 593; 50 Pac. 769.

¹³ State v. Noyes, 25 Nev. 31; 56 Pac. 946.

¹⁴ Madden v. Boston, 177 Mass. 350; 58 N. E. 1024. To the same effect see Sears v. Ry., 152 Mass. 151; 9 L. R. A. 117; 25 N. E. 98.

¹⁵ Wheeling etc. Co. v. Bridge Co., 138 U. S. 287; affirming 34 W.

Va. 155; 11 S. E. 1009, on other grounds.

¹⁶ See § 26.

¹⁷ Legare v. United States, 24 Ct. Cl. 513.

¹⁸ Potter v. Hollister, 45 N. J. Eq. 508; 18 Atl. 204. Compare with the similar principle as to acceptance in § 43.

¹⁹ Bickford v. Hyde Park, 173 Mass. 536; 54 N. E. 250; distinguishing Hall v. Holden, 116 Mass. 172; Nelson v. Milford, 7 Pick. (Mass.) 18.

²⁰ Marsh v. Scituate, 153 Mass. 34; 10 L. R. A. 202; 26 N. E. 412.

create legal relations on acceptance. It must not be an offer intended merely to open negotiations which will ultimately result in a contract, or intended to call forth an offer in legal form from the party to whom it is addressed.¹ The commonest examples of offers meant to open negotiations and to call forth offers in the technical sense, are the advertisements, circulars and trade letters sent out by business houses. While it is possible that the offers made by such means may be in such form as to become contracts, they are often merely expressions of a willingness to negotiate.²

The nature of the offer from this point of view is a question of construction of the terms of the offer, as explained by admissible evidence. The following examples serve to illustrate offers which are not intended to create legal relations on acceptance. Where A wrote to B "We are authorized to offer Michigan fine salt in full carload lots of eighty to ninety-five barrels," B telegraphed "Your letter of yesterday received and noted. You may ship me two thousand barrels of Michigan fine salt as offered in your letter;"³ or A wrote asking if certain realty was for sale and if so "telegraph lowest cash price;" B's reply quoted a price; A replied agreeing to buy at that price;⁴ no offer has been made in either case and hence the attempted

¹ *Harvey v. Facey* (H. L. E.) (1893), A. C. 552; *Hussey v. Horne-Payne*, L. R. 4 App. 311; 48 L. J. Ch. 846; *Maclay v. Harvey*, 90 Ill. 525; 32 Am. Rep. 35; *Cornwells v. Krengel*, 41 Ill. 394; *Allen v. Roberts*, 2 Bibb. (Ky.) 98; *Lyman v. Robinson*, 14 All. (Mass.) 242; *Plank's, etc., Co. v. Burkhard*, 87 Mich. 182; 49 N. W. 562; *Anderson v. Public Schools*, 122 Mo. 61; 26 L. R. A. 707; 27 S. W. 610; *Olds v. Marble Co. (Tenn. Ch. App.)*, 48 S. W. 333; *Fenno v. Weston*, 31 Vt. 345; *Moulton v. Kershaw*, 59 Wis. 316; 48 Am. Rep. 516; 18 N. W. 172.

² *Harvey v. Facey* (H. L. E.) (1893), A. C. 552; *Chytraus v. Smith*, 141 Ill. 231; 30 N. E. 450;

Maclay v. Harvey, 90 Ill. 525; 32 Am. Rep. 35; *Chicago, etc., Ry. v. Jones*, 53 Ill. App. 431; *Sibley v. Felton*, 156 Mass. 273; 31 N. E. 10; *May v. Ward*, 134 Mass. 127; *Lyman v. Robinson*, 14 All. (Mass.) 242; *Peek v. Novelty Works*, 29 Mich. 313; *Ahearn v. Ayres*, 38 Mich. 692; *Olds v. Marble Co. (Tenn. Ch. App.)*, 48 S. W. 333; *Moulton v. Kershaw*, 59 Wis. 316; 48 Am. Rep. 516; 18 N. W. 172.

³ *Moulton v. Kershaw*, 59 Wis. 316; 48 Am. Rep. 516; 18 N. W. 172.

⁴ *Harvey v. Facey* (H. L. E.) (1893), A. C. 552. A similar case is *Talbot v. Pettigrew*, 3 Dak. 141; 13 N. W. 576.

acceptance does not make a contract. So a table of rates sent in answer to a general inquiry, subject to change at short notice, cannot be accepted so as to make a contract.⁵ An advertisement that a certain train carried "free reclining chair cars" has been held not to be an offer which could be accepted by taking transportation on such train, unless the passenger can further show that he was misled or suffered loss.⁶ So a statement admitting a contingent liability, supposed by the writer to exist already, is not an offer to discharge such liability.⁷ So an advertisement or request for bids is not an offer to be accepted by the successful bidder, but a request for offers from bidders which may be accepted or not, as the party asking for bids chooses.⁸ So the trustees of a fund which was to be devoted to providing a scholarship for the pupil of a certain school who should pass the best examination in certain subjects, do not make an offer, by merely announcing an examination without offering to award the scholarship to the pupil passing with the highest grades at such examination.⁹

If the offer made by means of advertisements, circulars and the like shows an intent to assume legal liability thereby, such offer may on acceptance form a contract.¹⁰ An offer may be made in the catalogue of state university,¹¹ or of a private school;¹² by advertisement in a newspaper;¹³ in an official pamphlet of specifications issued by the United States

⁵ Chicago, etc., Ry. Co. v. Jones, 53 Ill. App. 431.

⁶ St. Louis, etc., Ry. Co. v. Hardy, 55 Ark. 134; 17 S. W. 711.

⁷ Russell v. Blair, 18 Wash. 339; 51 Pac. 477; 14 Wash. 106; 44 Pac. 122.

⁸ Kelly v. Chicago, 62 Ill. 279; Howard v. Industrial School, 78 Me. 230; 3 Atl. 657; Coquard v. School District, 46 Mo. App. 6; Smith v. New York, 10 N. Y. 504; Leskie v. Haseltine, 155 Pa. St. 98; 25 Atl. 886.

⁹ Rooke v. Dawson (1895), 1 Ch. 480.

¹⁰ Carlill v. Smoke Ball Co. (1893), 1 Q. B. 256; 67 L. T. N. S. 837; Vigo, etc., Society v. Brumfiel, 102 Ind. 146; 52 Am. Rep. 657; 1 N. E. 382; Tarbell v. Stevens & Co., 7 Ia. 163; Seymour v. Armstrong, 62 Kan. 720; 64 Pac. 612; Anderson v. Public Schools, 122 Mo. 61; 26 L. R. A. 707; 27 S. W. 610.

¹¹ Niedermeyer v. University, 61 Mo. App. 654.

¹² Horner School v. Wescott, 124 N. Car. 518; 32 S. E. 885.

¹³ Carlill v. Smoke Ball Co. (1893), 1 Q. B. 256; 67 L. T. N. S. 837.

government;¹⁴ or by a circular offering a reward;¹⁵ in form so definite that acceptance may convert it into agreement. Thus an advertisement of a competition for designs for a building, competing architects to receive \$500 each, and the successful architect to be engaged as architect, and superintendent of the building,¹⁶ and an advertisement that a certain sum would be paid to any person who was not cured of influenza after certain treatment with a prescribed remedy;¹⁷ each constitute offers. Time schedules,¹⁸ or freight schedules,¹⁹ may be such offers, if so worded as to show a definite intention to assume liability.

§27. Terms must be complete.

Fourth. The offer, even if intended to create legal relations, must be so complete that upon acceptance, an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not.¹ An offer in which the price is not fixed, and yet is so specified that it is evident that the parties did not intend merely whatever should be a reasonable compensation,² is not definite enough. If the price

¹⁴ Ward v. Dialogue, 64 N. J. L. 679; 46 Atl. 628. It was stated, with authority of a patentee, that he would furnish his patented boiler at a certain price.

¹⁵ Bank v. Griffin, 66 Ill. App. 577.

¹⁶ Walsh v. St. Louis, etc., Association, 90 Mo. 459; 2 S. W. 842.

¹⁷ Carlill v. Smoke Ball Co. (1893), 1 Q. B. 256; 67 L. T. N. S. 837.

¹⁸ Texas, etc., Ry. Co. v. Ludlam, 57 Fed. 481; 6 C. C. A. 454.

¹⁹ Kellerman v. Ry. Co., 136 Mo. 177; 34 S. W. 41; affirmed in banc 37 S. W. 828, affirming 68 Mo. App. 255.

¹ Winn v. Bull, L. R. 7 Ch. Div. 29; Peoria Grape Sugar Co. v. Babcock Co., 67 Fed. 892; Bissenger v. Prince, 117 Ala. 480; 23 So. 67; Santa Rosa, etc., Co. v. Woodward,

119 Cal. 30; 50 Pac. 1025; Etheredge v. Barkley, 25 Fla. 814; 6 So. 861; Almini Co. v. King, 92 Ill. App. 276; Wills v. Carpenter, 75 Md. 80; 25 Atl. 415; Sibley v. Felton, 156 Mass. 273; 31 N. E. 10; Rector Provision Co. v. Sauer, 69 Miss. 235; 13 So. 623; Kelly v. Thuey, 143 Mo. 422; 45 S. W. 300; reversing in banc 37 S. W. 516; Schenectady Stove Co. v. Holbrook, 101 N. Y. 45; 4 N. E. 4; St. Paul, etc., Ins. Co. v. Ulbright (Tenn. Ch. App.), 48 S. W. 131; Mattoon, etc., Co. v. Insurance Co., 69 Wis. 564; 35 N. W. 12.

² State v. Associated Press, 159 Mo. 410; 81 Am. St. Rep. 368; 51 L. R. A. 151; 60 S. W. 91; United Press v. Press Co., 164 N. Y. 406; 53 L. R. A. 288; 58 N. E. 527. (To take press reports for five years at not more than \$300 per week.) "Price is as essential as any other

is fixed, a clause providing that if the vendee finds that the price agreed upon does not give him a fair margin of profit on a resale he may offer another proposition, does not make the contract indefinite, as such a proposition is not binding on the vendor, and hence does not defeat the other clauses of the contract.³ An offer which leaves the amount of compensation to be determined by subsequent negotiation, fixing only the extreme limits within which the negotiations are to range;⁴ or one which leaves to a future valuation between the parties the price to be paid for realty,⁵ or personalty;⁶ or one which leaves the quantity of material to be furnished,⁷ or the character of buildings to be erected,⁸ or the terms of payment and security for the purchase price,⁹ to be determined by future negotiation, is not complete. So an offer to give a place in B's glass works, there being several different places to fill at different wages, is incomplete;¹⁰ and so is an offer for a lease subject to alterations to be agreed upon later.¹¹ An option for a sale of land which does not state the price, terms or time of payment, is incomplete even if the general policy of the vendor in selling land shows what terms he will agree to insert.¹²

However, the terms need not all be expressly set forth in the offer. If the terms can be determined from the context, or the extrinsic evidence admissible to explain the terms of the offer,

of the terms of a contract and without this agreed upon no contract exists." *State v. Associated Press*, 159 Mo. 410, 423; 81 Am. St. Rep. 368; 51 L. R. A. 151; 60 S. W. 91; *Kelly v. Thuey*, 143 Mo. 422; 45 S. W. 300. But where the compensation is entirely omitted the contract may be upheld on the theory that a reasonable compensation is intended. See *post*, this section.

³ *Lanford v. Wooden-Ware Co.*, 127 Mich. 614; 86 N. W. 1033.

⁴ *Anderson v. Dezonía*, 23 Ill. App. 422.

⁵ *Wardell v. Williams*, 62 Mich.

50; 4 Am. St. Rep. 814; 28 N. W. 796.

⁶ *Gunn v. Newcomb*, 82 Ia. 468; 48 N. W. 989.

⁷ *American etc. Co. v. Bridge Co.*, 29 Or. 549; 46 Pac. 138.

⁸ *Bissenger v. Prince*, 117 Ala. 480; 23 So. 67.

⁹ *Sands etc. Co. v. Crosby*, 74 Mich. 313; 41 N. W. 899.

¹⁰ *Shaw v. Glass Works*, 52 N. J. L. 7; 18 Atl. 696.

¹¹ *Mayer v. McCreery*, 119 N. Y. 434; 23 N. E. 1045.

¹² *Lombard & Co. v. Carter*, 7 Wash. 4; 38 Am. St. Rep. 861; 34 Pac. 209.

the offer is sufficiently complete.¹³ So a contract to furnish gas is not indefinite as not fixing the time during which gas is to be furnished, where the law requires a gas company to supply gas as long as required by the occupant of any building if he pays for it.¹⁴ So where the context shows that prompt performance is intended, the contract is sufficiently definite though no time is expressly fixed.¹⁵ So an offer to buy "four notes of three hundred dollars each" is sufficiently definite though no price is fixed, as the face value of the notes is intended.¹⁶

If the compensation is not fixed by the terms of the contract or by fair construction therefrom, the contract may nevertheless be enforced if a reasonable compensation was intended.¹⁷ Thus services rendered at the express request of the party for whom they are rendered,¹⁸ as by an attorney,¹⁹ or one who aids

¹³ *Christian etc. Co. v. Water Supply Co.*, 106 Ala. 124; 17 So. 352; *Hayes v. O'Brien*, 149 Ill. 403; 22 L. R. A. 555; 37 N. E. 73; *Wells v. Alexandre*, 130 N. Y. 642; 15 L. R. A. 218; 29 N. E. 142.

¹⁴ *Gallagher v. Gaslight Co.*, — Cal. —; 75 Pac. 329.

¹⁵ *Woarms v. Hammond*, 5 App. D. C. 338.

¹⁶ *Ubbinga v. Bank*, 108 Ia. 221; 78 N. W. 840.

¹⁷ *Nyhart v. Pennington*, 20 Mont. 158; 50 Pac. 413; *Perkins v. Hasbrouck*, 155 Pa. St. 494; 26 Atl. 695.

¹⁸ *Miller v. Ballerino*, 135 Cal. 566; 67 Pac. 1046; 68 Pac. 600; *Clark v. Clark*, 46 Conn. 586; *Wells v. Haynes*, 101 Ga. 841; 28 S. E. 968; *Lockwood v. Robbins*, 125 Ind. 398; 25 N. E. 455; *Clark v. Ellsworth*, 104 Ia. 442; 73 N. W. 1023; *Wadleigh v. McDowell*, 102 Ia. 480; 71 N. W. 336; *Coleman v. Simpson*, 2 Dana (Ky.) 166; *Norwood v. Lathrop*, 178 Mass. 208; 59 N. E. 650; *Taft v. Shaw*, 159 Mass. 592; 35 N. E. 88; *Sears v. Giddey*, 41 Mich. 590; 32 Am. Rep. 168; 2. N. W. 917; *Selover v. Bryant*, 54

Minn. 434; 40 Am. St. Rep. 349; 21 L. R. A. 418; 56 N. W. 58; *Harrison v. Hancock* (Neb.), 89 N. W. 374; *Randall v. Packard*, 142 N. Y. 47; 36 N. E. 823; *Perkins v. Hasbrouck*, 155 Pa. St. 494; 26 Atl. 695; *Masterson v. Masterson*, 121 Pa. St. 605; 15 Atl. 652; *Gorman v. Bannigan*, 22 R. I. 22; 46 Atl. 38; *Standard Printing Co. v. Publishing Co.*, 87 Wis. 127; 58 N. W. 238.

¹⁹ *Wells v. Haynes*, 101 Ga. 841; 28 S. E. 968; *Clark v. Ellsworth*, 104 Ia. 442; 73 N. W. 1023; *Germania etc. Co.'s Assignee v. Hargis*, 23 Ky. Law Rep. 874; 64 S. W. 516; *Brodie v. Parsons*, 23 Ky. Law Rep. 831; 64 S. W. 426; *Downing v. Major*, 2 Dana (Ky.) 228; *Taft v. Shaw*, 159 Mass. 592; 35 N. E. 88; *Selover v. Bryant*, 54 Minn. 434; 40 Am. St. Rep. 349; 21 L. R. A. 418; 56 N. W. 58; *Rose v. Spies*, 44 Mo. 20; *Randall v. Packard*, 142 N. Y. 47; 36 N. E. 823; *Starin v. New York*, 106 N. Y. 82; 12 N. E. 643; *Gorman v. Bannigan*, 22 R. I. 22; 46 Atl. 38; *Newman v. Davenport*, 9 Baxt. (Tenn.) 538.

in the preparation of a case for trial,²⁰ or an agent,²¹ or a physician,²² must be paid for by such party requesting such services although no price has been agreed upon. In such cases a reasonable compensation is allowed. So a promise that one shall be "well paid" if he will delay collecting a debt until the death of the debtor,²³ or if he will sell realty for the promisor,²⁴ is sufficiently definite.

So if no time is fixed for performance²⁵ or for commencing work²⁶ a reasonable time is intended. So if a contract of guaranty does not limit the time or length of credit to be given, a reasonable time is intended.²⁷ If a contract of sale makes no provision for the time of payment the implication is that payment on delivery is intended.²⁸ Contracts of this sort are really part express and part implied.

An offer leaving certain matters to the determination of one party or the other, and not to some subsequent agreement is definite enough. So where the offer fixes the time of commencing work within certain limits and leaves the exact time to the adversary party's choice,²⁹ or reserves the choice to the

²⁰ *Miller v. Ballerino*, 135 Cal. 566; 67 Pac. 1046; 68 Pac. 600.

²¹ *Stillman v. Lefferts* (Ia.), 82 N. W. 491; *Millar v. Cuddy*, 43 Mich. 273; 38 Am. Rep. 181; 5 N. W. 316; *Arrington v. Cary*, 5 Baxt. (Tenn.) 609; *Nauman v. Zoerhlaut*, 21 Wis. 466.

²² *Morrisette v. Wood*, 128 Ala. 505; 30 So. 630; *Shelton v. Johnson*, 40 Ia. 84; *Peck v. Hutchinson*, 83 Ia. 320; 55 N. W. 511; *Ely v. Wilbur*, 49 N. J. L. 685; 60 Am. Rep. 668; 10 Atl. 385, 441; *Prince v. McRae*, 84 N. C. 674; *Webster v. Lamb*, 15 S. D. 292; 89 N. W. 473; *McNamara v. McNamara*, 108 Wis. 613; 84 N. W. 901; *Garrey v. Stadler*, 67 Wis. 512; 58 Am. Rep. 877; 30 N. W. 787.

²³ *Davis v. Teachout*, 126 Mich.

135; 86 Am. St. Rep. 531; 85 N. W. 475.

²⁴ *Levitt v. Miller*, 64 Mo. App. 147.

²⁵ *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279; *Leis v. Sinclair*, — Kan. —; 74 Pac. 261; *Phelps v. Sheldon*, 13 Pick. (Mass.) 50; 23 Am. Dec. 659.

²⁶ *George D. Barnard Co. v. Bab-bitt*, 54 Ill. App. 62.

²⁷ *Lehigh etc. Co. v. Scallen*, 61 Minn. 63; 63 N. W. 245; *Harvey v. Bank*, 56 Neb. 320; 76 N. W. 870.

²⁸ *Drake v. Scott*, 136 Ala. 261; 96 Am. St. Rep. 25; 33 So. 873; *National Bank v. R. R.*, 44 Minn. 224; 20 Am. St. Rep. 566; 46 N. W. 342, 560.

²⁹ *Cochrane v. Mining Co.*, 16 Colo. 415; 26 Pac. 780.

promisor³⁰ it is sufficiently certain; and so is an offer to buy all the coal used for certain years at a price established for certain grades, though the purchaser has the right to select the grades to be furnished.³¹

An offer referring to a previous contract for the price is complete though the price is omitted from such offer.³² So a contract may be definite although certain terms are omitted, if a contract to be made thereafter between one of the parties and a third party is adopted in advance to supply such terms; such as a building contract³³ or an insurance contract,³⁴ or a contract to pay certain attorneys as much as either of two other attorneys receives for his services in the case.³⁵ So an offer of itself indefinite, as an offer to donate four acres, may be made definite by locating the tract by mutual agreement.³⁷ If the contract, while not specifically determining the subject-matter, fixes the method of determining it thereafter, as in a contract for the sale of realty³⁸ it is certain enough.

§28. Offer must be definite.

Fifth. The offer must not merely be complete in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not.¹ If no breach of the contract could be assigned which

³⁰ *Troy etc. Co. v. Logan*, 96 Ala. 619; 12 So. 712.

³¹ *Consolidated Coal Co. v. Smelting Co.*, 53 Ill. App. 565.

³² *Walsh v. Myers*, 92 Wis. 397; 66 N. W. 250. (An order for ten thousand cases of lye to be furnished "as heretofore.")

³³ *Blaney v. Hoke*, 14 O. S. 292.

³⁴ *Tower v. Grocers' etc. Co.*, 159 Pa. St. 106; 28 Atl. 229.

³⁵ *Lungerhausen v. Crittenden*, 103 Mich. 173; 61 N. W. 270.

³⁶ *Work v. Welsh*, 160 Ill. 468; 43 N. E. 719.

³⁷ So where a contract failed to show in what county the land was located, but the vendor put vendee in possession. *Brown v. Ward*, 110

Ia. 123; 81 N. W. 247.

³⁸ *Emshwiller v. Tyner*, 16 Ind. App. 133; 44 N. E. 811.

¹ *Hart v. Ry.*, 101 Ga. 188; 28 S. E. 637; *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85; 31 L. R. A. 529; 43 N. E. 774; *Des Moines v. Waterworks Co.*, 95 Ia. 348; 64 N. W. 269; *Peet v. Meyer*, 42 La. Ann. 1034; 8 So. 534; *State v. Associated Press*, 159 Mo. 410; 81 Am. St. Rep. 368; 51 L. R. A. 151; 60 S. W. 91; *Kelly v. Thuey*, 143 Mo. 422; 45 S. W. 300; *Vreeland v. Vreeland*, 53 N. J. Eq. 387; 32 A. 3; *United Press v. Press Co.*, 164 N. Y. 406; 53 L. R. A. 288; 58 N. E. 527; *Mfg. Co. v. Hobbs*, 128 N. C. 46; 83 Am. St. Rep. 661; 38 S. E. 26.

could be measured by any test of damages from the contract it has been said to be too indefinite to be enforceable,² and this vice is usually due to the form of the offer.

An offer to operate a mine "as long as they could make it pay";³ a contract to be terminated on sixty days' notice "for good cause";⁴ a license to cut timber for five years to begin when the buyer begins to manufacture the trees into lumber;⁵ and a promise to extend the time of payment until a certain bank shall resume payment;⁶ are not sufficiently definite. But if the time of performance is one which is bound to happen at some time in the future, such contract is certain even though the time cannot be fixed in advance. Thus a promise by A to marry B when A's wife, already divorced, shall die, is certain.⁷ An offer to allow "part" of the wages of an employee to be applied on a debt of his father's to his employer;⁸ an offer to furnish part of the money necessary to pay for a building,⁹ or one to teach school for "good wages";¹⁰ an offer that if the grain market shall advance enough to justify it, payee shall pay one of two notes for different amounts given him to hold till paid in grain;¹¹ an offer to pay a further sum on a horse, "If he did well and had no bad luck with the horse,"¹² are each too indefinite.

So a promise to pay "the average price paid by other cities" for water;¹³ a contract to build a first-class hotel for the traveling public and to keep it up in a first-class manner on considera-

² Pulliam v. Schimpf, 109 Ala. 179; 19 So. 428.

³ Davie v. Mining Co., 93 Mich. 491; 24 L. R. A. 357; 53 N. W. 625. For a similar offer for running a shooting gallery, see Pulliam v. Schimpf, 109 Ala. 179; 19 So. 428.

⁴ Cummer v. Butts, 40 Mich. 322; 29 Am. Rep. 530.

⁵ Mfg. Co. v. Hobbs, 128 N. C. 46; 83 Am. St. Rep. 661; 38 S. E. 26.

⁶ Ahlstrom v. Fitzpatrick, 17 Mont. 295; 42 Pac. 757.

⁷ Brown v. Odell, 104 Tenn. 250; 78 Am. St. Rep. 914; 52 L. R. A. 660; 56 S. W. 840.

⁸ Vansickle v. Ferguson, 122 Ind. 450; 23 N. E. 858.

⁹ Thomas v. Shooting Club, 123 N. C. 285; 31 S. E. 654.

¹⁰ Fairplay, etc., Township v. O'Neal, 127 Ind. 95; 26 N. E. 686.

¹¹ Thomson v. Gortner, 73 Md. 474; 21 Atl. 371.

¹² Burks v. Stam, 65 Mo. App. 455.

¹³ Des Moines v. Waterworks Co., 95 Ia. 348; 64 N. W. 269.

tion that a railroad would support the hotel by the patronage of its road;¹⁴ a covenant in a deed to "live in harmony with the grantor" and not "make him any more trouble about the sum of money she let him have some forty years ago";¹⁵ and a promise to satisfy one of the heirs, who were agreed on a division of the inherited property, if he should become dissatisfied;¹⁶ are each too indefinite to serve as a basis for a contract. So a by-law of a land association empowering it "to regulate other proceedings" is too vague.¹⁷

The following are other examples of indefinite offers: an agreement that a wholesale dealer in oil shall furnish oil to a retailer on terms so favorable that he can compete with other parties in the same territory;¹⁸ a statement by one who had contracted to manufacture certain articles, that he wished the other party to help him out on his pay-roll, or that he would have to be taken care of or he never would complete the order, even if assented to;¹⁹ a letter stating that A would want a certain amount of glass during the year, maybe more; if less, he would take the amount later, and B's answer that the order was entered and he hoped there would be no trouble in giving them all they wanted;²⁰ a promise not to practice medicine in "the territory surrounding" a specified town;²¹ a promise by a physician to locate elsewhere if he does not get a certain appointment "or the field is not larger then than now,"²² and an offer by first mortgage bondholders to second mortgage bondholders pending reorganization, that the second mortgage bondholders should take

¹⁴ *Hart v. Ry. Co.*, 101 Ga. 188; 28 S. E. 637.

¹⁵ *Howlett v. Howlett*, 115 Mich. 75; 72 N. W. 1100.

¹⁶ *Crawley v. Blackman*, 81 Ga. 775; 8 S. E. 533.

¹⁷ *Peabody Heights Co. v. Willson*, 82 Md. 186; 36 L. R. A. 393; 32 Atl. 386, 1077.

¹⁸ *Marble v. Standard Oil Co.*, 169 Mass. 553; 48 N. E. 783.

¹⁹ *Blakistone v. Bank*, 87 Md. 302; 39 Atl. 855.

²⁰ *Sidney Glass Works v. Barnes*, 86 Hun 374.

²¹ *Hauser v. Harding*, 126 N. C. 295; 35 S. E. 586. (Though good as to such town.) *Contra*: as to the sale of exclusive rights to sell certain goods in a given city "and the territory tributary thereto." *Kaufman v. Mfg. Co.*, 78 Ia. 679; 16 Am. St. Rep. 462; 43 N. W. 612.

²² *Teague v. Schaub*, — N. C. —; 45 S. E. 762.

part in such reorganization and rank as before.²³ However, a contract to cease the practice of medicine within a certain territory unless some unforeseen necessity should compel him to return has been held sufficiently definite.²⁴ So offers by one who is known not to own property offered, showing merely his belief that he can effect a transfer of it, are not definite enough.²⁵

An indefinite use of certain terms may invalidate an offer; as an ambiguous use of the term "freight allowance";²⁶ or an offer of "all the colored noils for the year 1887"; it not appearing whether it meant all made by the vendor or all used by the purchaser.²⁷ However, an offer "for all steel bow sockets for 1888," accepted "subject to all unavoidable or unforeseen causes" was held definite enough,²⁸ and so was a promise to sell one of each size and style of certain patterns, produced by the manufacturer thereof during the next two years.²⁹

If from the contract the court can determine the terms and conditions thereof and can determine the measure of damages in case of breach, the contract is sufficiently definite.³⁰ The surrounding facts may be looked to to determine whether the offer is sufficiently definite.³¹ Thus offers to pay one-third of the moneys received from all the privileges on fair grounds;³² an offer to sell goods, to be resold for cash, the money thus received, less certain specified expenses, to be turned over to the original vendor, out of which money the goods bought are to

²³ Robinson v. Ry. Co., 135 U. S. 522.

²⁴ Ryan v. Hamilton, 205 Ill. 191; 68 N. E. 781; reversing 103 Ill. App. 212.

²⁵ Wenham v. Switzer, 59 Fed. 942; 8 C. C. A. 404; Topliff v. McKendree, 88 Mich. 148; 50 N. W. 109.

²⁶ Peerless Glass Co. v. Crockery Co., 121 Cal. 641; 54 Pac. 101.

²⁷ Hall v. Woolen Co., 187 Pa. St. 18; 67 Am. St. Rep. 563; 52 L. R. A. 689; 40 Atl. 986.

²⁸ Shadbolt, etc., Co. v. Topliff, 85 Wis. 513; 55 N. W. 854.

²⁹ McCall, etc., Co. v. Icks, 107 Wis. 232; 83 N. W. 300. See Franz v. Bieler, 126 Cal. 176; 56 Pac. 249; 58 Pac. 466.

³⁰ Scholtz v. Ins. Co., 100 Fed. 573; 40 C. C. A. 556; Witty v. Ins. Co., 123 Ind. 411; 18 Am. St. Rep. 327 8 L. R. A. 365; 24 N. E. 141.

³¹ Concordia Fire Ins. Co. v. Hefron, 84 Ill. App. 610; Lulay v. Barnes, 172 Pa. St. 331; 34 Atl. 52.

³² Dargin v. Hewlitt, 115 Ala. 510; 22 So. 128.

be paid for;³³ an offer to sell a certain number of scales to be selected out of several different kinds which were sold at different prices;³⁴ an offer to allow the buyer of corporate stock to retain out of the purchase price an amount equal to the unpaid debts of the corporation;³⁵ an offer to sell a certain fraction of the total amount of the capital stock to be thereafter issued in a corporation to be formed;³⁶ an offer not to compete in the practice of medicine, nothing being said as to time;³⁷ and not to compete in business while the purchaser of the good will is engaged in it;³⁸ and an offer to A in consideration of his "assisting to make a success" of a wholesale cigar business;³⁹ are sufficiently definite. So an offer to furnish gas for an electric light plant as long as the gas-well holds out is definite enough, though the owner of the well can sell and use gas for other purposes.⁴⁰

So an offer of employment as long as the employee is able, ready and willing to do the work required of him;⁴¹ an offer to employ one as assistant manager as long as the corporation lasts, if he is efficient and holds a certain amount of stock;⁴² or to employ one as long as the works are running or until he quits;⁴³ and an offer to pay to an inventor a certain sum per week as long as his patents are used by the offerer, though the latter may

³³ *Clement v. Drybread*, 108 Ia. 701; 78 N. W. 235.

³⁴ *Kimball v. Deere*, 108 Ia. 676; 77 N. W. 1041. (Since damages can at least be estimated from the profits which would have been received from a purchase of the kind of scale on which the profits were least.)

³⁵ *Northern, etc., Ry. Co. v. Walworth*, 193 Pa. St. 207; 74 Am. St. Rep. 683; 44 Atl. 253.

³⁶ *Huse, etc., Co. v. Heinze*, 102 Mo. 245; 14 S. W. 756.

³⁷ *Hauser v. Harding*, 126 N. Car. 295; 35 S. E. 586. (Since in law it means for the life of the promiser.)

³⁸ *Eisel v. Hayes*, 141 Ind. 41; 40 N. E. 119.

³⁹ *Sutliff v. Seidenberg*, 132 Cal. 63; 64 Pac. 131, 469.

⁴⁰ *Xenia, etc. Co. v. Macy*, 147 Ind. 568; 47 N. E. 147; citing *Graves v. Gas Co.*, 83 Ia. 714; 50 N. W. 283; *Whiteman v. Gas Co.*, 139 Pa. St. 492; 20 A. 262.

⁴¹ *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109; 51 Am. St. Rep. 289; 32 N. E. 802; *Sax v. Ry.*, 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314; *Harrington v. Ry.*, 60 Mo. App. 223. But in *Louisville etc. R. R. v. Offutt*, 99 Ky. 427; 59 Am. St. Rep. 467; 36 S. W. 181, such a contract was held so indefinite that either party might terminate it at any time.

⁴² *McMullan v. Dickinson Co.*, 63 Minn. 405; 65 N. W. 661, 663.

⁴³ *Carter, etc., Co. v. Kinlin*, 47 Neb. 409; 66 N. W. 536.

cease manufacturing the articles patented and terminate the contract at will;⁴⁴ are all certain enough.

An offer by A to B to furnish B with all the goods of a certain kind that he may need during a certain time;⁴⁵ such as coal,⁴⁶ iron,⁴⁷ cans,⁴⁸ or ice,⁴⁹ is certain.⁵⁰ On the other hand an offer by A to B to furnish B with all the goods of a certain kind that B wishes during a certain time is indefinite, as B may wish any amount, however large.⁵¹ Thus a contract to saw all the lumber which another should furnish is unenforceable.⁵² Further, such contracts are without consideration as B may not wish any.⁵³

§29. Form of offer.—Express offer.

If the offer has the elements already indicated, its form is not material.¹ The offer may be made either by words or by acts. Thus of offers by express words, an option to a town to buy a water works, secured by a provision in the charter of the water-

⁴⁴ *Raymond v. White*, 119 Mich. 438; 78 N. W. 469.

⁴⁵ *Cold Blast Transportation Co. v. Nut Co.*, 114 Fed. 77; 57 L. R. A. 696; 52 C. C. A. 25; *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85; 31 L. R. A. 529; 43 N. E. 774; reversing 56 Ill. App. 248. (A contract by the lumber company for its "requirements" of coal for a certain season.) *E. C. Dailey Co. v. Can Co.*, 128 Mich. 591; 87 N. W. 761; *Hickey v. O'Brien*, 123 Mich. 611; 81 Am. St. Rep. 227; 49 L. R. A. 594; 82 N. W. 241; *Wells v. Alexandre*, 130 N. Y. 642; 15 L. R. A. 218; 29 N. E. 142.

⁴⁶ *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85; 31 L. R. A. 529; 43 N. E. 774; reversing 56 Ill. App. 248.

⁴⁷ *National Furnace Co. v. Mfg. Co.*, 110 Ill. 427.

⁴⁸ *E. C. Dailey Co. v. Can Co.*, 128 Mich. 591; 87 N. W. 761.

⁴⁹ *Smith v. Morse*, 20 La. Ann. 220; *Hickey v. O'Brien*, 123 Mich. 611; 81 Am. St. Rep. 227; 49 L. R. A. 594; 82 N. W. 241.

⁵⁰ Whether such promise is supported by sufficient consideration if accepted, see § 308.

⁵¹ *Cold Blast Transportation Co. v. Nut Co.*, 114 Fed. 77; 57 L. R. A. 696; *Crane v. Crane & Co.*, 105 Fed. 869; 45 C. C. A. 96; *Missouri, etc., Ry. v. Bagley*, 60 Kan. 424; 56 Pac. 759; *Tarbox v. Gotzian*, 20 Minn. 139.

⁵² *Harrison v. Lumber Co.*, — Gr. —; 45 S. E. 730.

⁵³ See § 307.

¹ *Pittsburgh, etc., Co. v. Racer*, 10 Ind. App. 503; 38 N. E. 186; 37 N. E. 280.

works company;² an offer made by a city ordinance;³ as an offer by a city ordinance to perform the conditions of a lease to be assigned;⁴ or to grant a telegraph company the right to erect poles in the city streets on certain specified conditions;⁵ or to allow a railway company to use a certain street, the railway company to pave the portion of the track between the rails in case the city paves the street;⁶ a vote by a township of a sum as a subscription to a railroad;⁷ a statute exempting the property of a railroad company from taxation;⁸ a petition for the construction of a private sewer with the approval thereof by council, and filing bond;⁹ a call to fill a pulpit at a specified salary;¹⁰ the allowance of a valid claim by the trustees of a municipal corporation, made to the holder as a basis of settlement;¹¹ a notice of wages to be paid for weaving styles of the first and second quality;¹² and advertisements of various forms;¹³ have each been held valid offers. The offer may be made by acts as well as by words. Such a contract is an implied contract, however, and will be discussed elsewhere.¹⁴

§30. Communication of offer.

It is an elementary proposition, scarcely needing demonstration, that an offer cannot be accepted so as either to confer rights or to impose liabilities until it has been communicated to

² *Braintree, etc., Co. v. Braintree*, 146 Mass. 482; 16 N. E. 420.

³ *People v. Telephone Co.*, 192 Ill. 307; 85 Am. St. Rep. 338; 61 N. E. 428; *Vincennes v. Gaslight Co.*, 132 Ind. 114; 16 L. R. A. 485; 31 N. E. 573; (*City of*) *Baxter Springs v. Power Co.*, 64 Kan. 591; 68 Pac. 63.

⁴ *Curtis v. Portsmouth*, 67 N. H. 506; 39 Atl. 439; citing *Hunneman v. Grafton*, 10 Met. (Mass.) 454.

⁵ *St. Louis v. Telegraph Co.*, 63 Fed. 68.

⁶ *Coast Line Ry. Co. v. Savannah*, 30 Fed. 646.

⁷ *Chicago, etc., R. R. Co. v. Osage County*, 38 Kan. 597; 16 Pac. 828.

⁸ *County Commissioners of Santa Fe County v. Ry. Co.*, 3 N. M. 126; 2 Pac. 376; *County Commissioners of Valencia County v. Ry. Co.*, 3 N. M. 677; 10 Pac. 294.

⁹ *Stevens v. Muskegon*, 111 Mich. 72; 36 L. R. A. 777; 69 N. W. 227.

¹⁰ *Jennings v. Scarborough*, 56 N. J. L. 401; 28 Atl. 559.

¹¹ *McConoughey v. Jackson*, 101 Cal. 265; 35 Pac. 863; 40 A. S. R. 53.

¹² *Gallagher v. Mfg. Co.*, 172 Mass. 230; 51 N. E. 1086.

¹³ See § 26.

¹⁴ See ch. XXXVII.

the person to whom it is to be made.¹ This rule is unquestioned in contracts where alleged acceptance of an uncommunicated offer is invoked to impose a liability upon the party accepting. Thus the unexpressed and uncommunicated intention of one who claims to act for himself on the one part and for a corporation on the other, that the corporation shall pay certain individual debts does not constitute a contract.² So the vote of a corporation has no effect as a contract until communicated to and accepted by the adversary party.³ So a telegram from A giving prices of glass jars "if specifications favorable," being too indefinite an offer to form the basis of a contract⁴ cannot be supplemented by a letter received by B after he had answered A's telegram, so as to constitute a complete contract.⁵ So where A sends a message to a telegraph office, written on plain paper, and the operator pasted it on a printed blank, A is not bound by terms in such blank.⁶ So where a shipper loaded cotton into a car standing on a side track, no agent of the railroad company being advised thereof, no contract existed.⁷ For the purposes of the law, however, an offer is communicated when it is brought to the attention of the adversary party in such a manner that by the use of ordinary intelligence he cannot help knowing its terms. Thus in case of written contracts, one who accepts a written offer which he has a fair opportunity to read, is bound by its terms in the absence of fraud or misrepresentation, even though he has not read them and does not know them;⁸

¹ *Armington v. Stelle*, 27 Mont. 13; 69 Pac. 115.

² *Durlacher v. Frazer*, 8 Wyom. 58; 80 Am. St. Rep. 918; 55 Pac. 306.

³ *Sears v. Ry.*, 152 Mass. 151; 9 L. R. A. 117; 25 N. E. 98.

⁴ See § 28.

⁵ *James v. Bottle Co.*, 69 Mo. App. 207.

⁶ *Harris v. Telegraph Co.*, 121 Ala. 519; 77 Am. St. Rep. 70; 25 So. 910. And see *Pearsall v. Telegraph Co.*, 124 N. Y. 256; 21 Am. St. Rep. 662; 26 N. E. 534; *Anderson v. Tele-*

graph Co., 84 Tex. 17; 19 S. W. 285.

⁷ *Tate v. R. R.*, 78 Miss. 842; 84 Am. St. Rep. 649; 29 So. 392.

⁸ *Martin v. Smith*, 116 Ala. 639; 22 So. 917; *Terry v. Ins. Co.*, 116 Ala. 242; 22 So. 532; *Macpherson v. Morrill*, 190 Ill. 194; 60 N. E. 86; *Miller v. Powers*, 119 Ind. 79; 4 L. R. A. 483; 21 N. E. 455; *Crim v. Crim*, 162 Mo. 544; 54 L. R. A. 502; 63 S. W. 489; *Little v. Little*, 2 N. D. 175; 49 N. W. 736; *Union, etc., Ins. Co. v. Hook*, 62 O. S. 256; 56 N. E. 906.

or if he misapprehends their legal effect;⁹ while on the other hand, a term of a written contract so inserted as not to be brought fairly to the attention of the adversary party does not bind him.¹⁰ So where the alleged offer consists of acts, it is necessary to show that such acts are brought to the knowledge of the adversary party.¹¹

§31. Necessity of communication of offer in railroad contracts.

Questions as to the effect of terms of a written contract not actually brought to the attention of the adversary party often arise on railroad tickets, bills of lading, and the like. A complicating feature in contracts of this sort, however, is that the common carrier is often seeking by the terms of the contract in question to avoid his Common Law liability — an attempt which some courts do not encourage.¹ Accordingly it is sometimes held that a contract whereby a common carrier seeks to avoid his Common Law liability is not binding unless such terms are especially called to the attention of the party to be bound thereby.² This rule rests in part upon the reason that tickets are usually bought in haste, and that the oral contract is made before the ticket is handed to passenger; two circumstances which prevent such terms from being a part of the con-

⁹ *Dusenberry v. Ins. Co.*, 188 Pa. St. 454; 41 Atl. 736.

¹⁰ *Lilly v. Person*, 168 Pa. St. 219; 32 Atl. 23. (Where A. was shown where to sign a contract written on several pages and his attention was not called to a term on a subsequent page.)

¹¹ See § 774.

¹ See ch. XVIII.

² *The Majestic*, 166 U. S. 375; *Railroad Co. v. Mfg. Co.*, 16 Wall. (U. S.) 318; *Wiegand v. Ry.*, 75 Fed. 370; *Boyd v. Spencer*, 103 Ga. 828; 68 Am. St. Rep. 146; 30 S. E. 841; *Illinois Central Ry. v. Beebe*, 174 Ill. 13; 66 Am. St. Rep. 253; 43 L. R. A. 210; 50 N. E. 1019; affirming 69 Ill. App. 363; *Illinois*

Central Ry. v. Carter, 165 Ill. 570; 36 L. R. A. 527; 46 N. E. 374; reversing 62 Ill. App. 618; *Chicago, etc., Ry. v. Simon*, 160 Ill. 648; 43 N. E. 596; *Chicago, etc., Ry. v. Davis*, 159 Ill. 53; 50 Am. St. Rep. 143; 42 N. E. 382; *Kansas City, etc., R. R. v. Rodebaugh*, 38 Kan. 45; 5 Am. St. Rep. 715; 15 Pac. 899; *Newberger Cotton Co. v. Ry.*, 75 Miss. 303; 23 So. 186; *Gardner v. Ry.*, 127 N. C. 293; 37 S. E. 328; *Norman v. Ry.*, 65 S. C. 517; 95 Am. St. Rep. 809; 44 S. E. 83; *Louisville, etc., Ry. v. Turner*, 100 Tenn. 213; 43 L. R. A. 140; 47 S. W. 223. So under § 2068 of the Georgia Code. *Wood v. Express Co.*, 95 Ga. 451; 22 S. E. 535.

tract.³ Accordingly where a ticket is purchased with full opportunity for examination, such as a steamship ticket, it is presumed that the purchaser knows its contents.⁴ This rule has been applied even if the passenger cannot read.⁵ The same principle applies where a railway ticket is purchased under circumstances which give to the purchaser a full opportunity for examination and the terms thereof are fairly brought to his notice.⁶ So if a warehouse receipt is accepted with the words "at owner's risk" stamped legibly on its face, such provision forms part of the contract.⁷ In some jurisdictions the mere receipt of a bill of lading is not held as a matter of law to show an acceptance of its terms.⁸ "Where a contract limiting the liability of the carrier is contained in a bill of lading which in its entirety constitutes both a receipt and a contract, the onus is on the carrier to show the restrictions of the Common Law liability were assented to by the consignor."⁹ Bills of lading are not usually taken in such haste as tickets and there is greater reason for holding the shipper bound by such terms.

Other courts hold that the party accepting a bill of lading and the like from a common carrier is bound by terms thereon which are fairly placed before him even if not especially called to his attention.¹⁰ Where the view last expressed obtains and

³ *Henderson v. Stevenson*, L. R. 2 H. L. (Sc.) 470; *Boyd v. Spencer*, 103 Ga. 828; 68 Am. St. Rep. 146; 30 S. E. 841; *Louisville, etc., Ry. v. Turner*, 100 Tenn. 213; 43 L. R. A. 140; 47 S. W. 223.

⁴ *O'Regan v. Steamship Co.*, 160 Mass. 356; 39 Am. St. Rep. 484; 35 N. E. 1070; *Fonseca v. Steamship Co.*, 153 Mass. 553; 25 Am. St. Rep. 660; 12 L. R. A. 340; 27 N. E. 665; *Steers v. Steamship Co.*, 57 N. Y. 1; 15 Am. Rep. 453.

⁵ *O'Regan v. Steamship Co.*, 160 Mass. 356; 39 Am. St. Rep. 484; 35 N. E. 1070.

⁶ *Eddy v. Harris*, 78 Tex. 661; 22 Am. St. Rep. 88; 15 S. W. 107.

⁷ *Taussig v. Bode*, 134 Cal. 260; 54 L. R. A. 774; 66 Pac. 259.

⁸ *Chicago, etc., Ry. v. Stock Farm*,

194 Ill. 9; 88 Am. St. Rep. 68; 61 N. E. 1095; *Chicago, etc., Ry. v. Simon*, 160 Ill. 648; 43 N. E. 596; *Erie, etc., Co. v. Dater*, 91 Ill. 195; 33 Am. Rep. 51; *Gaines v. Union Transportation, etc., Co.*, 28 O. S. 418.

⁹ *Chicago, etc., Ry. v. Simon*, 160 Ill. 648; 43 N. E. 596; quoted in *Chicago, etc., Ry. v. Stock Farm*, 194 Ill. 9; 88 Am. St. Rep. 68; 61 N. E. 1095; so *Illinois Central Ry. v. Carter*, 165 Ill. 570; 36 L. R. A. 527; 46 N. E. 374.

¹⁰ *Bank v. Express Co.*, 93 U. S. 174; *Grace v. Adams*, 100 Mass. 505; 1 Am. Rep. 131; 97 Am. Dec. 117; *McMillan v. Ry.*, 16 Mich. 79; 93 Am. Dec. 208; *Schaller v. Ry.*, 97 Wis. 31; 71 N. W. 1042.

terms printed in obscure type on the face of the ticket, or printed on the back, are sought to be incorporated in the contract of transportation, the rules determining liability are as follows:

(1) If the person buying the ticket or bill of lading knows what the terms and conditions thus offered are, he is bound thereby.¹¹ A similar rule applies to bills of lading.¹²

(2) Even if he does not know of the nature of special terms and conditions thus offered, he is nevertheless bound if he is notified in a reasonable manner of their existence and omits to ascertain their nature.¹³

This rule applies whether the passenger signs the ticket,¹⁴ even if in haste,¹⁵ or whether he omits to sign it.¹⁶ The sale of a ticket at a reduced rate is notice of special conditions therein.¹⁷ So that a condition on the face of a ticket, sold at a reduced rate, that it should be stamped before return, is binding even on a purchaser who cannot read and does not know of the condi-

¹¹ *Hanlon v. R. R.*, 109 Ia. 136; 80 N. W. 223; *Coburn v. R. R.*, 105 La. Ann. 398; 83 Am. St. Rep. 242; 29 So. 882; *Trezona v. Ry. Co.*, 107 Ia. 22; 43 L. R. A. 136; 77 N. W. 486; *Hanlon v. Ry. Co.*, 109 Ia. 136; 80 N. W. 223; *Bowers v. Pennsylvania Co.*, 158 Pa. St. 302; 27 Atl. 893; *Houston, etc., Ry. v. Arey*, 18 Tex. Civ. App. 457; 44 S. W. 894; *Muldoon v. Ry. Co.*, 10 Wash. 311; 45 Am. St. Rep. 787; 38 Pac. 995.

¹² *Merchants', etc., Co. v. Joesting*, 89 Ill. 152; *Smith v. Express Co.*, 108 Mich. 572; 66 N. W. 479.

¹³ *Acton v. Packet Co. (Q. B.)*, 73 Law T. Rep. 158; *Boylan v. Ry.*, 132 U. S. 146; *McGhee v. Drisdale*, 111 Ala. 597; 20 So. 391; *Garden Grove Bank v. Ry.*, 67 Ia. 526; 25 N. W. 761; *Hewett v. Ry.* 63 Ia. 611; 19 N. W. 790; *Robinson v. Transportation Co.*, 45 Ia. 470; *Mulligan v. Ry.*, 36 Ia. 181; 14 Am. Rep. 514; *Walker v. Price*, 62 Kan. 327; 84 Am. St. Rep. 392; 62 Pac.

1001; *Grace v. Adams*, 100 Mass. 505; 1 Am. Rep. 131; 97 Am. Dec. 117; *Rahilly v. Ry.*, 66 Minn. 153; 68 N. W. 853; *Aiken v. Ry.*, 80 Mo. App. 8; *Zimmer v. Ry.*, 137 N. Y. 460; 33 N. E. 642; *Ballou v. Earle*, 17 R. I. 441; 33 Am. St. Rep. 881; 14 L. R. A. 433; 22 Atl. 1113.

¹⁴ *Boylan v. Ry.*, 132 U. S. 146.

¹⁵ *Bethea v. Ry. Co.*, 26 S. Car. 91; 1 S. E. 372.

¹⁶ *Fonseca v. Steamship Co.*, 153 Mass. 553; 25 Am. St. Rep. 660; 12 L. R. A. 340; 27 N. E. 665. (The length of the ticket does not prevent its terms from being binding if the buyer knows that the ticket contains terms and conditions.)

¹⁷ *St. Louis, etc., Ry. v. Weakley*, 50 Ark. 397; 7 Am. St. Rep. 104; 8 S. W. 134; *Bissell v. R. R.*, 25 N. Y. 442; 82 Am. Dec. 369; *Watson v. Ry.*, 104 Tenn. 194; 49 L. R. A. 454; 56 S. W. 1024; *Ranchau v. R. R.*, 71 Vt. 142; 76 Am. St. Rep. 761; 43 Atl. 11.

tions.¹⁸ Still more is a pass notice of a provision therein.¹⁹

Bills of lading and contracts for the transportation of baggage are subject to the same rules as tickets for transportation of passengers. The shipper is bound by terms on the face of his contract, whether read or not if he has an opportunity to read them.²⁰ If the terms of the contract appear on the face of the bill of lading, the fact that the shipper cannot read does not prevent these terms from binding him, at least if the shipper does not know of such inability.²¹

(3) Where the terms and conditions of the ticket are not actually brought to the notice of the purchaser, and no reasonable notice thereof is given to him, he is not bound thereby.²²

¹⁸ *Watson v. Ry. Co.*, 104 Tenn. 194; 49 L. R. A. 454; 56 S. W. 1024.

¹⁹ *Boering v. Ry.*, 193 U. S. 442; *Griswold v. Ry.*, 53 Conn. 371; 55 Am. Rep. 115; 4 Atl. 261; *Illinois Central R. R. v. Read*, 37 Ill. 484; 87 Am. Dec. 260; *Quimby v. R. R.*, 150 Mass. 365; 5 L. R. A. 846; 23 N. E. 205; *Squire v. R. R.*, 98 Mass. 239; 93 Am. Dec. 162; *Perkins v. R. R.*, 24 N. Y. 196; 82 Am. Dec. 282; *Gulf, etc., Ry. v. McGown*, 65 Tex. 640.

²⁰ *Cau v. Ry.*, 194 U. S. 427; *Calderon v. Steamship Co.*, 64 Fed. 874; *Mouton v. Ry.*, 128 Ala. 537; 29 So. 602; *St. Louis, etc., Ry. v. Weakley*, 50 Ark. 397; 7 Am. St. Rep. 104; 8 S. W. 134; *Michalitschke v. Wells, Fargo & Co.*, 118 Cal. 683; 50 Pac. 847; *Overland Mail, etc., Co. v. Carroll*, 7 Colo. 43; 1 Pac. 682; *Pacific Express Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107; 26 Pac. 665; *Graves v. Express Co.*, 176 Mass. 280; 57 N. E. 462; *Cox v. Ry.*, 170 Mass. 129; 49 N. E. 97; *Smith v. Express Co.*, 108 Mich. 572; 66 N. W. 479; *Christenson v. Express Co.*, 15 Minn. 270; 2 Am. Rep. 122; *St. Louis, etc., Ry. v. Cleary*, 77 Mo.

634; 46 Am. Rep. 13; *Wyrick v. Ry.*, 74 Mo. App. 406; *McFadden v. Ry.*, 92 Mo. 343; 1 Am. St. Rep. 721; 4 S. W. 689; *Durgin v. Express Co.*, 66 N. H. 277; 20 Atl. 328; 9 L. R. A. 453; *Merrill v. Express Co.*, 62 N. H. 514; *Hill v. Ry.* 73 N. Y. 351; 29 Am. Rep. 163; *Phifer v. R. R.*, 89 N. C. 311; 45 Am. Rep. 687; *Johnstone v. Ry.*, 39 S. C. 55; 17 S. E. 512; *Davis v. Ry.*, 66 Vt. 290; 44 Am. St. Rep. 852; 29 Atl. 313.

²¹ *Jones v. Ry.*, 89 Ala. 376; 8 So. 61.

²² *Richardson v. Browntree*, L. R. (1894) App. Cas. 217; *The Majestic*, 166 U. S. 375; *Potter v. The Majestic*, 60 Fed. 624; 9 C. C. A. 161; 23 L. R. A. 746; *The Majestic*, 56 Fed. 244; *Wiegand v. Ry. Co.*, 75 Fed. 370 (limitation on liability for baggage); *Boyd v. Spencer*, 103 Ga. 828; 68 Am. St. Rep. 146; 30 S. E. 841 (limitation as to time); citing *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469; *Pennsylvania Ry. Co. v. Spicker*, 105 Pa. St. 142; and distinguishing *Phillips v. Georgia, etc., Co.*, 93 Ga. 356; 20 S. E. 247; *Kansas, etc., Ry. Co. v. Rodabaugh*, 38 Kan. 45; 5 Am. St. Rep. 715;

So a notice as to excursions is not binding unless in the ticket.²³ So while a shipper has as a rule an opportunity for examining the bill of lading furnished to him, he is not bound by the terms thereof where no such opportunity is given and no notice is given thereof.²⁴

What amounts to reasonable notice of terms in tickets and bills of lading is in part a question of fact. The following are cases in which the purchaser was held not to have a reasonable notice of the terms contained in the ticket: Where on the face of the ticket were the words "See back" in conspicuous type, but no reference was made to the conditions on the back as part of the contract nor was the attention of the passenger called to them;²⁵ where a ticket was folded up when delivered to the purchaser, and, while he knows that there is writing thereon, he does not know that such writing is a contract;²⁶ where a ticket was sold whose time-limit had expired but the purchaser was unable to read the terms because of the poor light in the depot;²⁷ or where a receipt for a trunk contained special terms which could not be read in the dimly lighted car where it was delivered.²⁸ Where the terms are in part expressed by punch marks and the like so unintelligible as not to be easily understood by a person of ordinary intelligence, the purchaser will not be bound thereby even if a notice on the face of the ticket recites that a "passenger in accepting this transfer agrees to read and be governed by the conditions on the back thereof"; and on the

15 Pac. 899; *Runyan v. Ry. Co.*, 61 N. J. L. 537; 68 Am. St. Rep. 711; 43 L. R. A. 284; 41 Atl. 367; *Cole v. Goodwin*, 19 Wend. 251; 32 Am. Dec. 470; *Rawson v. Ry. Co.*, 48 N. Y. 212; 8 Am. Rep. 545; *Kent v. R. R.* 45 O. S. 284; 4 Am. St. Rep. 539; 12 N. E. 798; *Arnold v. R. R.* 115 Pa. St. 135; 2 Am. St. Rep. 542; 8 Atl. 213; *Mack v. Western Dispatch*, 2 Ohio C. D. 22; *Lake Shore, etc., Ry. Co. v. Mortal*, 8 Ohio C. D. 134 (duty to have return coupon stamped); *Louisville, etc., Co. v. Turner*, 100 Tenn. 213; 43 L. R. A. 140; 47 S. W. 223 (time limit).

²³ *Pennsylvania R. R. v. Spicker*, 105 Pa. St. 142.

²⁴ *Chicago, etc., Ry. Co. v. Simon*, 160 Ill. 648; 43 N. E. 596.

²⁵ *The Majestic*, 166 U. S. 375.

²⁶ *Richardson v. Browntree*, L. R. (1894); App. Cas. 217.

²⁷ *Calloway v. Mellett*, 15 Ind. App. 366; 57 Am. St. Rep. 238; 44 N. E. 198.

²⁸ *Madan v. Sherard*, 73 N. Y. 329; 29 Am. Rep. 153; and see *Blossom v. Dodd*, 43 N. Y. 264; 3 Am. Rep. 701.

back appears a condition that the passenger shall examine date, time, and directions of a transfer check, which are so complicated in the form used that they cannot be easily understood by persons of ordinary intelligence.²⁹

So where the clause in question is on the back of the bill of lading and is not brought to the attention of the shipper,³⁰ or where the clause in question is stamped in red ink on one corner of the shipping receipt,³¹ or is in type too small to be read,³² or is covered by a revenue stamp so as to be illegible,³³ he is not bound thereby.

(4) If a passenger makes an oral contract with the railway company, he may assume in the absence of special notice, that the ticket given to him shows the terms of the contract correctly.³⁴ So where an oral agreement for transportation is made, the shipper may assume that a bill of lading subsequently delivered to him sets forth the terms of the oral agreement correctly; and he is not bound by the insertion of different terms therein.³⁵ So a verbal agreement for transportation cannot be varied by the terms of a receipt delivered by the agent of the

²⁹ O'Rourke v. Ry. Co., 103 Tenn. 124; 76 Am. St. Rep. 639; 46 L. R. A. 614; 52 S. W. 872.

³⁰ Railroad Co. v. Mfg. Co., 16 Wall (U. S.) 318; Merchants', etc., Co. v. Furthmann, 149 Ill. 66; 41 Am. St. Rep. 265; 36 N. E. 624; Newell v. Smith, 49 Vt. 255.

³¹ New York, etc., Co. v. Sayles, 87 Fed. 444.

³² Ryan v. Ry., 65 Tex. 13; 57 Am. Rep. 589.

³³ Perry v. Thompson, 98 Mass. 249.

³⁴ Indianapolis, etc., Co. v. Cox, 29 Ind. 360; 95 Am. Dec. 640; Malone v. Ry., 12 Gray (Mass.) 388; 74 Am. Dec. 598; Gulf, etc., Ry. v. Copeland, 17 Tex. Civ. App. 55; 42 S. W. 239.

³⁵ North-West, etc., Co. v. McKenzie, 25 Can. S. C. 38; Merchants',

etc., Co. v. Furthmann, 149 Ill. 66; 41 Am. St. Rep. 265; 36 N. E. 624; affirming 47 Ill. App. 561; Stoner v. Ry., 109 Ia. 551; 30 N. W. 563; Missouri Pacific Ry. v. Beeson, 30 Kan. 298; 2 Pac. 496; Louisville, etc., Ry. v. Cooper (Ky.), 56 S. W. 144; Gott v. Dinsmore, 111 Mass. 45; Rudell v. Transit Co., 117 Mich. 568; 44 L. R. A. 415; 76 N. W. 380; Southard v. Ry., 60 Minn. 382; 62 N. W. 442, 619; Germania Fire Ins. Co. v. Ry., 72 N. Y. 90; 28 Am. Rep. 113; Gaines v. Ins. Co., 28 O. S. 418; Illinois, etc., Ry. v. Craig, 102 Tenn. 298; 52 S. W. 164; San Antonio, etc., Ry. v. Wright, 20 Tex. Civ. App. 136; 49 S. W. 147; Texas, etc., Ry. v. Avery, 19 Tex. Civ. App. 235; 46 S. W. 897; Strohn v. Ry., 21 Wis. 554; 94 Am. Dec. 564.

carrier to the shipper, folded up, which he put in his pocket in ignorance of its contents.³⁶

In general it may be deduced from the cases cited that if the instrument offered by the carrier is understood to be a receipt, a check, or a voucher, the party receiving it is not bound by terms not called to his attention; while if he understands it to be a contract he is bound to use reasonable care to ascertain the terms thereof.

A class of cases similar to these arises where by mistake, misrepresentation, or fraud, A is induced to enter into a written contract which contains terms of which he is not informed. A discussion of A's liability is given under the titles of fraud, misrepresentation and mistake.³⁷ A is usually held not liable if he is free from negligence and has not estopped himself from showing that he did not know the terms of the contract; but if he knew or by reasonable effort might know the contents of the contract he is liable, except in the case of fraud or misrepresentation.

§32. Necessity of communication of offer in rewards.

It is usually so clear that no rights can arise out of acts done without knowledge of or intent to accept an offer, though such acts might be an appropriate means of acceptance if intended for that purpose, that few questions ever arise thereunder. One class of cases is, however, anomalous in its treatment by some courts and has given rise to a conflict of authority on this point. This class consists of cases where a reward has been offered for doing some act and the act has been done in ignorance of the offer. The logical treatment of these cases would be to hold that no acceptance can be made of an uncommunicated

³⁶ *Stoner v. Ry.*, 109 Ia. 551; 80 N. W. 569. "Assent of the plaintiff to the alleged change cannot be inferred from his acceptance of the folded writing, the contents of which he did not know and of which he

was not informed." *Stoner v. Ry.*, 109 Ia. 551; 80 N. W. 569; (citing *Strohm v. Ry.*, 21 Wis. 554; 94 Am. Dec. 564; *Gulf, etc., Ry. v. Wood* (Tex. Civ. App.), 30 S. W. 715; *King v. Woodridge*, 34 Vt. 564.)

³⁷ See § 62 *et seq.*

offer, and many courts do in fact so hold.¹ Many of these cases are cases where a reward was offered for the arrest of an alleged criminal.²

Other courts moved rather by a feeling that if the person offering the reward receives the benefit of the act, he should make compensation, than by technical legal considerations have treated such acts as a valid acceptance, and have enforced such contracts.³ Many of these cases are cases where a reward was offered for the recovery of property.⁴ In some cases involving arrest, the party who made the arrest recovered the reward even where the arrest was made before the reward was offered.⁵ He has been allowed to recover where he had heard of the reward though he had not seen the formal notice until after the arrest.⁶

The questions of whether any proper acceptance is made where the offer is communicated, but the act is done for a motive other than the reward, and whether any consideration exists are questions discussed later.⁷

§33. Express revocation of offer.

An offer may be withdrawn at any time before it has been

¹ *Hewitt v. Anderson*, 56 Cal. 476; 38 Am. Rep. 65; *Marvin v. Treat*, 37 Conn. 96; 9 Am. Rep. 307; *Ensminger v. Horn*, 70 Ill. App. 605; *Chicago, etc., Ry. Co. v. Sebring*, 16 7 Dana (Ky.) 29; overruled in *Auditor v. Ballard*, 9 Bush (Ky.) 572; 15 Am. Rep. 728; *Fitch v. Snedaker*, 38 N. Y. 248; 97 Am. Dec. 791; *Howland v. Lounds*, 51 N. Y. 604; 10 Am. Rep. 654; *Stamper v. Temple*, 6 Hump (Tenn.) 113; 44 Am. Rec. 296.

² *Ensminger v. Horn*, 70 Ill. App. 605; *Lee v. Flemingsburg*, 7 Dana (Ky.) 29; *Fitch v. Snedaker*, 38 N. Y. 248; 97 Am. Dec. 791; *Stampfer v. Temple*, 6 Hump. (Tenn.) 113 44 Am. Dec. 296. Recovery of a reward offered for lost property was refused in *Howland v. Lounds*, 51 N. Y. 604; 10 Am. Rep. 654.

³ *Gibbons v. Proctor*, 64 L. T. R. 594; *Eagle v. Smith*, 4 Houst (Del.) 293; *Everman v. Hyman*, 26 Ind. App. 165; 84 Am. St. Rep. 284; 28 N. E. 1022; *Dawkins v. Sappington*, 26 Ind. 199; *Auditor v. Ballard*, 9 Bush (Ky.) 572; 15 Am. Rep. 728; *Wentworth v. Day*, 3 Met. (Mass.) 352; 37 Am. Dec. 145; *Russell v. Stewart*, 44 Vt. 170.

⁴ *Eagle v. Smith*, 4 Houst (Del.) 293; *Everman v. Hyman*, 26 Ind. App. 165; 28 N. E. 1022; 84 Am. St. Rep. 284; *Dawkins v. Sappington*, 26 Ind. 109.

⁵ *Coffey v. Commonwealth (Ky.)*, 37 S. W. 575; *Auditor v. Ballard*, 9 Bush (Ky.) 572; 15 Am. Rep. 728.

⁶ *Swanton v. Ost*, 74 Ill. App. 281.

⁷ See § 295.

accepted, and cannot, after withdrawal, be accepted so as to make a binding contract.¹ An offer may be withdrawn even if negotiations have progressed as long as no acceptance has been made,² or even if money has been paid when the offer was made.³ Thus, an order for goods given to a traveling salesman, accepted subject to acceptance by his employer, can be revoked by the party giving the order at any time before such acceptance,⁴ even if the party making the offer deposited notes as part of the offer, and the principal of the agent accepts after the withdrawal.⁵ So an acceptance by one attorney of an offer by another subject to the approval of the client of such offer may be revoked by the first before approval by the client.⁶ Thus at an auction sale a bid may be withdrawn at any time before it

¹ *Moffett, etc., Co. v. Rochester*, 178 U. S. 373; reversing 91 Fed. 28; 33 C. C. A. 319; which reversed 82 Fed. 255; *Borst v. Simpson*, 90 Ala. 373; 7 So. 814; *Abbott v. Land, etc., Co. (Cal.)*, 53 Pac. 445; *Smith v. Bateman*, 25 Colo. 241; 53 Pac. 457; affirming 8 Colo. App. 336; 46 Pac. 213; *Sherwin v. National, etc., Co.*, 5 Colo. App. 162; 38 Pac. 392; *Krause v. Kraus*, 162 Ill. 328; 44 N. E. 736; *Crandall v. Willig*, 166 Ill. 233; 46 N. E. 755; *Augustine v. M. E. Society*, 79 Ill. App. 452; *Murray v. Doud*, 63 Ill. App. 247; *Young v. Trainor*, 57 Ill. App. 632; *Cincinnati, etc., Co. v. Clifford*, 113 Ind. 460; 15 N. E. 524; *McCormick, etc., Co. v. Richardson*, 89 Ia. 525; 56 N. W. 682; *Peet v. Meyer*, 42 La. Ann. 1034; 8 So. 534; *Miller v. Douville*, 45 La. Ann. 214; 12 So. 132; *Lincoln v. Gay*, 164 Mass. 537; 49 Am. St. Rep. 480; 42 N. E. 95; *Brown v. Snider*, 126 Mich. 198; 85 N. W. 570; *McCormick Harvesting Machine Co. v. Cusack*, 116 Mich. 647; 74 N. W. 1005; *Smith v. Brennan*, 62 Mich. 349; 4 Am. St. Rep. 867; 28 N. W. 892; *Hill v. Webb*, 43 Minn. 545; 45 N. W. 1133; *Scanlon v. Oliver*, 42 Minn. 538; 44

N. W. 1031; *Storch v. Duhnke*, 76 Minn. 521; 79 N. W. 533; *Chadwick v. Knox*, 31 N. H. 226; 64 Am. Dec. 329; *Corser v. Hale*, 149 Pa. St. 274; 24 Atl. 285; *Johnston v. Fessler*, 7 Watts (Pa.) 48; 32 Am. Dec. 738; *Strasburg R. R. v. Echternacht*, 21 Pa. St. 220; 60 Am. Dec. 49; *Jones v. Ins. Co.*, 15 Utah 522; 50 Pac. 620; *McCaffrey v. Wagner*, 81 Wis. 633; 51 N. W. 958.

² *Corser v. Hale*, 149 Pa. St. 274; 24 Atl. 285.

³ *Scanlon v. Oliver*, 42 Minn. 538; 44 N. W. 1031.

⁴ *Thompson Mfg. Co. v. Perkins*, 97 Ia. 607; 66 N. W. 874; *Martin v. Wilms*, 61 Ill. App. 108; *Gregg v. Wooliscraft*, 52 Ill. App. 214.

⁵ *Gross v. Arnold*, 177 Ill. 575; 52 N. E. 867; affirming 77 Ill. App. 33; citing on this point, *Stitt v. Huidekopers*, 17 Wall (U. S.) 384; *Lincoln v. Gay*, 164 Mass. 537; 49 Am. St. Rep. 480; 42 N. E. 95; *McDonald v. Bewick*, 51 Mich. 79; 16 N. W. 240; *Townsend v. Corning*, 23 Wend. (N. Y.) 435; *Dodge v. Hopkins*, 14 Wis. 630.

⁶ *Cady v. Strauss*, 97 Va. 701; 34 S. E. 615.

is accepted.⁷ So the party offering the property for sale may withdraw it at any time before a bid has been accepted.⁸ A public officer,⁹ such as a commissioner,¹⁰ or an executor,¹¹ has the same right to withdraw an offer before a bid is accepted unless the authority under which he sells gives him no discretion. So the auctioneer may withdraw all articles from sale without any liability to prospective bidders.¹² In the United States an agreement in advance, without valuable consideration, that bids should not be withdrawn does not destroy the right to withdraw bids.¹³ In England it has been held that under an announcement of a sale "without reserve," the highest bid must be accepted.¹⁴

§34. Implied revocation.

An offer may be withdrawn before acceptance by acts of the offerer, inconsistent with the continued existence of the offer, and brought to the knowledge of the offeree.¹ A common example of such revocation is found in offers of sale, where the offerer sells the property in question to another person before the offer is accepted, and the offeree learns of such sale before acceptance.² Thus A offered to B to sell a mortgage for less

⁷ *Grotenkemper v. Achtermeyer*, 11 Bush (Ky.) 222; *Dunham v. Hartman*, 153 Mo. 625; 77 Am. St. Rep. 741; 55 S. W. 233; *Fisher v. Seltzer*, 23 Pa. St. 308; 62 Am. Dec. 335.

⁸ *Scales v. Chambers*, 113 Ga. 920; 39 S. E. 396; *Corryolles v. Mossy*, 2 La. 504.

⁹ *Blossom v. R. R.*, 3 Wall (U. S.) 196.

¹⁰ *Miller v. Law*, 10 Rich. Eq. (S. C.) 320; 73 Am. Dec. 92.

¹¹ *Payne v. Cave*, 3 T. R. 148; *Tillman v. Dunman*, 114 Ga. 406; 88 Am. St. Rep. 28; 57 L. R. A. 784; 40 S. E. 244.

¹² *Harris v. Nickerson*, L. R. 8 Q. B. 286.

¹³ *Fisher v. Seltzer*, 23 Pa. St. 308; 62 Am. Dec. 335.

¹⁴ *Johnston v. Boyes* (1899), 2 Ch. 73; *Warlow v. Harrison*, 1 E. & E. 295; *Mansfield v. Hodgdon*, 147 Mass. 304; 17 N. E. 544.

¹ *Dickinson v. Dodds*, 2 Ch. Div. 463; *Larmon v. Jordan*, 56 Ill. 206; *Wardell v. Williams*, 62 Mich. 50; 4 Am. St. Rep. 814; 28 N. W. 796; *Stensgaard v. Smith*, 43 Minn. 11; 19 Am. St. Rep. 205; 44 N. W. 669; *Longworth v. Mitchell*, 26 O. S. 334.

² *Dickinson v. Dodds*, 2 Ch. Div. 463; *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417; 11 Atl. 284; *Stensgaard v. Smith*, 43 Minn. 11; 19 Am. St. Rep. 205; 44 N. W. 669; *Longworth v. Mitchell*, 26 O. S. 334.

than the amount due. Before definite acceptance A notified B that he had sold the mortgage to a third person. This was equivalent to a withdrawal of the offer.³

§35. What offers are irrevocable.

An offer may be withdrawn at any time before acceptance, even though it was originally made to remain open for a fixed time, if not upon valuable consideration or under seal.¹

If the promise not to withdraw the offer for the time specified is upon valuable consideration, the offerer has not the right to withdraw such offer during the time specified.² Thus if the offerer agrees to keep his offer open for two days on consideration that the offeree will pay the attorney's fees and expenses of the offerer if the offer is not accepted, the offerer cannot revoke such offer during such time.³ While the offerer has no right to withdraw such an offer, he not infrequently attempts to do so: and an important question arises as to the effect upon the offer of the attempted revocation. Is the attempted revocation a nullity, leaving the original offer open, so that acceptance within the time limited will make it a contract; or does it revoke the offer, leaving the offerer liable for breach of his contract not to revoke the offer? Many of the cases which declare that an offer to be open for a fixed time on a valuable consid-

³ *Thurber v. Smith*, 25 R. I. 60; 54 Atl. 790.

¹ *Bristol, etc., Co. v. Maggs*, L. R. 44 Ch. D. 616; *Cooper v. Wheel Co.*, 94 Mich. 272; 34 Am. St. Rep. 341; 54 N. W. 39; *Davis v. Petty*, 147 Mo. 374; 48 S. W. 944; *Bosshardt, etc., Co. v. Oil Co.*, 171 Pa. St. 109; 32 Atl. 1120.

² *Robson v. Logging Co.*, 43 Fed. 364; *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47; 11 L. R. A. 148; 8 So. 368; *Hanna v. Ingram*, 93 Ala. 482; 9 So. 621; *Linn v. McLean*, 80 Ala. 360; *Black v. Maddox*, 104 Ga. 157; 30 S. E. 723; *Souffrain v. McDonald*, 27 Ind. 269;

Herrman v. Babcock, 103 Ind. 461; 3 N. E. 142; *Manary v. Runyon*, 43 Or. 495; 73 Pac. 1028; *Stinson v. Hardy*, 27 Or. 584; 41 Pac. 116; *Bradford v. Foster*, 87 Tenn. 4; 9 S. W. 195; *Weaver v. Burr*, 31 W. Va. 736; 3 L. R. A. 94; 8 S. E. 743; *Peterson v. Chase*, 115 Wis. 239; 91 N. W. 687. "If the offer is in writing, for a valuable consideration, and time is given within which it shall stand open for acceptance, such option during the time specified is irrevocable." *Black v. Maddox*, 104 Ga. 157, 162; 30 S. E. 723.

³ *Manary v. Runyon*, 43 Or. 495; 73 Pac. 1028.

eration is irrevocable do so in obiters, as in such cases the offer was either accepted before revocation,⁴ or was not accepted until after the offer had lapsed by efflux of time.⁵ Of the cases in which an attempted revocation was made before the expiration of the time fixed by the offer, many are cases in which specific performance would have been given had the offer been accepted before revocation. In cases of this sort if the offer is to remain open a fixed time and is on valuable consideration, equity ignores the attempted revocation, and treats a subsequent acceptance exactly as if no attempted revocation had been made; that is, unless the rights of third persons have intervened, it gives specific performance wherever that remedy would have been given had such attempted revocation not been made.⁶ At law a right of action on the contract made by the original offer as accepted has been recognized.⁷ The difference between the two theories is often of no practical importance at law since the same evidence would be admitted and the same measure of value adopted under one as under the other.

Some courts hold that an offer under seal to remain open for a certain time is irrevocable;⁸ others, that it is revocable.⁹ This conflict of authority, like the rule itself, depends in part on the view of the effect of the seal entertained in that jurisdiction.

The result of holding such offer irrevocable is spoken of as

⁴ *Linn v. McLean*, 80 Ala. 360; *Herrman v. Babcock*, 103 Ind. 461; 3 N. E. 142; *Goodpaster v. Porter*, 11 Ia. 161; *Gustin v. School District*, 94 Mich. 502; 34 Am. St. Rep. 361; 54 N. W. 156; *Trustees of Congregation v. Gerbert*, 57 N. J. L. 395; 31 Atl. 383; *Yerkes v. Richards*, 153 Pa. St. 646; 34 Am. St. Rep. 721; 26 Atl. 221; *Bradford v. Foster*, 87 Tenn. 4; 9 S. W. 195.

⁵ *Weaver v. Burr*, 31 W. Va. 736; 3 L. R. A. 94; 8 S. E. 743.

⁶ *Watts v. Kellar*, 56 Fed. 1; *Black v. Maddox*, 104 Ga. 157; 30 S. E. 723; *Clarno v. Grayson*, 30 Or. 111; 46 Pac. 426; *Barrett v. Mc-*

Allister, 33 W. Va. 738; 11 S. E. 220.

⁷ *Dambmann v. Rittler*, 70 Md. 380; 14 Am. St. Rep. 364; 17 Atl. 389. In this case A had bought three hundred tons of phosphate from B, with an option for two hundred tons more. B. tried to revoke the option, but A refused to acquiesce in such revocation, accepted the option and on B's failure to deliver, A sued him for breach of contract.

⁸ *Xenos v. Wickham*, L. R. 2 H. L. 296; *McMillan v. Ames*, 33 Minn. 257; 22 N. W. 612.

⁹ *Penn Match Co. v. Hapgood*, 141 Mass. 145; 7 N. E. 22.

"anomalous."¹⁰ *Xenos v. Wickham*¹¹ is cited as an authority for this proposition wherever it is advanced, and the language of some of the judges forming a majority of the court certainly recognizes the doctrine. The case itself, however, presents no features of a remarkable character. An insurance policy was contracted for, issued on credit, and placed in the hands of an agent of the insurer indeed; but absolutely within the control of the insured, to be handed to him when he asked for it. Accordingly the policy was held to be delivered and in full force and effect. This is in accordance with the holding of American courts.¹² Subsequently the broker, who had effected the insured, ordered the policy cancelled, without authority from the insured. Thereafter the vessel insured was lost; and it was held that as the policy was delivered and had never been cancelled by authority, the insurers were liable for the loss. The difficulty of the case consists in the fact that some of the judges rested their concurrence on the fact that a sealed offer could not be revoked, and the correctness of this view is generally the point on which the case is either criticised as an anomaly or defended as an example of the peculiar effect of the sealed offer.

§36. Necessity of communicating revocation.

A revocation to be effectual must be communicated to the offeree before acceptance.¹ Thus a revocation sent by mail or telegraph is ineffectual until received by the offeree.² An exception to this rule is found in offers by advertisement, which may be revoked in the same way in which they are made.³ It seems that it is not necessary that express notice of revocation effected by acts should be given by the offerer, if the offeree learns it from other sources.⁴ This doctrine does not probably apply to revocation by express words.

¹⁰ Wald's *Pollock on Contracts*, 7. 198; 60 *Am. St. Rep.* 387; 46 *N. E.* 617.
¹¹ *L. R.* 2 *H. L.* 296.

¹² See § 591.

¹ *Henthorne v. Fraser* [1892], 2 *Ch.* 27; *Patrick v. Bowman*, 149 *U. S.* 411; *Kempner v. Cohn*, 47 *Ark.* 519; 58 *Am. Rep.* 775; 1 *S. W.* 869; *Wheat v. Cross*, 31 *Md.* 99; 1 *Am. Rep.* 28; *Brauer v. Shaw*, 168 *Mass.*

² See § 52.

³ *Shuey v. United States*, 92 *U. S.* 73.

⁴ *Dickinson v. Dodds*, 2 *Ch. Div.* 463; *Coleman v. Applegarth*, 68 *Md.* 21; 6 *Am. St. Rep.* 417; 11 *Atl.* 284.

§37. Rejection of offer.

An offer, when once rejected loses its legal force and cannot be accepted thereafter so as to create a binding agreement,¹ unless it is renewed after the rejection by the original offerer. No revocation of the offer is therefore necessary to prevent its subsequent acceptance after it has once been rejected.

§38. Lapse of offer by expiration of time.—Time not fixed by offer.

An offer once made is not to be regarded as open for acceptance indefinitely. The rules on this subject may be grouped under two general classes.

(1) If no time for acceptance is fixed by the terms of the offer, an acceptance if made within a reasonable time and before revocation completes the contract;¹ but a delay in acceptance beyond a reasonable time causes the offer to lapse, and a subsequent attempt to accept is of no legal effect.² No formal withdrawal of the offer is necessary if it remains unaccepted after a reasonable time.³ Thus if a contract is to take effect on A's approval, A must give notice of his approval in a reasonable time to make the contract valid.⁴

Where the offer is to do an act in the future, it may be accepted a reasonable time after it is made,⁵ and possibly within a reasonable time from the time fixed for doing such act. Thus

¹ *Sheffield Canal Co. v. Ry.*, 3 Eng. Ry., etc., Cas. 121; *Minneapolis, etc., R. R. v. Rolling Mill Co.*, 119 U. S. 149; *National Bank v. Hall*, 101 U. S. 50; *Pope v. Hoopes*, 90 Fed. 451; 33 C. C. A. 595; *Richardson v. Lenhard*, 48 Kan. 629; 29 Pac. 1076; *Haynes v. Wilson* (Ky.) 55 S. W. 209; *Davis v. Parish*, Litt. Sel. Cases (Ky.) 153; *Clay v. Ricketts*, 66 Ia. 362; 23 N. W. 755; *Eggleston v. Wagner*, 46 Mich. 610; 10 N. W. 37.

¹ *Ryan v. United States*, 136 U. S. 68.

² *Koeffler v. Davidson*, 66 Ill. App. 542; *Ferrier v. Storer*, 63 Ia. 484; 50 Am. St. Rep. 752; 19 N. W. 288; *Graff v. Buchanan*, 46 Minn. 254; 48 N. W. 915; *McCracken v. Harned*, 66 N. J. L. 37; 48 Atl. 513; *Cunyus v. Lumber Co.*, 20 Tex. Civ. App. 290; 48 S. W. 1106.

³ *Bowen v. McCarthy*, 85 Mich. 26; 48 N. W. 155.

⁴ *Robinson v. Peru, etc., Co.*, 1 Okla. 140; 31 Pac. 988.

⁵ *Wheaton v. Rampacker*, 3 Wyom. 441; 26 Pac. 912.

an offer to buy a foal if it was "a filly, all right and sound at five months old" may be accepted within a reasonable time after it is five months old;⁶ and an offer made in 1884 to take stock at its cost price "any time after Jan. 1, 1886, if at that time you desire to have me do so," must be accepted in at least a reasonable time after January 1, 1886.⁷

It is impossible to lay down a rule for determining what is a reasonable time in every case. Delays of twenty years,⁸ twelve years,⁹ four years,¹⁰ six months,¹¹ and one month,¹² have been held unreasonable. It was, on the other hand, held reasonable where the offer to sell land was accepted in seventeen days; a note and defective mortgage were tendered in six days more, and a valid mortgage in twenty-one days more.¹³

An application of this rule, rather than an exception to it, exists where the circumstances indicate that acceptance must be made at once if at all;¹⁴ as where the parties are in personal communication.¹⁵ Thus where the market was ready to open, and letters between the parties had always been answered in three days, a delay of six days was held unreasonable.¹⁶

§39. Time fixed by offer.

(2) If a time is fixed by the terms of the offer, within which acceptance can be made, the party to whom the offer is made may accept at any time within the limit thus fixed, the offer not being withdrawn, even if the delay would be held unreason-

⁶ *Dawley v. Potter*, 19 R. I. 372; 36 A. 92.

⁷ *Park v. Whitney*, 148 Mass. 278; 19 N. E. 161. In *Cabot v. Kent*, 20 R. I. 197; 37 Atl. 945, it was said that a similar offer must be accepted at the latest on the day specified.

⁸ *Marr v. Shaw*, 51 Fed. 860.

⁹ *Mitchell v. Abbott*, 86 Me. 338; 41 Am. St. Rep. 559; 29 Atl. 1118; 25 L. R. A. 503.

¹⁰ *Wemple v. Elevator Co.*, 67 Minn. 87; 69 N. W. 478.

¹¹ *Park v. Whitney*, 148 Mass. 278; 19 N. E. 161.

¹² *Dillingham v. Labatt* (Tex. Civ. App.); 30 S. W. 370. (In this case rates of shipment were asked, which were accepted a month later after a new rate had been asked for.)

¹³ *Phillips v. Deck*, 76 Cal. 384; 18 Pac. 336.

¹⁴ *Vincent v. Oil Co.*, 165 Pa. St. 402; 30 Atl. 991; (and a reasonable time to investigate cannot then be allowed.)

¹⁵ *Johnston v. Fessler*, 7 Watts (Pa.) 48; 32 Am. Dec. 738.

¹⁶ *Hargadine, etc., Co. v. Reynolds*, 64 Fed. 560.

able but for the terms of the offer.¹ So acceptance was held valid where A offered to C to discount B's bills without recourse after a certain date, and C answered that he would let A know before such date whether he would accept A's offer; and five days before such date C notified A that he accepted, and thereupon C discounted B's bills, though in the meantime B had failed.²

On the other hand an offer lapses by failure to accept within the time limited even if the delay would not ordinarily be deemed unreasonable had no time been limited.³ So a telegram received at 10 p. m. Saturday night to be "instantly" answered cannot be accepted on Monday morning, nothing preventing a reply on Saturday night;⁴ nor can an offer requiring telegraphic acceptance on receipt, be accepted on the following

¹ Rickard v. Taylor, 122 Fed. 931; Ide v. Leiser, 10 Mont. 5; 24 Am. St. Rep. 17; 24 Pac. 695; Paddock v. Davenport, 107 N. Car. 710; 12 S. E. 464; Arnold v. Blabon, 147 Pa. St. 372; 23 Atl. 575; Watson v. Coast, 35 W. Va. 463; 14 S. E. 249; Clark v. Gordon, 35 W. Va. 735; 14 S. E. 255.

² Sherley v. Peel, 84 Wis. 46; 54 N. W. 267. In this case A's offer was made on August 26, 1889, to discount B's bills at any time after September 15, 1889. C's answer showed that he understood that he had till September 15 to accept. A did nothing to remove this impression of C's; nor did A withdraw his offer when B became insolvent.

³ Campbell v. Ry., 5 Hare 519; Doloret v. Rothschild, 1 Sim. & Stu. 590; Waterman v. Banks, 144 U. S. 394; Eliason v. Henshaw, 4 Wheat. (U. S.) 225; Harding v. Gibbs, 8 Am. St. Rep. 345; 125 Ill. 85; 17 N. E. 60; Larmon v. Jordan, 56 Ill. 204; Tevis v. Nugent, (Ky.); 59 S. W. 9; Coleman v. Applegarth, 68 Md. 21; 6 Am. St.

Rep. 417; 11 Atl. 284; Chaffee v. Ry., 146 Mass. 224; 16 N. E. 34; Carter v. Phillips, 144 Mass. 100; 10 N. E. 500; Boston, etc., Ry. v. Bartlett, 3 Cush (Mass.) 224; Goldsmith v. Guild, 10 All. (Mass.) 239; Cleaves v. Walsh, 125 Mich. 638; 84 N. W. 1108; Mason v. Payne, 47 Mo. 517; Schields v. Horbach, 30 Neb. 536; 46 N. W. 629; Potts v. Whitehead, 20 N. J. Eq. 55; Page v. Shainwald, 169 N. Y. 246; 57 L. R. A. 173; 62 N. E. 356; Lester v. Jewett, 11 N. Y. 453; Longworth v. Mitchell, 26 O. S. 334; McMillan v. Philadelphia Co., 159 Pa. St. 142; 28 Atl. 220; Yerkes v. Richards, 153 Pa. St. 646; 34 Am. St. Rep. 721; 26 Atl. 221; Cabot v. Kent, 20 R. I. 197; 37 Atl. 945; Haskins v. Dern, 19 Utah 89; 56 Pac. 953; Barrett v. McAlister, 33 W. Va. 738; 11 S. E. 220; Weaver v. Burr, 31 W. Va. 736; 3 L. R. A. 94; 8 S. E. 743; Atlee v. Bartholomew, 69 Wis. 43; 5 Am. St. Rep. 103; 33 N. W. 110.

⁴ James v. Marion, etc., Co., 69 Mo. App. 207.

day.⁵ So if acceptance is to be by return mail, a subsequent acceptance has no validity;⁶ and an offer to sell, if to be accepted by telegram on receipt of the letter, cannot be accepted after two days.⁷ If the last day fixed by the offer is a holiday, but the statute does not provide for a suspension of business on that day, an acceptance on the day following is too late.⁸ A subsequent request for time to consider a subsequent demand for performance and an offer of compromise does not amount to a renewal of the offer.⁹

§40. Lapse of offer by death or insanity of offerer.

The death of the offerer before acceptance effects a revocation of the offer;¹ and so does his insanity.² So a guaranty of future obligations which is in the nature of a continuing offer is revoked by the death of the guarantor as to liabilities incurred thereafter.³ However if the offer is, for a valuable consideration, to remain open for a certain time, the offerer cannot revoke it,⁴ and so it has been held that his death does not cause it to lapse.⁵ On the other hand it has been held that the death of the offeree causes such an offer to lapse; and that his heirs or per-

⁵ *Eagle Mill Co. v. Caven*, 76 Mo. App. 458.

⁶ *MacLay v. Harvey*, 90 Ill. 525; 32 Am. Rep. 35. (A delay of two days by carelessness of a boy entrusted with the letter. But in *Palmer v. Ins. Co.*, 84 N. Y. 63, it was held that an acceptance on the same day but not by return mail, was sufficient.)

⁷ *Horne v. Niver*, 168 Mass. 4; 46 N. E. 393.

⁸ *Page v. Shainwald*, 169 N. Y. 246; 57 L. R. A. 173; 62 N. E. 356. (In this case the last day fixed by the offer was January 1. January 2 was Sunday. Acceptance was made on January 3.)

⁹ *Page v. Shainwald*, 169 N. Y. 246; 57 L. R. A. 173; 62 N. E. 356.

¹ *Grand Lodge, etc., v. Farnham*, 70 Cal. 158; 11 P. 592; *Riner v. Husted*, 13 Colo. App. 523; 58 Pac. 793; *Pratt v. Baptist Society*, 93 Ill. 475; 34 Am. Rep. 187; *Twenty-third, etc., Church v. Cornell*, 117 N. Y. 601; 6 L. R. A. 807; 23 N. E. 177; *Aitken v. Lang*, 106 Ky. 652; 90 Am. St. Rep. 263; 51 S. W. 154; *Wallace v. Townsend*, 43 O. S. 537; 54 Am. Rep. 829; 3 N. E. 601; *Helfenstein's Estate*, 77 Pa. St. 328; 18 Am. Rep. 449; *Foust v. Board*, 8 Lea (Tenn.), 552.

² *Beach v. Church*, 96 Ill. 177.

³ *Aitken v. Lang*, 106 Ky. 652; 90 Am. St. Rep. 263; 51 S. W. 154.

⁴ See § 35.

⁵ *Mueller v. Nortmann*, 116 Wis. 468; 96 Am. St. Rep. 997; 93 N. W. 538.

sonal representatives cannot accept it.⁶ These two views are not necessarily irreconcilable. Though the death of one party does not necessarily cause such an offer to lapse, the offerer contracts for the credit and ability of the offeree to perform as an essential feature of the contract; and so an offer made to him cannot in case of his death be accepted by any one else.

§41. Necessity and effect of acceptance.

Until acceptance the offer is not an agreement between the parties.¹ Such offer has no legal effect for two reasons: acceptance is necessary to form an agreement, and without acceptance no consideration exists.² So if A offers to convey certain property to B if B, in return, will agree to do certain things, no rights either in such property or against A personally can come into existence until B accepts such offer.³ So an order for goods is of no legal effect until accepted.⁴ Upon acceptance the offer becomes an agreement, enforceable if otherwise valid;⁵ which cannot be withdrawn thereafter by the offerer.⁶ Thus if a contract for lighting streets is contained in

⁶ *Newton v. Newton*, 11 R. 1. 390; 23 Am. Rep. 476.

¹ *Montgomery v. Enslin*, 126 Ala. 654; 28 So. 626; *Borst v. Simpson*, 90 Ala. 373; 7 So. 814; *McCormick, etc., Co. v. Richardson*, 89 Ia. 525; 56 N. W. 682; *Burkhalter v. Jones*, 32 Kan. 5; 3 Pac. 559; *Sears v. Ry.*, 152 Mass. 151; 9 L. R. A. 117; 25 N. E. 98; *Hanson v. Nelson*, 82 Minn. 220; 84 N. W. 742; *Storch v. Duhme*, 76 Minn. 521; 79 N. W. 533; *Denton v. McInnis*, 85 Mo. App. 542; *Ft. Worth, etc., Ry. v. Lindsey*, 11 Tex. Civ. App. 244; 32 S. W. 714; *Beck, etc., Co. v. Cereal Mills*, 109 Wis. 65; 85 N. W. 127.

² See § 302 *et seq.*

³ *Davis v. Thomas*, 28 Colo. 303; 64 Pac. 187; *Bostwick v. Hess*, 80 Ill. 138; *Stembridge v. Stembridge*, 87 Ky. 91; 7 S. W. 611; *Williams*

v. Reynolds (Tenn. Ch. App.), 64 S. W. 290; *Dyer v. Duffy*, 39 W. Va. 148; 24 L. R. A. 339; 19 S. E. 540; *Watson v. Coast*, 35 W. Va. 463; 14 S. E. 249; *Barrett v. McAllister*, 33 W. Va. 738; 11 S. E. 220; *Weaver v. Burr*, 31 W. Va. 736; 3 L. R. A. 94; 8 S. E. 743.

⁴ *Corbin v. Speeter*, 92 Ill. App. 652.

⁵ *Andrews v. Schreiber*, 93 Fed. 367; *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E. 899; (*City of*) *Ft. Madison v. Moore*, 109 Ia. 476; 80 N. W. 527; *Chadsey v. Condley*, 62 Kan. 853; 62 Pac. 663; *Hayden v. Bryon*, 78 Minn. 27; 80 N. W. 835; *Patton v. Cardiner*, 72 Vt. 47; 47 Atl. 110.

⁶ *Mills v. Osawatomie*, 59 Kan. 463; 53 Pac. 470; reversing in part 4 Kan. App. 299; 45 Pac. 937; *Cary Library v. Bliss*, 151 Mass.

a city ordinance, it cannot after acceptance, be ended by repealing the ordinance.⁷ New terms cannot be inserted after acceptance without the consent of both parties.⁸ Thus an attorney who offered to try a case for a school board for a certain sum cannot after informal acceptance and after the trial of the case withdraw his offer and recover a larger sum on the ground that he had no binding contract with the board.⁹

The contract dates from the acceptance, and does not relate back to the date of the original offer. Hence if improvements on realty have been destroyed between the dates of offer and acceptance the offeree cannot have a decree for specific performance with the improvements restored, nor can he have an abatement from the price offered.¹⁰ The elements of acceptance must therefore be considered in detail.

§42. Elements of acceptance.—Intention to accept.

An intention to accept the terms of the offer as valid is ordinarily an essential element of a valid acceptance. Hence failure or omission to reject an offer is not the equivalent of an acceptance.¹ Thus a statement by a son, one of several children, to his mother in answer to her request that he would return to her farm to live, that he would not go back to it again to repair it for people who had not done any work on it, followed by his return, does not show acceptance of his offer to manage the farm and support her for life if she would leave him the farm in severalty at her death.² So where A made an offer to B, which B did not reject because he was too weak and

364; 7 L. R. A. 765; 25 N. E. 92; Walsh v. School District, 17 Mont. 413; 43 Pac. 180; Pettibone v. Moore, 75 Hun. 461; Short v. Threadgill, 3 Tex. App. Civ. Cas., § 267, p. 324; New Home Sewing Machine Co. v. Simon, 104 Wis. 120; 80 N. W. 71.

⁷ Mills v. Osawatomie, 59 Kan. 463; 53 Pac. 470; reversing in part, 4 Kan. App. 299; 45 Pac. 937.

⁸ American Lighting Co. v. McCuen, 92 Md. 703; 48 Atl. 352.

⁹ Walsh v. School District, 17 Mont. 413; 43 Pac. 180.

¹⁰ Caldwell v. Frazier, 65 Kan. 24; 68 Pac. 1076.

¹ Regan v. Regan, 192 Ill. 589; 61 N. E. 842; Holmes v. Holmes, 129 Mich. 412; 89 N. W. 47; Fuller, etc., Co. v. Houseman, 114 Mich. 275; 72 N. W. 187; Hanson v. Nelson, 82 Minn. 220; 84 N. W. 742.

² Regan v. Regan, 192 Ill. 589; 61 N. E. 842.

sick to talk, such failure to reject is not an acceptance.³ Even if the party making the offer prescribes that a failure to answer shall be regarded as an acceptance, such failure does not amount to an acceptance.⁴

The party to whom the offer is made may, however, have agreed that his silence shall be equivalent to an acceptance; and this agreement may be understood from the conduct of the parties. In such a case, retaining a letter applying for shares is an acceptance.⁵

The exceptions to the rule that intention to accept is an essential element of acceptance are found in jurisdictions where acts done without knowledge of a reward are considered as an acceptance of an offer of a reward for the doing of such acts.⁶

§43. Necessity of communication of acceptance.

A mere mental intention to accept, not followed by such act or notice as is sufficient in law to charge the party making the offer with notice of the acceptance, does not have any legal effect in converting the offer into a contract.¹

An offer to a corporation is not accepted by the corporation's adoption of a resolution to accept the offer, of which resolution no notice is given.² But where A signed an application for a mortgage and the finance committee who had power to make the loan approved it, such acceptance was held sufficient.³ A made a proposition to a corporation through its committee for the termination of a lease. The committee recommended the acceptance of this proposition: and the

³ *Hanson v. Nelson*, 82 Minn. 220; 84 N. W. 742.

⁴ *Felthouse v. Bindley*, 11 C. B. N. S. 869.

⁵ *In re Bultfontein Sun Diamond Mine*, 75 Law T. Rep. N. S. 669.

⁶ See § 32.

¹ *Sprinkle v. Trulove*, 22 Ind. App. 577; 54 N. E. 461; *Trounstone v. Sellers*, 35 Kan. 447; 11 P. 441; *Bowen v. McCarthy*, 85 Mich. 26; 48 N. W. 155; *Lancaster v. Elliott*, 28 Mo. App. 86; *Cangas v. Mfg. Co.*,

37 Mo. App. 297; *Perry v. Ins. Co.*, 67 N. H. 291; 68 Am. St. Rep. 668; 33 A. 731; *White v. Corlies*, 46 N. Y. 467; *Connor v. Renneker*, 25 S. Car. 514; *Weaver v. Burr*, 31 W. Va. 736; 3 L. R. A. 94; 8 S. E. 743; *Dyer v. Duffy*, 39 W. Va. 148; 24 L. R. A. 339; 19 S. E. 540.

² *Cozart v. Herndon*, 114 N. Car. 252; 19 S. E. 158.

³ *New York, etc., Co. v. Lord*, 100 Fed. 17; 40 C. A. A. 585.

corporation accepted the report of the committee. No communication of this was made to A by authority of the corporation. It was held that no contract was made.⁴ A vote by the officers of a corporation or municipality to accept a certain bid, is not of itself an acceptance of such bid, so as to create a contract between the bidder and the corporation.⁵ So no contract was made where the plans of all the architects submitted were rejected. A, one of the architects, was by vote of the board chosen as architect. This vote was reconsidered and rescinded before A was notified by the board, though he learned it from some members; or before A accepted.⁶ So an offer by a wife that she and her husband would pay his stepdaughter, her daughter, for services in the family, made in his presence, does not bind unless the husband knew that the daughter continued her services in reliance on the promise.⁷ So where A offered to join in buying future cotton, but was not notified of acceptance till the transaction was completed, at a loss, there was no contract.⁸ So where A offered to allow B to use part of A's realty for a party wall, and B did not accept this offer, but built the wall, two years later, without A's knowledge, no contract existed.⁹ Upon the question of whether knowledge of acceptance acquired from some person other than the offeree or his agent is sufficient, a distinction must be made. If the acceptance is to be made expressly, by words, a communication by the offeree to a stranger is not an acceptance, even if the offerer should learn of it.¹⁰ If the acceptance is to be made by acts, according to the weight of authority, if knowledge of the acceptance is actually brought to the offerer, it makes no difference

⁴ *Carroll v. Society*, 125 Mass. 565.

⁵ *People's, etc., Ry. v. Ry.*, 10 Wall. (U. S.) 38; *Benton v. Springfield Y. M. C. A.*, 170 Mass. 534; 64 Am. St. Rep. 320; 49 N. E. 928; *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 528; 49 N. E. 918; *Water Commissioners v. Brown*, 32 N. J. L. 504.

⁶ *Benton v. Springfield Y. M. C.*

A., 170 Mass. 534; 64 Am. St. Rep. 320; 49 N. E. 928.

⁷ *Harris v. Smith*, 79 Mich. 54; 6 L. R. A. 702; 44 N. W. 169.

⁸ *Peet v. Meyer*, 42 La. Ann. 1034; 8 So. 534.

⁹ *Graff v. Buchanan*, 46 Minn. 254; 48 N. W. 915.

¹⁰ *Leszynsky v. Meyer*, (Cal.) 53 Pac. 703; *Benton v. Springfield Y. M. C. A.*, 170 Mass. 534; 64 Am. St. Rep. 320; 49 N. E. 928.

that it was not brought by the offeree or his agent.¹¹ Thus if a guaranty can be accepted by extending credit to the party guaranteed, knowledge of the extension of credit, no matter how acquired is notice to the guarantor of the acceptance of his offer.¹²

§44. Acceptance must be positive.

The intention to accept must be expressed in positive terms.¹ Thus a statement by the offeree that he would think over the matter,² or that he would like to accept,³ or a promise to "take up the matter" at a later time,⁴ or that he would see what he could do and give notice later⁵ are none of them equivalent to an acceptance. So where A asked for prices on five cars of corn and B replied quoting different prices on two varieties and A ordered five cars, not indicating which variety, no contract was made.⁶

§45. Acceptance must correspond to offer.

The acceptance must, furthermore, correspond to the offer

¹¹ *Adams v. Jones*, 12 Pet. (U. S.) 207; *First National Bank v. Carpenter*, 41 Ia. 518; *Case v. Howard*, 41 Ia. 479; *Greer Machinery Co. v. Sears*, 23 Ky. Law Rep. 2025; 66 S. W. 521; *Lynn, etc., Co. v. Andrews*, 180 Mass. 527; 62 N. E. 1061; *Bascom v. Smith*, 164 Mass. 61; 41 N. E. 130; *Bishop v. Eaton*, 161 Mass. 496; 42 Am. St. Rep. 437; 37 N. E. 665; *Oaks v. Weller*, 16 Vt. 63. "Knowledge, no matter how acquired, is held to be notice, and it may be inferred from facts and circumstances warranting such a conclusion." *German Savings Bank v. Roofing Co.*, 112 Ia. 184; 88 Am. St. Rep. 335; 51 L. R. A. 758; 83 N. W. 960.

¹² *German Savings Bank v. Roofing Co.*, 112 Ia. 184; 88 Am. St. Rep. 335; 51 L. R. A. 758; 83 N.

W. 960; *Greer Machinery Co. v. Sears*, 23 Ky. Law Rep. 2025; 66 S. W. 521; *Lynn, etc., Co. v. Andrews*, 180 Mass. 527; 62 N. E. 1061; *Peoria Rubber Mfg. Co. v. Daring*, 85 Mo. App. 131.

¹ *Thurber v. Smith*, 25 R. I. 60; 54 Atl. 790; *Beck, etc., Co. v. Cereal Mills*, 109 Wis. 65; 85 N. W. 127.

² *McGinnis v. Smythe*, 1 Sil. (N. Y.) 23.

³ *Thurber v. Smith*, 25 R. I. 60; 54 Atl. 790.

⁴ *Beck, etc., Co. v. Cereal Mills*, 109 Wis. 65; 85 N. W. 127.

⁵ *John R. Davis Lumber Co. v. Ins. Co.*, 94 Wis. 472; 69 N. W. 156 (in response to a request for insurance).

⁶ *Seley v. Williams*, 20 Tex. Civ. App. 405; 50 S. W. 399.

at every point, leaving nothing open for future negotiations.¹ An attempted acceptance which leaves open the adjustment of the price,² or the ascertainment of the capacity of the ship chartered, where that is a material term of the offer,³ or the time of delivery⁴ or of payment⁵ or an acceptance as to the price only,⁶ is without validity.

§46. Acceptance purporting to modify offer.

An attempted acceptance which seeks to modify one or more terms of the offer is of no legal effect as an acceptance. It is really a rejection of the offer, and a counter-proposition in lieu of the original offer, and must be accepted by the party making the original offer in order to constitute an agreement.¹ Thus an attempted acceptance of an offer to sell land, adding a term

¹ *Compania Bilbaina, etc., v. Spanish, etc., Co.*, 146 U. S. 483; *Monk v. McDaniel*, 116 Ga. 108; 42 S. E. 360; *Sibley v. Felton*, 156 Mass. 273; 31 N. E. 10; *Callanan v. Chapin*, 158 Mass. 113; 32 N. E. 941; *Krum v. Chamberlain*, 57 Neb. 220; 77 N. W. 665; *Virginia, etc., Co. v. Harrison*, 93 Va. 569; 25 S. E. 888.

² *Sault Ste., etc., Co. v. Simons*, 41 Fed. 835.

³ *Wilfred v. Myers*, 40 Fed. 170.

⁴ *Decker v. Gwinn*, 95 Ga. 518; 20 S. E. 240.

⁵ *Shepard v. Carpenter*, 54 Minn. 153; 55 N. W. 906.

⁶ *Davenport v. Newton*, 71 Vt. 11; 42 Atl. 1087 (citing *Potts v. Whitehead*, 23 N. J. Eq. 512).

¹ *Minneapolis, etc., Ry. v. Rolling Mill Co.*, 119 U. S. 149; *Bowman v. Patrick*, 36 Fed. 138; *Wenham v. Switzer*, 59 Fed. 942; 8 C. C. A. 404; *Kleinhans v. Jones*, 68 Fed. 742; 15 C. C. A. 644; *Phenix, etc., Co. v. Schultz*, 80 Fed. 337; 25 C. C. A. 453; *Wristen v. Bowles*, 82 Cal. 84; 22 Pac. 1136; *Harding*

v. Gibbs, 125 Ill. 85; 8 Am. St. Rep. 345; 17 N. E. 60; *Moody v. Wheel Co.*, 20 Ind. App. 422; 50 N. E. 890; *Stennett v. Bank*, 112 Ia. 273; 83 N. W. 1069; *Sawyer v. Brossart*, 67 Ia. 678; 56 Am. Rep. 371; 25 N. W. 876; *Bentz v. Eubanks*, 41 Kan. 28; 20 Pac. 505; *Seymour v. Armstrong*, 62 Kan. 720; 64 Pac. 612, affirming 10 Kan. App. 10; 61 Pac. 675; *Metropolitan Coal Co. v. Towing Co.*, — Mass. —; 70 N. E. 421; *Sears v. Ry. Co.*, 152 Mass. 151; 9 L. R. A. 117; 25 N. E. 98; *Patton v. Taft*, 143 Mass. 140; 9 N. E. 517; *Wilkin, etc., Co. v. Lumber Co.*, 94 Mich. 158; 53 N. W. 1045; *Bowen v. McCarthy*, 85 Mich. 26; 48 N. W. 155; *Thomas v. Greenwood*, 69 Mich. 215; 37 N. W. 195; *Langellier v. Schaefer*, 36 Minn. 361; 31 N. W. 690; *Ames Co. v. Smith*, 65 Minn. 304; 67 N. W. 999; *Egger v. Nesbit*, 122 Mo. 667; 43 Am. St. Rep. 596; 27 S. W. 385; *Cangas v. Mfg. Co.*, 37 Mo. App. 297; *Potter v. Hollister*, 45 N. J. Eq. 508; 18 Atl. 204; *Wiley v. San Pedro, etc., Co.*, 5

to the effect that the title is to be good² or is to be approved by the vendee's representative³ is ineffectual. So where the offer is to sell land "as the title now stands. Have no desire to get bottom title," and the acceptance is "without qualification," but adding, "We understand, of course, that you have Lash's title and that you will place the same on record."⁴ So is the addition of terms requiring payment of the expenses of the transfer and a year's insurance,⁵ or an acceptance if the purchasers pays the taxes and allows the vendor to reserve the rent, the purchaser to take possession as leases on the realty expire,⁶ or an acceptance of an offer to buy containing new terms as to preliminary deposit and the period for searching the title,⁷ or omitting a guaranty as to a street, and attempting to substitute a covenant to reduce incumbrances for an actual payment of them.⁸ An acceptance which attempts to change the place of payment is invalid,⁹ as where the offer implies a payment to the vendor at his residence and the acceptance fixes the place of payment at the residence of the vendee,¹⁰ or at a designated bank,¹¹ or

N. M. 111; 20 Pac. 115; *Gregory v. Bullock*, 120 N. Car. 260; 26 S. E. 820; *American, etc., Co. v. Baldwin*, 12 Ohio C. C. 403; affirmed without report, 58 O. S. 724; 51 N. E. 1096; *Connor v. Reuneker*, 25 S. Car. 514; *Olds v. Marble Co.* (Tenn. Ch. App.), 48 S. W. 333; *North Texas Building Co. v. Coleman* (Tex. Civ. App. 1900), 58 S. W. 1044; *Flomerfeldt v. Hume*, 11 Tex. Civ. App. 30; 31 S. W. 679; *Weaver v. Burr*, 31 W. Va. 736; 3 L. R. A. 94; 9 S. E. 743; *Russell v. Mfg. Co.*, 106 Wis. 329; 82 N. W. 134.

² *Corcoran v. White*, 117 Ill. 118; 57 Am. Rep. 858; 7 N. E. 525; *Warner, etc., Co. v. Guthrie*, 12 Ohio C. C. 182; affirmed without report, 50 N. E. 1135; 57 O. S. 672. *Contra*, where the acceptance is conditioned "if the title prove satisfactory" on the theory that such condition was implied in the offer.

Bolton v. Huling, 91 Ill. App. 350. See § 165.

³ *James v. Darby*, 100 Fed. 224; 40 C. C. A. 341.

⁴ *Batie v. Allison*, 77 Ia. 313; 42 N. W. 306.

⁵ *Kennedy v. Gramling*, 33 S. Car. 367; 26 Am. St. Rep. 676; 11 S. E. 1081.

⁶ *Middaugh v. Stough*, 161 Ill. 312; 43 N. E. 1061.

⁷ *Jones v. Daniel* (1894), 2 Ch. 332.

⁸ *Connor v. Buhl*, 115 Mich. 531; 73 N. W. 821.

⁹ *Greenawalt v. Este*, 40 Kan. 418; 19 Pac. 803.

¹⁰ *Robinson v. Weller*, 81 Ga. 704; 8 S. E. 447.

¹¹ *Sawyer v. Brossart*, 67 Ia. 678; 56 Am. Rep. 371; 25 N. W. 876 (vendor in California; bank in Iowa).

where the land is situated,¹² or an acceptance which attempts to change the time and place of the delivery of a deed,¹³ or where the vendee by acceptance attempts to change the delivery of the deed to a delivery in escrow to a person designated by vendee, to whom he offers to pay the purchase-money.¹⁴ An acceptance changing the time and terms of payment¹⁵ or the time of performance¹⁶ does not constitute a contract. If the offer of sale does not state the terms of payment, cash payment is implied. Hence an acceptance which attempts to secure even a short period of credit does not make a contract.¹⁷ So an acceptance which attempts to modify the price,¹⁸ as by asking a rebate for damages previously caused by fire,¹⁹ which attempts to modify the quantity offered for sale,²⁰ or the quality of goods offered,²¹ or the time for which the contract is to run,²² or adding a clause as to the disposition of the cases in which the eggs purchased were to be shipped²³ is invalid. So where

¹² *Gilbert v. Baxter* 71 Ia. 327; - 32 N. W. 364 (vendor in New York; land in Iowa).

¹³ *Northwestern, etc., Co. v. Meade*, 21 Wis. 474; 94 Am. Dec. 557.

¹⁴ *De Jonge v. Hunt*, 103 Mich. 94; 61 N. W. 341.

¹⁵ *Wilkin, etc., Co. v. Lumber Co.*, 94 Mich. 158; 53 N. W. 1045; *Russell v. Mfg. Co.*, 106 Wis. 329; 82 N. W. 134.

¹⁶ *United States Heater Co. v. Applebaum*, 126 Mich. 296; 85 N. W. 743 (here an offer was made to deliver iron during the year 1899, beginning April 1, and was accepted, requiring delivery between April 1, 1899, and April 1, 1900).

¹⁷ *Rogers v. French*, — Ia. —; 96 N. W. 767.

¹⁸ *Arthur v. Gordon*, 37 Fed. 558 (a reply to an offer to sell for \$1,000, "I am not willing to give more than \$750.").

¹⁹ *Griffin v. Lumber Co.*, 97 Mich. 557; 56 N. W. 1034.

²⁰ *Michigan Bolt Works v. Steel*, 111 Mich. 153; 69 N. W. 241 (offer for a season's supply; acceptance for less amount); *Allen v. Kirwan*, 159 Pa. St. 612; 28 Atl. 495 (offer to sell a few jars; order for 500 gross; answer that vendor could sell only 250 gross).

²¹ *Melchers v. Springs*, 33 S. Car. 279; 11 S. E. 7881 (order for a given brand of flour refused, and counter-offer of a brand just as good, which was refused).

²² *Christian, etc., Co. v. Water-Supply Co.*, 106 Ala. 124; 17 So. 352 (offer to have a three-year contract continued; acceptance, to continue it from month to month); *Erickson v. Wallace*, 45 Kan. 430; 25 Pac. 898 (offer; lease for five years, if security given for payment of taxes; acceptance; lease for three years; no security given).

²³ *Seymour v. Armstrong*, 62 Kan. 720; 64 Pac. 612, affirming 10 Kan. App. 10; 61 Pac. 675.

there were two maps of the property at Merced under consideration, a town plat and a map of a larger tract with the town marked off, and offer for the "balance of Merced town property" was not accepted by a reply agreeing to sell the "Merced property," though referred to as the property for which the offer was made.²⁴ So acceptance of an offer to sell lumber at fixed price is not made by an indorsement on the 18th, "I accept the above price as quoted on Ashland dock. Will wire acceptance on balance contract on 20th," where the offer gave the purchaser a choice between paying cash and giving paper due in 90 days.²⁵ So where A asked B for the cost of a certain number each of certain sizes of rhododendrons and B gave the price for all but one size and suggested a cable code for ordering such sizes as he had, and A cabled, "Ship as ordered," no contract existed, as A was ordering one size on which B had declined to quote a price.²⁶ However, where A sent B a letter offering to sell two cars at a fixed rate, B's telegram "accept your offer, two cars . . . as per letter," is an unconditional acceptance, the 'letter' referring to A's letter to B, and not to one to be sent to A from B and hence adds no new term.²⁷

On the same principle if a written offer is made and before acceptance by the offeree it is modified by a third party, without the consent of the offerer, and it is then accepted by the offeree, no valid contract exists.²⁸

An acceptance may state with emphasis certain terms which are contained in the offer by construction or by implication of the law. If the terms thus insisted on in the acceptance are the same as those of the offer, an agreement is thereby created.²⁹ Thus an offer to sell, "terms of sale cash" and an acceptance providing that bills for goods delivered shall be paid daily

²⁴ Breckenridge v. Crocker, 78 Cal. 529; 21 Pac. 179.

²⁵ Shores Lumber Co. v. Patterson, 98 Wis. 534; 74 N. W. 367.

²⁶ Shady Hill Nursery Co. v. Waterer, 179 Mass. 318; 60 N. E. 789.

²⁷ King v. Dahl, 82 Minn. 240; 84 N. W. 737.

²⁸ Wiswell v. Bresnahan, 84 Me.

397; 24 Atl. 885; McGavock v. Morton, 57 Neb. 385; 77 N. W. 785.

²⁹ Anglo-American, etc., Co. v. Prentiss, 157 Ill. 506; 42 N. E. 157; Ottumwa, etc., Co. v. Ainley, 109 Ia. 386; 80 N. W. 510; Hubbell v. Palmer, 76 Mich. 441; 43 N. W. 442.

make a contract;³⁰ and so where the offer provides that the work shall be done in a certain time and the acceptance adds that time is of the essence of the contract;³¹ or where the offer is to sell land at \$3,500; and the acceptance is, "I will pay the \$3,500 cash. Send you hereby \$500 and pay balance on delivery of warranty deed,"³² or where an acceptance of an offer to sell flour adds "If the sacks are branded must be resacked in plain sacks,"³³ or where an ordinance provided that the contractor should accept assessments on abutting property except as to intersections and improvements in front of the city and other property not subject to assessment and the bid accepted the offer provided the city would guarantee the certificate of assessment as to certain specified property, which belonged to the state.³⁴ So an offer to buy bonds, to run 30 years is governed by statute making them redeemable in 5 years; and hence acceptance by city is binding.³⁵

An acceptance may refer to new terms not as part of the contract but as favors asked of the party offering to be granted or withheld at his option. Such new terms do not of course invalidate the acceptance.³⁶ Thus an answer to a request for insurance for a certain amount that the amount seemed too

³⁰ *Anglo-American, etc., Co. v. Prentiss*, 157 Ill. 506; 42 N. E. 157 (at least where the goods were afterwards furnished).

³¹ *Hubbell v. Palmer*, 76 Mich. 441; 43 N. W. 442.

³² *Veith v. McMurtry*, 26 Neb. 341; 42 N. W. 6.

³³ *King v. Dahl*, 82 Minn. 240; 84 N. W. 737 (since it was held not to require vendor to do it or to pay for it).

³⁴ *Ottumwa, etc., Co. v. Ainley*, 109 Ia. 386; 80 N. W. 510.

³⁵ *Roberts v. Paducah*, 95 Fed. 62.

³⁶ *Simpson v. Hughes*, 66 L. J. Ch. N. S. 143, 334 (asking from what time the purchase of land is to date, and that the fences be at-

tended to at once); *Culton v. Gilchrist*, 92 Ia. 718; 61 N. W. 384 (asking that permission be given in lease to lessee to build an addition to the house leased); *Brown v. Cairns*, 63 Kan. 693; 66 Pac. 1033 (accepting an offer of a reduction in rent for two years only, instead of five as requested; but adding, "We will continue to do our best, and if we cannot make it, I am sure you will meet us again, as we don't want to leave the place but don't intend to go in the hole"). *Eckert v. Schoch*, 155 Pa. St. 530; 26 Atl. 654 (asking a broker who has offered five cars of wheat at a certain price to send them, getting them as quickly as possible).

much but that the insurance could stand till Monday, when the insurers would be glad to see the insurer, was an acceptance of the proposal to insure for the full amount for the time indicated.³⁷ An inquiry as to whether the offerer will modify the terms of the offer is not a rejection.³⁸

If after acceptance the acceptor insists on a modification of the original contract in which the offerer does not acquiesce, such insistence cannot avoid the contract. Hence the acceptor can subsequently enforce the original contract in the absence of facts to create an estoppel.³⁹

§47. Conditional or modified acceptance treated as rejection and counter offer.

A conditional acceptance of an offer does not constitute an agreement unless the condition is complied with.¹ Among examples of conditional acceptances which do not create a contract are the following: an acceptance of an offer to obtain land at execution sale, conditioned on the offerer's giving an obligation that the land would not cost over a certain sum;² an acceptance of a request to borrow money on real estate security, which was never given,³ an acceptance conditioned on giving certain security, which was never given,⁴ or of transmitting certain information to the party accepting;⁵ or of furnishing the written legal opinion of the city attorney that the bonds offered for sale were legal;⁶ an acceptance conditioned on the assent

³⁷ *Neville v. Bank*, 17 Ohio 192.

³⁸ *Stevenson v. McLean*, L. R. 5 Q. B. 346.

³⁹ *McLean v. Gymnasium Association*, 64 Mo. App. 55.

¹ *Putnam v. Grace*, 161 Mass. 237; 37 N. E. 166; *Grunow v. Salter*, 118 Mich. 148; 76 N. W. 325; *Harris v. Scott*, 67 N. H. 437; 32 Atl. 770; *Woodward v. Edmunds*, 20 Utah 118; 57 Pac. 848; *Clark v. Burr*, 85 Wis. 649; 55 N. W. 401.

² *Boyd v. Hankinson*, 83 Fed. 876.

³ *National Bank v. Munger*, 95 Fed. 87; 36 C. C. A. 659.

⁴ *Lamar, etc., Co. v. Craddock*, 5 Colo. App. 203; 37 Pac. 950; *Woodward v. Edmunds*, 20 Utah 118; 57 Pac. 848.

⁵ *Harris v. Scott*, 67 N. H. 437; 32 Atl. 770 (condition that offerer send names of parties who had bid for certain stock which was the subject of the contract).

⁶ *Coffin v. Portland*, 43 Fed. 411.

of a third person, which is never given;⁷ a letter stating that the writer's acceptance when confirmed by a certificate of agency from the sendee is an agreement of agency, the letter not being assented to and the certificate not signed;⁸ an acceptance conditioned on payment to acceptor of insurance received by adversary party for loss of a building on the land contracted for, which was refused.⁹

Since the acceptance with an attempted modification is at least a counter proposal, it may be accepted by the original offerer, and thus may constitute a contract.¹⁰ Thus a valid agreement is produced by A's offer to B's agent to sell subject to B's approval, B's approval subject to new conditions, and A's acceptance of such new conditions;¹¹ and so where the offer was to take a thirty day acceptance of a draft, and a note was offered and accepted.¹²

§48. Prescribed form of acceptance.

The party making the offer may prescribe a mode in which acceptance must be made, if at all. Two results follow in such cases.

(1) Unless the party making the offer subsequently modifies his requirements, expressly or impliedly, he cannot be bound

⁷ *Strobridge, etc., Co. v. Randall*, 73 Fed. 619 (condition that a third person release a debt); *Putnam v. Grace*, 161 Mass. 237; 37 N. E. 166 (condition on assent of lessor and the court, if necessary, to the assignment of a lease); *Grunow v. Salter*, 118 Mich. 148; 76 N. W. 325 (condition that third person join in release of liability on a contract to buy land given by acceptor to adversary party). *Watson v. Neal*, 38 S. Car. 90; 16 S. E. 833 (condition that others join with acceptor in contract).

⁸ *Bergmeier v. Eisenmenger*, 59 Minn. 175; 60 N. W. 1097.

⁹ *Clark v. Burr*, 85 Wis. 649; 55 N. W. 401.

¹⁰ *Sloan v. Wolf Co.*, 124 Fed. 196; *Iron Works v. Douglass*, 49 Ark. 355; 5 S. W. 585; *Chicago, etc., Co. v. Armington*, 67 Ill. App. 538; *Fairmount, etc., Works v. Woodenware Co.*, 106 Ky. 659; 51 S. W. 196; *Earle v. Angell*, 157 Mass. 294; 32 N. E. 164; *Mueller v. Spring Co.*, 88 Mich. 390; 50 N. W. 319; *Sanders v. Fruit Co.*, 144 N. Y. 209; 43 Am. St. Rep. 757; 29 L. R. A. 431; 39 N. E. 75; *Atlantic, etc., Co. v. Sullivan*, 34 S. Car. 301; 13 S. E. 539; *Saveland v. Green*, 40 Wis. 431.

¹¹ *Atlantic, etc., Co. v. Sullivan*, 34 S. Car. 301; 13 S. E. 539.

¹² *Tatnall v. Rome, etc., Co.*, 98 Ala. 532; 13 So. 271.

by an acceptance in any other form.¹ Thus A made B an offer by messenger, acceptance to be delivered to the messenger. The messenger said that he was not sure that he would return to A; and B, with good cause, thought that an acceptance by letter would reach A sooner and more certainly than an acceptance by messenger. The messenger returned to A before the letter reached him. It was held that A was justified in treating his offer as having lapsed, as soon as the messenger returned without an acceptance.² Thus where the offer requires an acceptance to be made in writing, no other form of acceptance can be made.³ Where the proposal required acceptance "by wire or otherwise," it could be accepted by telegram or personal verbal acceptance.⁴ So an offer to be effective upon certain conditions can be accepted only by performing such conditions.⁵ So an option to be accepted by paying a certain sum of money cannot be accepted by words only.⁶ An offer which provides for acceptance by making a specified payment by a specified time cannot be accepted unless such payment is made.⁷ So offers as of rewards for doing certain acts can be accepted only by doing such acts, an oral acceptance of such offer without doing such act being of no effect in law;⁸ though considered as a counter-offer, it might be accepted in turn. So offers of subscriptions in consideration of incurring certain obligations can be accepted only by incurring such obligations.⁹ (2) In case the party to whom the offer is made has done all that is prescribed in the offer as requisite for an acceptance, the offer is accepted whether the party offering has actual knowledge of the acceptance or not. Examples of this last rule may be found in those cases where the understanding of the parties is that acceptance may be made by mail or telegraph, and where, accordingly, acceptance is completed when delivered to the post or the telegraph for transmission.¹⁰

¹ Wiswell v. Bresnahan, 84 Me. 397; 24 Atl. 885

² Eliason v. Henshaw, 4 Wheat. (U. S.) 225.

³ Wiswell v. Bresnahan, 84 Me. 397; 24 Atl. 885.

⁴ Watson v. Coast, 35 W. Va. 463; 14 S. E. 249.

⁵ McCormick v. Bonfils, 9 Okl. 605; 60 Pac. 296.

⁶ Lockman v. Anderson, 116 Ia. 236; 89 N. W. 1072.

⁷ Rickard v. Taylor, 122 Fed. 931.

⁸ See § 32.

⁹ See § 298.

¹⁰ See § 52.

Other examples may be found in the cases where a reward is offered for the doing of an act, and acceptance consists in doing such act; preliminary notice to the party offering being unnecessary.¹¹ An illustration of this principle is found in some forms of guaranty. If A offers to B to guarantee C's debt to B, he may so word his offer that the only acceptance necessary is B extending credit, forbearing suit, or whatever else may be the consideration of the guaranty stipulated. In absolute guaranties, this form of acceptance is usually held to be all that is necessary to bind the guarantor unless he stipulates express for notice of acceptance.¹² Thus an absolute guaranty may be binding without notice though an accompanying agreement to buy stock is invalid for want of acceptance.¹³

Such notice of acceptance may be unnecessary even where the parties are in personal communication when the offer is made. Thus notice of acceptance was held unnecessary where A offered to give five thousand dollars to any person who would bring the body of A's wife, dead or alive, from a burning building and B without giving notice of acceptance entered such building and brought the dead body of A's wife therefrom.¹⁴ So subscriptions as to educational and charitable objects can ordinarily be accepted only by performing the conditions stipu-

¹¹ See § 32. *Central, etc., Co. v. Cheatham*, 85 Ala. 292; 7 Am. St. Rep. 48; 4 So. 828 (furnishing evidence); *Wilson v. Stump*, 103 Cal. 255; 42 Am. St. Rep. 111; 37 Pac. 151 (producing a letter).

¹² *Davis v. Wells*, 104 U. S. 159; *London, etc., Bank v. Parrott*, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164; *Scribner v. Schenkel*, 128 Cal. 250; 60 Pac. 860; *Ferst v. Blackwell*, 39 Fla. 621; 22 So. 892; *Manry v. Waxelbaum Co.*, 108 Ga. 14; 33 S. E. 701; *Rogers v. Burr*, 105 Ga. 432; 70 Am. St. Rep. 50; 31 S. E. 438; *Wright v. Griffith*, 121 Ind. 478; 23 N. E. 281; 6 L. R. A. 639; *Snyder v. Click*, 112 Ind. 293; 13 N. E. 581; *Hall's Executor*

v. Bank, 23 Ky. L. Rep. 1450; 65 S. W. 365; *Baker v. Warehouse Co.*, 90 Ky. 419; 14 S. W. 410; *People's Bank v. Lemarie*, 106 La. 429; 31 So. 138; *Standard Oil Co. v. Hoese*, 57 Neb. 665; 78 N. W. 292; *Bank v. Sinclair*, 60 N. H. 100; 49 Am. Rep. 307; *Beebe v. Dudley*, 26 N. H. 249; 59 Am. Dec. 341; *Union Bank v. Coster*, 3 N. Y. 203; 53 Am. Dec. 280; *Wise v. Miller*, 45 O. S. 388; 14 N. E. 218; *Powers v. Bumeratz*, 12 O. S. 273; *Yancey v. Brown*, 3 Sneed (Tenn.) 89; *Wells, etc., Co. v. Davis*, 2 Utah, 411.

¹³ *Rogers v. Burr*, 105 Ga. 432; 70 Am. St. Rep. 50; 31 S. E. 438.

¹⁴ *Reif v. Page*, 55 Wis. 496; 42 Am. Rep. 731; 13 N. W. 473.

lated in the offer; but the performance of such conditions within a proper time is a sufficient acceptance, even if not specifically brought to the notice of the offerer.¹⁵

The party prescribing a form of acceptance may waive such form, and accept as binding any other method of acceptance. Such waiver occurs where an acceptance not made in the prescribed form is communicated to the offerer and is received by him without objection.¹⁶

Where the party prescribing the mode of acceptance voluntarily makes it impossible for the adversary party to accept in the prescribed mode, he is held to waive such form. Thus where A offered to B to sell cattle, the offer to be accepted by B at an appointed interview on the following day, if at all, and B was present at the appointed time and place, but A was absent, it was held that B might accept by sending for the cattle the next day.¹⁷ Where a written formal acceptance of rights and benefits under a statute was required, allowing a railroad company to act thereunder and to exercise such rights waives such requirements.¹⁸

§49. Methods of express acceptance.

Where the offer does not prescribe any specific manner of acceptance any form of communicating intention to accept the offer, made to the party making the offer or to some one duly authorized to represent him is sufficient, and converts the offer into a promise or agreement.¹

Among the forms of acceptance held proper are the following: replying to an offer of a position as teacher, "Yes, I guess I will take the school";² an acknowledgment of the receipt of

¹⁵ See §§ 50, 298.

¹⁶ *Perry v. Iron Co.*, 15 R. I. 380; 2 Am. St. Rep. 902; 5 Atl. 632.

¹⁷ *Omer v. Farlow*, 46 Ill. App. 122.

¹⁸ *St. Paul, etc., Ry. Co. v. Greenalgh*, 139 U. S. 19; *St. Paul, etc., Ry. Co. v. Wenzel*, 139 U. S. 23 (at least so as to prevent the railroad company from escaping liability).

¹ *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E.

899; *McLean v. Gymnasium Association*, 64 Mo. App. 55; *Wullenwahr v. Dunnigan*, 30 Neb. 877; 13 L. R. A. 811; 47 N. W. 420; *Drew v. Edmunds & Ellison*, 60 Vt. 401; 6 Am. St. Rep. 122; 15 Atl. 100.

² "Guess" was here used in its popular sense. *School Directors v. Newman*, 47 Ill. App. 364 (even if he suggested a change in the date of opening.)

"the following contracts for which we thank you" followed by a list of the orders;³ where A wrote asking lowest prices, on certain sizes of fruit jars; B replied giving prices, adding "for immediate acceptance," and A telegraphed "enter order for ten car loads," and wrote directing manner of shipment;⁴ acceptance of a call to fill a pulpit at a fixed salary;⁵ accepting an allowance of a valid claim by the trustees of a municipal corporation;⁶ an acceptance of a written bid, entered upon the city records;⁷ a vote of a town to buy water works which by the charter of the water company might be bought by the town,⁸ and filing a bill for specific performance of an irrevocable option to sell land.⁹ If, however, the acceptance is not definite but leaves a doubt as to the liability assumed by the promisee, no contract exists. Thus no contract was held to exist where A who was looking up lands of B, clearing title, etc., wrote to B proposing that he should receive one-half lands and pay his own expenses or one-third lands and expenses clear; and B answered "go ahead and get all our lands clear, and, after all entanglements are removed, satisfactory arrangements will be made. Perhaps your ideas are not too high."¹⁰

An offer made in writing¹¹ or verbally,¹² may be accepted by telegram;¹³ or by telephone.¹⁴ If the promisee signs and returns a written offer it amounts *prima facie* to an acceptance.¹⁵ So if the promisee signs a written contract for the sale of books

³ *Jordan v. Patterson*, 67 Conn. 473; 35 Atl. 521. But a postal card acknowledging receipt of order and promising that "the same shall have prompt attention" is not an acceptance. *Manier v. Appling*, 112 Ala. 663; 20 So. 978.

⁴ *Fairmount Glass Works v. Woodenware Co.*, 106 Ky. 659; 51 S. W. 196.

⁵ *Jennings v. Scarborough*, 56 N. J. L. 401; 28 Atl. 559.

⁶ *McConoughy v. Jackson*, 101 Cal. 265; 40 Am. St. Rep. 53; 35 Pac. 863.

⁷ *City of Ft. Madison v. Moore*, 109 Ia. 476; 80 N. W. 527.

⁸ *Braintree, etc., Co. v. Braintree*, 146 Mass. 482; 16 N. E. 420.

⁹ *Black v. Maddox*, 104 Ga. 157; 30 S. E. 723 (citing *Woodruff v. Woodruff*, 44 N. J. Eq. 349; 1 L. R. A. 380; 16 Atl. 4).

¹⁰ *Bowen v. Hart*, 101 Fed. 376; 41 C. C. A. 390.

¹¹ *Cochrane v. Mining Co.*, 16 Colo. 415; 26 Pac. 780.

¹² *Cobb v. Foree*, 38 Ill. App. 255.

¹³ See § 52.

¹⁴ *Smith v. Ingram*, 90 Ala. 529; 8 So. 144.

¹⁵ *W. G. Taylor Co. v. Bannerman*, — Wis. —; 97 N. W. 918.

and allows the promisor's agent to take the contract away and to forward it to the promisor, the promisee is bound thereby. although he has made a different oral contract with such agent, of which contract the vendor is not informed.¹⁶

§50. Acceptance implied from acts.

The party accepting an offer may as well signify his assent to an offer by doing acts which clearly and unequivocally show such assent, as by express words. If such acts are done with the knowledge of the party making the offer, they amount to an acceptance thereof.¹ Thus where an order for goods has been sent, a shipment of such goods, within proper time for an acceptance, is an acceptance of such order,² and accepting goods is an acceptance of the offer under which such goods are sent.³ So an offer for the erection of a water-works,⁴ a railroad,⁵ or

¹⁶ Putnam v. Macleod, 23 R. I. 373; 50 Atl. 646.

¹ Morton v. Burn, 7 Ad. & El. 19; Sumner v. Thompson, 31 N. S. 481; Old Jordan, etc., Co. v. Societe, etc., 164 U. S. 261; Whitney v. Wyman, 101 U. S. 392; Sanford v. Howard, 29 Ala. 684; 68 Am. Dec. 101; Marshall v. Old, 14 Colo. App. 32; 59 Pac. 217; Stanton v. New York, etc., Co., 59 Conn. 272; 21 Am. St. Rep. 110; 22 Atl. 300; Lauder v. Peoria, etc., Society, 71 Ill. App. 475; Moore v. Hubbard, 15 Ind. App. 84; 42 N. E. 962; Moore v. McKenney, 83 Me. 80; 23 Am. St. Rep. 753; 21 Atl. 749; Howard v. Taggart, 133 Mass. 284; Wellington v. Apthorp, 145 Mass. 69; 13 N. E. 10; Batelle v. Northwestern, etc. Co., 37 Minn. 89; 33 N. W. 327; Allen v. Chouteau, 102 Mo. 309; 14 S. W. 869; W. W. Kendall, etc., Co. v. Bain, 46 Mo. App. 581; Pettis v. Asphalt Co., — Neb. —; 99 N. W. 235; Morse v. Bellows, 7 N. H. 549; 28 Am. Dec. 372; Strong

v. Sheffield, 144 N. Y. 392; 39 N. E. 330; Elting v. Vanderlyn, 4 Johns. (N. Y.) 237; Croak v. Cowan, 64 N. C. 743; Thomas v. Croft, 2 Rich. Law (S. Car.) 113; 44 Am. Dec. 279; Yancey v. Brown, 3 Sneed (Tenn.) 89; Erbacher v. Seefeld, 92 Wis. 350; 66 N. W. 252.

² McCormick, etc., Co. v. Richardson, 89 Ia. 525; 56 N. W. 682; McCormick, etc., Co. v. Markert, 107 Ia. 340; 78 N. W. 33; Aultman, Miller & Co. v. Nilson, 112 Ia. 634; 84 N. W. 692; Kaufman Bros. v. Mfg. Co., 78 Ia. 679; 16 Am. St. Rep. 462; 43 N. W. 612; American, etc., Co. v. Klarquist, 47 Minn. 344; 50 N. W. 243.

³ Harris v. Lumber Co., 97 Ga. 465; 25 S. E. 519; Garst v. Harris, 177 Mass. 72; 58 N. E. 174; Waters v. Glendenning, 87 Wis. 250; 58 N. W. 404.

⁴ Muscatine etc., Co. v. Lumber Co., 85 Ia. 112; 39 Am. St. Rep. 284; 52 N. W. 108 (offer of annual rent)

⁵ Hoffman v. Ry. Co., 157 Pa. St. 174; 27 Atl. 564.

a mill,⁶ may be accepted by erecting the required improvement. So an offer to do some specified act if the other party will forbear suit for a certain time may be accepted by forbearing suit for such time in reliance on such promise, where the circumstances bring such form of acceptance to the knowledge of the party making the offer.⁷ So if A offers to B to guarantee C's debt to B if B will forbear suit, B's forbearance in reliance thereon if known to A is a sufficient acceptance.⁸ This reason has been expressly given for contracts of guaranty.⁹ Another reason given for this rule is that the guarantor should learn from his principal "with whom he is supposed to be on intimate terms" whether his guaranty is accepted.¹⁰ So an offer by a mortgagor to one who has assumed the mortgage on purchasing the mortgaged property, to release him personally and look solely to the property for payment may be accepted by conduct in refraining from any attempt to have such property applied on such debt.¹¹ So entering a school or college in reliance upon the terms of the catalogue is an acceptance of the offer there made.¹² But if such acts are not brought to the knowledge of the party making the offer they do not amount to an acceptance.¹³ So a written contract signed by one party may be accepted by the other party by assenting to it and acting upon it, even if he

⁶ Building a mill in accordance with a subscription may be an acceptance. *Superior, etc., Co. v. Bickford*, 93 Wis. 220; 67 N. W. 45.

⁷ *Morton v. Burn*, 7 Ad. & El. 19; *Marshall v. Old*, 14 Colo. App. 32; 59 Pac. 217; *King v. Upton*, 4 Greenl. (Me.) 387; *Moore v. McKenney*, 83 Me. 80; 21 Atl. 749; *Howe v. Taggart*, 133 Mass. 284; *Wheeler v. Benton*, 71 Minn. 456; 74 N. W. 154; *Elting v. Vanderlyn*, 4 Johns. (N. Y.) 237; *Strong v. Sheffield*, 144 N. Y. 392; 39 N. E. 330; *Thomas v. Croft*, 2 Rich. Law (S. Car.) 113; 44 Am. Dec. 279; *Yancey v. Brown*, 3 Sneed (Tenn.) 89.

⁸ *People's Bank v. Lemaire*, 106

La. 429; 31 So. 138; *Walker v. Sherman*, 11 Met. (Mass.) 170; *McCorney v. Stanley*, 8 Cush. (Mass.) 85; *Powers v. Bumcrantz*, 12 O. S. 273.

⁹ *People's Bank v. Lemaire*, 106 La. 429; 31 So. 138; *Powers v. Bumcrantz*, 12 O. S. 273.

¹⁰ *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Powers v. Bumcrantz*, 12 O. S. 273.

¹¹ *First, etc., Bank v. Walkins*, 154 Mass. 385; 28 N. E. 275.

¹² *Niedermeyer v. University*, 61 Mo. App. 654; *Horner School v. Wescott*, 124 N. Car. 518; 32 S. E. 885.

¹³ See § 43.

does not sign it.¹⁴ So if A makes a promise to B for C, C's suing on such contract is an acceptance thereof.¹⁵ If C is a minor and the contract is for his benefit, his acceptance may be presumed.¹⁶ So where the correspondence shows that both parties assumed that they had thereby entered into a binding contract, the fact that no express acceptance of the offer is made does not prevent agreement from existing.¹⁷

§51. Who can accept offer.

An offer is usually made to some definite person. In such case only such person can accept the offer, and acceptance by another has no legal effect.¹ Thus an offer by A to B to guarantee X's debt to B, cannot be accepted by C so as to create liability against A,² as where an offer of guaranty, made to a firm is accepted by one partner who continues in business after dissolution of the firm.³ Such attempted acceptance may of course amount to a new proposition from such third person, which may in turn be accepted by the original offerer.

It is possible for an offer to be made, not to any specific person, identified as the offeree when the offer is made, but to any person, then indefinite, who shall later be ascertained. Such offers are valid.⁴ A common type of such offers is the offer of

¹⁴ Sellers v. Greer, 172 Ill. 549; 40 L. R. A. 589; 50 N. E. 246; Vogel v. Pekoc, 157 Ill. 339; 30 L. R. A. 491; 42 N. E. 386. See § 570.

¹⁵ Copeland v. Summers, 138 Ind. 219; 35 N. E. 514; rehearing denied, 138 Ind. 226; 37 N. E. 971.

¹⁶ Copeland v. Summers, 138 Ind. 219; 35 N. E. 514; rehearing denied, 138 Ind. 226; 37 N. E. 971; Pruitt v. Pruitt, 91 Ind. 595; Nolte v. Libbert, 34 Ind. 163.

¹⁷ Haines v. Dearborn, 199 Pa. St. 474; 49 Atl. 319.

¹ Gordon v. Street (1899) 2 Q. B. 641; Mannix v. Hildreth, 2 App. D. C. 259; Second National Bank v. Diefendorf, 90 Ill. 396; Barnes v. Shoemaker, 112 Ind. 512; 14 N.

E. 367; Schoonover v. Osborne, 108 Ia. 453; 79 N. W. 263; Rodliff v. Dallinger, 141 Mass. 1; 55 Am. Rep. 439; 4 N. E. 805; Harris v. McKinley, 57 Minn. 198; 58 N. W. 991; Crane Co. v. Specht, 39 Neb. 123; 42 Am. St. Rep. 562; 57 N. W. 1015; Randolph Iron Co. v. Elliott, 34 N. J. L. 184; Barnes v. Barrow, 61 N. Y. 39; 19 Am. Rep. 247; Taylor v. Wetmore, 10 Ohio 490.

² Taylor v. Wetmore, 10 Ohio 490.

³ Second National Bank v. Diefendorf, 90 Ill. 396.

⁴ Hopkins v. Upshur, 20 Tex. 89; 70 Am. Dec. 375; Strong v. Eldridge, 8 Wash. 595; 36 Pac. 696; Lathrop v. Knapp, 27 Wis. 222.

a reward for the doing of some specified act. The doing of the act serves the triple purpose of consideration, acceptance, and identification of the offeree.⁵ So an offer of a subscription for a certain purpose, not made to any specified person may be accepted by the person for whose benefit it was made.⁶

In some cases an offer may be made to a person not in existence, which offer if still outstanding may be accepted by such person after coming into existence. Thus an offer to a corporation, made before it is formed, may be accepted by it afterwards.⁷ So a corporation may become liable for services of a promoter by accepting the benefit of them after it is incorporated.⁸

§52. Acceptance by mail or telegraph.

Where the mail or telegraph is a proper means of communication the great weight of modern authority is that the acceptance is binding on both parties from the moment that it is transmitted if such transmission is effected in the proper way.¹ So an insurance policy which is not to be in effect

⁵ *Central, etc., Co. v. Cheatham*, 85 Ala. 292; 7 Am. St. Rep. 48; 4 So. 828; *Wilson v. Stump*, 103 Cal. 255; 42 Am. St. Rep. 111; 37 Pac. 151; *Reif v. Paige*, 55 Wis. 496; 42 Am. Rep. 731; 13 N. W. 473.

⁶ *Strong v. Eldridge*, 8 Wash. 595; 36 Pac. 696 (in this case a subscription "I agree to subscribe \$1,500 towards getting the foundry at Fairhaven," was enforced by the owners of such foundry).

⁷ *Work v. Welsh*, 160 Ill. 468; 43 N. E. 719; *Omaha, etc., Co. v. Goodman*, 62 Neb. 197; 86 N. W. 1082. See § 1002.

⁸ *Farmers' Bank v. Smith*, 105 Ky. 816; 88 Am. St. Rep. 341; 49 S. W. 810; *Low v. R. R.*, 45 N. H. 370. *Contra*, *Weatherford, etc., Ry. v. Granger*, 86 Tex. 350; 40 Am. St. Rep. 837; 24 S. W. 795. See upon this question § 1002.

¹ *Henthorn v. Fraser* (1892), 2 Ch. 27; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Patrick v. Bowman*, 149 U. S. 411; *Tayloe v. Ins. Co.*, 9 How. (U. S.) 390; *Andrews v. Schreiber*, 93 Fed. 367; *Phenix Insurance Co. v. Schultz*, 80 Fed. 337; 25 C. C. A. 453 (citing *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Tayloe v. Ins. Co.*, 9 How. (U. S.) 390; *Trevor v. Wood*, 36 N. Y. 307); *Garettson v. Bank*, 47 Fed. 867; *Minnesota Linseed Oil Co. v. White-Lead Co.*, 4 Dill (U. S.) 43; *Linn v. McLean*, 80 Ala. 360; *Kempner v. Cohn*, 47 Ark. 519; 58 Am. Rep. 775; 1 S. W. 869; *Ferrier v. Storer*, 63 Ia. 484; 50 Am. Rep. 752; 19 N. W. 288; *Hunt Higman*, 70 Ia. 406; 30 N. W. 769; *Wheat v. Cross*, 31 Md. 99; 1 Am. Rep. 28; *Lungstrass v. Ins. Co.*, 48 Mo. 201; 8 Am. Rep. 100; North-

until "delivery" takes effect when it is mailed to the insured, properly addressed, postage prepaid.² The chief classes of cases in which this question becomes important are as follows: (1) Where the letter is lost, and the question arises as to whether the party offering is bound, the weight of authority is that he is bound though he had no actual knowledge of the acceptance, if a letter was a proper means of communication.³ (2) If the party making the offer attempts to revoke the offer by sending a later letter or telegram, such attempted revocation is of no effect.⁴ Thus an offer was made by telegraph, subject to "prompt reply." It was accepted by telegraph twelve minutes after receipt, which telegram was not delivered for an hour. After the telegram of acceptance was sent and before it was delivered, a telegram was sent revoking the offer. The contract was held to be binding.⁵ So, on the same principle the party who has accepted cannot, by a subsequent communication, modify the terms of the agreement thus made.⁶ (3) If the party making the offer dies before the letter of acceptance is received, but after it is mailed, the offer

ampton, etc., Co. v. Tuttle, 40 N. J. L. 476; Mactier v. Frith, 6 Wend. 103; 21 Am. Dec. 262; Vassar v. Camp, 11 N. Y. 441; Trevor v. Wood, 36 N. Y. 307; 93 Am. Dec. 511; Sanders v. Fruit Co., 144 N. Y. 209; 43 Am. St. Rep. 757; 29 L. R. A. 431; 39 N. E. 75; Watson v. Russell, 149 N. Y. 388; 44 N. E. 161; Perry v. Iron Co., 15 R. I. 380; 2 Am. St. Rep. 902; 5 Atl. 632; Blake v. Ins. Co., 67 Tex. 160; 60 Am. Rep. 15; 2 S. W. 368; Scottish American Mortgage Co. v. Davis, (Tex. Civ. App.), 72 S. W. 217; Hartford, etc., Co. v. Lasher, etc., Co., 66 Vt. 439; 44 Am. St. Rep. 859; 29 Atl. 629; Washburn v. Fletcher, 42 Wis. 152.

² Mutual Reserve Fund Life Association v. Farmer, 65 Ark. 581; 47 S. W. 850.

³ Hunt v. Higman, 70 Ia. 406; 30 N. W. 769; Bishop v. Eaton, 161 Mass. 496; 42 Am. St. Rep. 437; 37 N. E. 665; Commercial Insurance Co. v. Hallock, 27 N. J. L. 645; 72 Am. Dec. 379; Vassar v. Camp, 11 N. Y. 441; Howard v. Daly, 61 N. Y. 362; 19 Am. Rep. 285.

⁴ Henthorn v. Fraser (1892), 2 Ch. 27; Patrick v. Bowman, 149 U. S. 411; Kemper v. Cohn, 47 Ark. 519; 58 Am. Rep. 775; 1 S. W. 869; Moore v. Pierson, 6 Ia. 279; 71 Am. Dec. 409; Hand v. Marble Co., 88 Md. 226; 40 Atl. 899 (citing Tayloe v. Ins. Co., 9 How. (U. S.) 390); Brauer v. Shaw, 168 Mass. 198; 60 Am. St. Rep. 387; 46 N. E. 617.

⁵ Brauer v. Shaw, 168 Mass. 198; 60 Am. St. Rep. 387; 46 N. E. 617.

⁶ Gartner v. Hand, 86 Ga. 558; 12 S. E. 878.

does not lapse, since it has already been turned into an agreement by acceptance.⁷ The rule is the same where the party accepting the offer dies after his letter of acceptance is mailed.⁸

Some authorities have held that the date of the receipt of the letter fixed the moment of acceptance.⁹ The English Law has been settled in accordance with the rule in the text;¹⁰ and the later Massachusetts cases have ignored the earlier Massachusetts rule and laid down the same rule as that already indicated.¹¹

In any event the contract is of course complete on receipt of the telegram,¹² or letter.¹³

Under what circumstances the mail or telegraph is a proper means of communication is a question on which the courts have expressed different opinions in assigning reasons for their decisions; though the actual conflict in decisions has been slight.

⁷ *Haarstick v. Fox*, 9 Utah 110; 33 Pac. 251.

⁸ *Mactier v. Frith*, 6 Wend. (N. Y. 103; 21 Am. Dec. 262.

⁹ *Beaubien, etc., Co. v. Robertson* 18 Queb. L. R. (Sup.) 429; *McCulloch v. Ins. Co.*, 1 Pick. (Mass.) 278; *Thayer v. Ins. Co.*, 10 Pick. (Mass.) 326.

¹⁰ *Henthorn v. Fraser* (1892), 2 Ch. 27.

¹¹ *Bishop v. Eaton*, 161 Mass. 496; 42 Am. St. Rep. 437; 37 N. E. 665; *Brauer v. Shaw*, 168 Mass. 198; 60 Am. St. Rep. 387; 46 N. E. 617. "The offer must be made before the acceptance, and it does not matter whether it is made a longer or a shorter time before, if by its express or implied terms it is outstanding at the time of its acceptance. Whether much or little time has intervened, it reaches forward to the moment of the acceptance, and speaks then. It would be monstrous to allow an inconsistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the con-

tract; for instance a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking. The principle is the same when the time is longer and the act relied on a step looking to but not giving notice. The contrary suggestion by Wilde, J., in *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278, 279, is not adopted as a ground of decision, and the view which we take is that taken by the Supreme Court of the United States, and is now the settled law of England." *Brauer v. Shaw*, 168 Mass. 198, 200; 60 Am. St. Rep. 387; 46 N. E. 617 (citing many recent cases).

¹² *Webb v. Sharman*, 34 U. C. Q. B. 410; *Perry v. Iron Co.*, 15 R. I. 380; 2 Am. St. Rep. 902; 5 Atl. 632.

¹³ *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E. 899; *Haines v. Dearborn*, 199 Pa. St. 474; 49 Atl. 319.

In many of the cases, the original offer was made by mail or telegraph and considerable stress was laid on that fact as indicating that such means of acceptance was proper, the mail being said to be the offerer's agent to deliver the offer and receive the acceptance.¹⁴ The courts have been inclined to extend the propriety of accepting by letter or telegraph to cases where the party making the offer contemplated a final acceptance or refusal at a time when the parties were not in personal communication.¹⁵ A recent English case has gone so far as to hold that an offer made personally may be accepted by mail where time for acceptance was given, and that even in such case, the acceptance dates from mailing.¹⁶ However, where under postal regulations a letter of acceptance is stopped *in transitu* and returned to the writer it is held that no contract was made by depositing it in the mail.¹⁷

What constitutes a proper sending by mail or telegraph is a question upon which there has been but little discussion. Depositing a letter in the post office is a sufficient mailing if the letter is stamped.¹⁸ On the other hand, if the town postman is not the agent of the post office to receive letters, delivery to him is not mailing, for purpose of determining the acceptance of a letter applying for an allotment of shares.¹⁹ If a letter is delivered to a messenger to mail, acceptance dates from the time the messenger mails it.²⁰ If this is not done until the offer is revoked or lapses, it is of course too late.

If the party making the offer wishes to avoid the application of these rules, he can do so by prescribing that only the receipt of the letter or telegram of acceptance shall constitute a proper

¹⁴ Household, etc., Co. v. Grant, L. R. 4 Ex. Div. 216; Patrick v. Bowman, 149 U. S. 411; Moore v. Pierson, 6 Ia. 279; 71 Am. Dec. 409; Wheat v. Cross, 31 Md. 99; 1 Am. Rep. 28; Hartford, etc., Co. v. Lasher, etc., Co., 66 Vt. 439; 44 Am. St. Rep. 859; 29 Atl. 629.

¹⁵ Wilcox v. Cline, 70 Mich. 517; 38 N. W. 555.

¹⁶ Henthorn v. Fraser (1892), 2 Ch. 27.

¹⁷ Scottish-American Mortgage Co. v. Davis, 96 Tex. 504; 97 Am. St. Rep. 932; 74 S. W. 17.

¹⁸ Blake v. Ins. Co., 67 Tex. 160; 60 Am. Rep. 15; 2 S. W. 368. (Deposit of an unstamped letter is ineffectual.)

¹⁹ *In re* London & Northern Bank (1900), 1 Ch. 220.

²⁰ Maclay v. Harvey, 90 Ill. 525; 32 Am. Rep. 35.

acceptance. Thus where A offered by letter, and required a prompt answer by telegraph, and provided that unless he received the answer "yes" by a certain time, he would infer that "no" was intended, no contract is made until an answer is received.²¹ So no contract was created, where A offered to settle a claim for a certain sum if paid in ten days; and B mailed A a check within ten days but it was not received till afterwards.²² So he may prescribe some other method of acceptance, as sending acceptance by the messenger carrying the offer.²³

From the nature of the case no doubt can exist in law as to the time at which a contract is made by telephone. Wherever the question of the place where such a contract is made is material there is opportunity for dispute. It has been held that the place at which such acceptor is when he accepts by telephone is the place where such contract is made.²⁴

§53. Importance of distinguishing between offer and acceptance.

The existence of a contract, therefore, often depends on whether a given communication is an offer or an acceptance. Thus, in contracts of guaranty, a written communication by A to B agreeing to guarantee X's debt to B may be an acceptance of a proposition by B to A to lend money to X if A will guarantee it; and in such case A's acceptance completes the contract, and B may hold A on such contract, the other elements of a valid contract being present, without acceptance by B.¹ On the other hand, it may be an offer by A to B to induce B to make the loan to X. In such case, B must accept the offer to hold A. A's loan to X without such acceptance is not sufficient.²

²¹ *Lewis v. Browning*, 130 Mass. 173.

²² *Hutchinson, etc., Co. v. Wallace*, 7 Kan. App. 612; 52 Pac. 458.

²³ *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225.

²⁴ *Bank v. Flour Co.*, — Cal. —; 74 Pac. 855.

¹ *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524; *Davis v. Wells*, 104 U. S. 159; *Cook v. Orne*, 37 Ill. 186; *German Savings Bank*

v. Roofing Co., 112 Ia. 184; 84 Am. St. Rep. 335; 51 L. R. A. 758; 83 N. W. 960; *Lennox v. Murphy*, 171 Mass. 370; 50 N. E. 644; *Bishop v. Eaton*, 161 Mass. 496; 42 Am. St. Rep. 437; 37 N. E. 665; *Beebe v. Dudley*, 26 N. H. 249; 59 Am. Dec. 341.

² *Farmers' Bank v. Tatnall*, 7 Houst. (Del.) 287; *German Savings Bank v. Roofing Co.*, 112 Ia. 184; 84 Am. St. Rep. 335; 51 L. R. A.

So if A makes an agreement with B's agent, in the form of a contract, but subject to B's approval, this is in legal effect an offer by A to B and may be revoked at any time before B accepts.³ So a contract signed by an agent, which is not to go into effect until approved by his principal in writing has no effect till then.⁴ After B has shipped goods in accordance with A's offer, and has notified A, the contract is complete.⁵

§54. Effect of intending to reduce contract to writing.

In many cases of oral offer and acceptance, the parties intend to reduce the contract to writing, but such reduction is not effected. The validity of the oral agreement in such cases depends on the intention of the parties. If the parties intend the oral agreement to be binding, and the written contract to be merely for convenience as evidence of the exact terms of the oral agreement, such oral agreement is valid; and the same rule applies where the agreement is reached informally by means of letters and telegrams, while a subsequent written contract is

758; 83 N. W. 960; *Gano v. Bank*, 103 Ky. 508; 82 Am. St. Rep. 596; 45 S. W. 519; *Thompson v. Glover*, 78 Ky. 193; 39 Am. Rep. 220; *Lowe v. Beckwith*, 14 B. Mon. (Ky.) 184; 58 Am. Dec. 659; *Kincheloe v. Holmes*, 7 B. Mon. (Ky.) 5; 45 Am. Dec. 41; *De Cremer v. Anderson*, 113 Mich. 578; 71 N. W. 1090; *Acme Mfg. Co. v. Reed*, 197 Pa. St. 359; 80 Am. St. Rep. 832; 47 Atl. 205.

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an accept-

ance by the other party to complete the contract."

Davis Sewing Machine Co. v. Richards, 115 U. S. 524; quoted in *German Savings Bank v. Roofing Co.*, 112 Ia. 184; 84 Am. St. Rep. 335; 51 L. R. A. 758; 83 N. W. 960.

³ *Barnes Cycle Co. v. Schofield*, 111 Ga. 880; 36 S. E. 965; *McCormick, etc., Machine Co. v. Richardson* 89 Ia. 525; 56 N. W. 682; *Bronson v. Herbert*, 95 Mich. 478; 55 N. W. 359; *Reid v. Wagon Co.*, 79 Minn. 369; 82 N. W. 672.

⁴ *Whitman Agricultural Co. v. Hornbrook*, 24 Ind. App. 255; 55 N. E. 502.

⁵ *Burwell & Dunn Co. v. Chapman*, 59 S. C. 581; 38 S. E. 222; *Embree-McLean Carriage Co. v. Lusk*, 11 Tex. Civ. App. 493; 33 S. W. 154.

contemplated.¹ Thus where an offer contained "if this is agreed to, the contract can be drawn up and signed," it was held that such offer did not call for formal contract, but gave the promisee the option to demand one.² On the same principle a written contract, providing for a general release in the future, is binding, so that the releasor cannot insist on a subsequent release different in legal effect from that agreed upon.³

But where the parties intend the oral agreement merely as a step in the preliminary negotiations leading up to a written contract which is to be the only binding agreement between the parties, the oral agreement is, of itself, of no validity.⁴ So where the proposals of different contractors contemplated a formal written agreement, awarding the work to one of the contractors is neither a contract nor a contract to make a contract.⁵ This

¹ *Nash v. Kreling* (Cal.), 56 Pac. 262; *Cochrane v. Mining Co.*, 16 Colo. 415; 26 Pac. 780; *Herring v. Ins. Co.*, — Ia. —; 99 N. W. 130; *Post v. Davis*, 7 Kan. App. 217; 52 Pac. 903; *Drummond v. Crane*, 159 Mass. 577; 38 Am. St. Rep. 460; 23 L. R. A. 707; 35 N. E. 90; *Allen v. Choteau*, 102 Mo. 309; 14 S. W. 869; *Green v. Cole*, 103 Mo. 70; 15 S. W. 317; *Sanders v. Fruit Co.*, 144 N. Y. 209; 43 Am. St. Rep. 757; 29 L. R. A. 431; 39 N. E. 75; *Blaney v. Hoke*, 14 O. S. 292; *Weaver v. Simmons*, 15 Tex. Civ. App. 154; 38 S. W. 1140; *Lawrence v. Ry. Co.*, 84 Wis. 427; 54 N. W. 797; *Cohn v. Plumer*, 88 Wis. 622; 60 N. W. 1000.

² *Allen v. Chouteau*, 102 Mo. 309; 14 S. W. 869. An acceptance by telegraph, "Letter received; offer accepted; writing," was held valid, though no writing was sent. *Dalrymple v. Scott*, 19 Ont. App. 477.

³ *Trustees of Amherst College v. Ritch*, 151 N. Y. 282; 37 L. R. A. 305; 45 N. E. 876.

⁴ *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Winn v. Bull*, L. R. 7 Ch.

D. 29; *Hodges v. Sublett*, 91 Ala. 588; 8 So. 800; *Spinney v. Downing*, 108 Cal. 666; 41 Pac. 797; *Pacific, etc., Co. v. R. R.*, 90 Cal. 627; 27 Pac. 525; *Webb v. Janney*, 9 App. D. C. 41; *Barnes Cycle Co. v. Schofield*, 111 Ga. 880; 36 S. E. 965; *Weitz v. Des Moines, etc., District*, 79 Ia. 423; 44 N. W. 696; *Ferre Canal Co. v. Burgin*, 106 La. 309; 30 So. 863; *Mississippi, etc., Co. v. Swift*, 86 Me. 248; 41 Am. St. Rep. 545; 29 Atl. 1063; *Edge Moor, etc., Works v. Bristol County*, 170 Mass. 528; 49 N. E. 918; *Starkey v. Minneapolis*, 19 Minn. 203; *Eads v. Carondelet*, 42 Mo. 113; *Hogan v. Shields*, 20 Mont. 438; 52 Pac. 55; *Irish v. Pulliam*, 32 Neb. 24; 48 N. W. 963; *Donnelly v. Hardware Co.*, 66 N. J. L. 388; 49 Atl. 428; *Jersey, etc., Commissioners v. Brown*, 32 N. J. L. 504; *Wood v. Edwards*, 19 Johns. (N. Y.) 205; *Congdon v. Darcy*, 46 Vt. 478.

⁵ *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 528; 49 N. E. 918; *Kayser v. Arnold*, 124 N. Y. 674; 27 N. E. 360; *Hogan*

is especially true in public contracts which are required to be in writing.⁶

So where the act of Congress required all contracts made by the commissioners of the District of Columbia to be copied into a book for that purpose and signed by the commissioners, a memorandum on the minutes of the commissioners of the appointment of a referee was not a contract;⁷ and where the bidder for printing knows that a formal written contract is required under the power given by the legislature to a joint committee the oral acceptance of his bid and awarding him the contract is not a valid contract.⁸ But if the statute does not require a written contract, acceptance of a bid may make a complete contract.⁹ A cablegram which reads like acceptance, but adds "contract mailed," is not an acceptance.¹⁰ This principle often overlaps another, already stated,¹¹ and in some of the foregoing cases the oral agreement is purely preliminary, certain terms being left open for future negotiation and possible modification. In such cases the oral agreement is of course of no validity.¹² So an attempted acceptance "accepted, contract to be drawn in accordance with the above proposition or bid. This is about right and will be satisfactory to" the corporation to which the offer was made, was held invalid.¹³

v. Shields, 20 Mont. 438; 52 Pac. 55; Megrath v. Gilmore, 10 Wash. 339; 39 Pac. 131.

⁶ Haldane v. United States, 69 Fed. 819; 16 C. C. A. 447; Capital Printing Co. v. Hoey, 124 N. C. 767; 33 S. E. 160; Hughes v. Clyde, 41 O. S. 339.

⁷ District of Columbia v. Bailey, 171 U. S. 161.

⁸ Capital Printing Co. v. Hoey, 124 N. Car. 767; 33 S. E. 160.

⁹ Highland County v. Rhoades, 26 D. S. 411.

¹⁰ Runyon v. Wilkinson, etc., Co., 57 N. J. L. 420; 31 Atl. 390.

¹¹ See § 27.

¹² Bissenger v. Prince, 117 Ala. 480; 23 So. 67 (where the contractors were informed that they should have the contract before the character of the building was definitely determined). Pacific, etc., Co. v. Riverside, etc., Co., 90 Cal. 627; 27 Pac. 525 (where the purchaser was to examine the title).

¹³ Sparks v. Pittsburg Co., 159 Pa. St. 295; 28 Atl. 152.

CHAPTER IV.

GENERAL NATURE OF FRAUD—MISREPRESENTATION —MISTAKE AND NON-DISCLOSURE.

§55. Introductory.

The outward form of offer and acceptance may exist while in reality there is either no agreement at all, or one which is voidable at the election of one party thereto. This state of affairs, if due to some defect in the offer and acceptance, may exist by reason of one of two things. First: one party may go through the form of making a contract because of an erroneous belief of some sort. In certain cases contracts thus entered into are valid, in others voidable, in others, void. Under this general head are included fraud, either actual or constructive; misrepresentation, mistake and non-disclosure. Anyone of these may exist where the party subject thereto is free from any constraint or overpowering influence. Second: one party may go through the form of making an agreement because his mind is so overpowered that he apparently makes a contract, but does not really consent thereto. Under this general head are included duress and undue influence. Either of these may exist where the party subjected thereto is informed of all the material facts. It is possible and not uncommon for a combination of these two general types to exist: that is, the party seeking relief may be under some overpowering influence and at the same time under some erroneous belief concerning some material fact. Either or both of these states of mind may be further complicated with weakness of mind, drunkenness and the like, not sufficient to destroy the capacity of the party if free from restraint, deceit and the like; yet making the person in question peculiarly susceptible to the effects of the restraint or deceit to which he is subjected. These questions will be considered separately as far as it is practicable.

§56. Definition and nature of fraud.

Fraud as a tort was a term of exact meaning at Common Law. It consisted of a false representation of a material fact made by one who knew that it was false or in some cases who made a positive statement when he knew that he had not information sufficient to warrant his belief in the truth of such statement, made to one who did not know that it was false, with intent to deceive such person and to influence his action, which did deceive such person and influence his action to his damage. Actual fraud, so-called, has in the law of contracts substantially the same elements as those of the tort.¹ The term fraud is used, however, in a less exact and precise sense than this. In equity especially, any unfair dealing which is ground for equitable relief is called fraud and the courts of equity have carefully refrained from confining this idea within the limits of a definition.² Constructive fraud, therefore, though not a very appropriate name, has a well-recognized place in law.³

Fraud must be distinguished from other legal ideas. It differs from mistake in that the statement of the adversary party is the cause of the false impression in fraud, while it cannot be so in mistake. It differs from misrepresentation in that a misrepresentation is made by one who believes it to be true and has reasonable ground for such belief, while fraud is committed by one who knows that his statement is false, or who makes it posi-

¹ *Derry v. Peek*, L. R. 14 App. Cas. 337; *Cooper v. Schlesinger*, 111 U. S. 148; *Sellar v. Clelland*, 2 Colo. 532; *Mizell v. Upchurch*, — Fla. —; 35 So. 9; *Wheeler v. Baars*, 33 Fla. 696; 15 So. 584; *Crocker v. Manley*, 164 Ill. 282; 56 Am. St. Rep. 196; 45 N. E. 577; *Antle v. Sexton*, 137 Ill. 410; 27 N. E. 691; affirming 32 Ill. App. 437; *Wachsmuth v. Martini*, 45 Ill. App. 244; *Hoefl v. Kock*, 119 Mich. 458; 78 N. W. 556; *Bank v. Byers*, 139 Mo. 627; 41 S. W. 325; *Hitchcock v. Irrigation Co.*, — Neb. —; 95 N. W. 638; *Spencer v. Johnston*, 58 Neb. 44; 78 N. W. 482;

Arthur v. Griswold, 55 N. Y. 400; *Brackett v. Griswold*, 112 N. Y. 454; 20 N. E. 376; *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651; 29 L. R. A. 360; 41 N. E. 414; *Spencer v. King*, 3 Ohio N. P. 270; *Hexter v. Bast*, 125 Pa. St. 52; 11 Am. St. Rep. 874; 17 Atl. 252; *Scott v. Boyd*, — Va. —; 42 S. E. 918; *Dudley v. Minor's Executor*, 100 Va. 728; 42 S. E. 870; *Lake v. Tyree*, 90 Va. 719; 19 S. E. 787. The elements of fraud are discussed in detail in ch. VI.

² See § 176.

³ See ch. XI.

tively without reasonable grounds for believing it to be true. It differs from non-disclosure in that in fraud the party against whom relief is sought does something by word or deed to mislead the adversary party, while in non-disclosure he merely omits to give information

§57. Definition and nature of misrepresentation.

A misrepresentation is a false statement of a material fact made by one party to a contract to the adversary party, with intent to influence his action, which such adversary party believes and in reliance on which he acts to his damage. Misrepresentation is to be distinguished from mistake in that the erroneous belief in misrepresentation is due to the false statement of the other party to the contract, while in mistake such erroneous belief must be due to some other cause. It is distinguished from fraud in that in fraud the party making the false statement has actual or constructive knowledge of its falsity,¹ and makes the statement with intent to deceive the person to whom it is made;² while misrepresentation is essentially a *bona fide* misstatement. It differs from non-disclosure in that in misrepresentation the erroneous belief of one party is caused by the acts of the other; while in non-disclosure it is caused by his omission to speak. While eminent authority treats misrepresentation as in part mistake and in part fraud,³ it possesses peculiarities of its own, and is best discussed as a separate topic. Still it must be admitted that the courts often call it mistake.⁴ To add to the confusion, some courts call misrepresentation "legal fraud,"⁵ or "constructive fraud,"⁶ or *ex post facto* fraud.⁷

¹ See § 56.

² See § 112 *et seq.*

³ Bishop on Contracts, enlarged edition, § 663.

⁴ Crowe v. Lewin, 95 N. Y. 423. (In this case rescission was allowed because of misrepresentation as to the identity of the realty conveyed.) Bigham v. Madison, 103 Tenn. 358; 47 L. R. A. 267; 52 S. W. 1074.

⁵ Schofield, etc., Co. v. Schofield, 71 Conn. 1; 40 Atl. 1046; Newman v. Claffin Co., 107 Ga. 89; 32 S. E.

943; Walters v. Eaves, 105 Ga. 584; 32 S. E. 609; Totten v. Burhans, 91 Mich. 495; 51 N. W. 1119; Zunker v. Kuehn, 113 Wis. 421; 88 N. W. 605.

⁶ Prewitt v. Trimble, 92 Ky. 176; 36 Am. St. Rep. 586; 17 S. W. 356; Vaughn v. Smith, 34 Or. 54; 55 Pac. 99; By statute in Georgia an innocent misrepresentation if acted on is a "legal fraud." Walters v. Eaves, 105 Ga. 584; 32 S. E. 609.

⁷ "He who would avail himself of

§58. Definition and nature of mistake.

Mistake is a term which includes a number of distinct legal concepts, which have in common no more than this, that the party seeking relief was not aware of some fact or rule of law when he entered into the contract in question. A general definition of mistake, which, like an accurate definition will at least indicate the extent and limits of the thing defined, is practically impossible.¹ In the first place, mistake may be (1) of fact, or (2) of law. In the second place, in determining how far mistake is operative we must ascertain (1) whether it affects the execution and the essential elements of a contract, or (2) whether it affects some collateral material matter, or (3) whether it affects some collateral immaterial matter; or (4) whether the parties have made a valid oral contract free from mistake, but a mistake in expressing its terms has been made in reducing it to writing, or (5) whether payment has been made under mistake where no liability in fact existed. Each of these forms of mistake is so essentially different from the others in its nature, and often in its legal effects, that no definition covering all these diverse forms can be framed. However, some definitions, helpful if not comprehensive, have been attempted. Mistake in the broad sense of the term is said to be "that result of ignorance of law or of fact, which has misled a person to commit that which, if he had not been in error, he would not have

his own misrepresentation, even where it was unintentional, is as much open to an imputation of fraud as if its falsity had been known to him." *Tyson v. Passmore*, 2 Pa. St. 122; 44 Am. Dec. 181.

¹ "To formulate an accurate and practically applicable definition of the mistake of fact which will warrant rescission of a contract, has been apparently well-nigh the despair of law writers. Indeed, no definition or general rule has been invented which is sufficient or accurate, except by immediately surrounding it with numerous excep-

tions and qualifications more important than itself. This is not surprising, in view of the fact that the whole doctrine is an invasion or restriction upon that most fundamental rule of the law, that contracts which parties see fit to make shall be enforced, and in view of the further consideration that one or both of the parties is often, if not usually, ignorant or forgetful of some facts, thoughtfulness of which might vary his conduct." *Kowalke v. Light Co.*, 103 Wis. 472; 74 Am. St. Rep. 877; 79 N. W. 762.

done.”² “A mistake of fact is an unconscious ignorance or forgetfulness of the existence or non-existence of a fact, past or present, material to the contract.”³

§59. Definition and nature of non-disclosure.

Pure non-disclosure, as the name implies, is the omission to disclose to the adversary party facts not known to him but known to the party so omitting to make disclosure. It differs from fraud and misrepresentation in that the party omitting to make disclosure does nothing in pure non-disclosure by word or act to mislead the adversary party. While in many respects analogous to mistake, it differs therefrom in this: in pure mistake, the adversary party is not aware of the existence of the mistake, in non-disclosure, he is. It must be conceded, however, that many of the cases classed under mistake are really cases of non-disclosure. Active concealment is a form of fraud and is discussed in connection therewith.¹

§60. Distinction between essential elements of the contract and matters of inducement.

Each of the subjects of fraud, misrepresentation, mistake and non-disclosure must be considered, with reference to its point of contact with the contract. Each of them may (1) concern some one of the essential elements of the contract or (2) concern some collateral though often material matter.

(1) The essential elements of a contract are the parties, the subject-matter, the consideration and the offer and acceptance, which last, in one sense, includes the others. We have already seen in discussing offer and acceptance¹ that the offer as made must be accepted fully and completely, to constitute an agreement. If there is an attempted acceptance by a party other than the one to whom the offer is made, or an acceptance con-

² Chicago, etc., Ry. v. Hay, 119 Ill. 493, 504; 10 N. E. 29; (quoting 3 Jeremy Eq. Jurs. 358; quoted in Story Eq. Juris. § 110).

³ Pom. Eq. Juris. § 839; quoted

in Kowalke v. Light Co., 103 Wis. 472; 74 Am. St. Rep. 877; 79 N. W. 762.

¹ See § 90.

¹ See § 45 *et seq.*

cerning a different subject-matter or consideration, or an acceptance which attempts to modify the terms of the offer, no contract exists. This attempted acceptance, however, may be regarded as a counter-proposition which may in turn be accepted by the original offerer by words or acts. The function of fraud, misrepresentation, mistake, or non-disclosure as to an essential element of a contract is to conceal from one or both of the parties thereto the fact that in reality they have never agreed.² The further function of fraud, misrepresentation, mistake or non-disclosure is to rebut the presumption of offer and acceptance that would otherwise arise from the conduct of the parties. Thus if A makes an offer to B and X accepts, no contract arises. If A acts on X's offer, it would be inferred that A had accepted X's proposition, as that is the legal effect of X's nominal acceptance. A's mistake as to X's identity rebuts the inference that he has accepted X's offer. Like reasoning applies to mistakes in the subject-matter or consideration. If A makes an offer to B, and B attempts to accept with a modification, no contract arises, B's "acceptance" being a rejection with a counter-proposition. If A acts on B's counter-proposition, an acceptance thereof might be inferred from A's conduct. This inference may be rebutted by showing that A, by operative mistake, understood that B had accepted his offer as he made it. Like considerations apply to fraud, misrepresentation and non-disclosure as to an essential element of the contract. They each, in proper cases prevent offer and acceptance from existing where without one of them, the parties would be, by the inevitable legal effect of their conduct, precluded from denying the existence of a contract. Their appearance in an essential element of the contract, therefore, renders it ordinarily void. The principles involved as to fraud, misrepresentation, mistake or non-disclosure concerning an essential element of a contract are discussed most fully under mistake. Indeed some authorities attempt to include them all as forms of mistake. This is

² Thus in speaking of a mistake as to the identity of the reality contracted for the court said: "In this case the minds of the parties never

met. The contract in form was not a contract in fact." Crowe v. Lewin, 95 N. Y. 423.

incorrect as certain complications, such as negligence lead to different results in some of these subjects from that reached in others.

(2) On the other hand, the party to the contract may understand the identity of the adversary party, the consideration, the subject-matter, and the terms of the contract; and may be willing to enter into such contract. His willingness so to enter may, however, be due to an erroneous belief as to some collateral, though possibly highly material matter. This erroneous belief may be caused by fraud, misrepresentation, mistake or non-disclosure. For lack of a better term this may be said to affect a matter of inducement. Such a contract is never void. In some cases it is voidable, in others, valid. It will thus be seen that while fraud, misrepresentation, mistake, and non-disclosure have sharp points of contrast, each with the other, the difference between any two of them is slight when compared with the difference between one of them, for instance, mistake, as affecting some essential element of the contract, and the same defect as affecting some collateral matter. Each of these is more like the others in questions affecting an essential element of the contract than it is like the same defect as affecting a matter of inducement. Accordingly each of these topics will be considered as affecting (1) an essential element of a contract; and (2) a matter of inducement. Matters of inducement will be considered (1) as questions of fact and (2) as question of law.

§61. Effect of making existence of fact a term of contract.

It may be observed before beginning a discussion of the topics of fraud, misrepresentation, mistake and non-disclosure, that if such terms are properly used they all apply to facts which are not carried into the contract by the express stipulation of the parties, and made terms thereof. The validity of the contract may of course be expressly conditioned upon the existence or non-existence of specific facts.¹ In such cases, no enforceable

¹ Sterricker v. McBride, 157 Ill. 70; 41 N. E. 744; Leonard v. Assurance Co., 24 R. I. 7; 96 Am. St.

Rep. 698; 51 Atl. 1049; Harran v. Klaus, 79 Wis. 383; 48 N. W. 479.

contract can be said to exist if the fact is not as stipulated, even though no mistake is made as to the identity of the adversary party, or the subject-matter or the terms of the contract.² Thus where A agreed to make a flouring mill for B, and as both A and B assumed that X's mill produced fifty-five per cent. flour, they agreed that taking X's mill as a basis, the mill to be furnished by A should produce flour five per cent. better than the fifty-five per cent. flour produced by X's mill. Since X's mill did not produce fifty-five per cent. flour, and he refused to convert it so as to make that grade, the court held that the contract between A and B was based on a mistake and was unenforceable.³ When the existence of a certain fact is made a term of the contract, certain results follow which show that false statements concerning such fact cannot amount to fraud and the like. The fact that the parties have conditioned the validity of such contract on the existence of such fact shows that the party to whom such representation is made does not rely upon the truth of such statement; for if he had, he would not have stipulated for the event of its proving false. Accordingly, even if the other elements of fraud are present it is held in many jurisdictions that a false statement of this sort cannot be fraud, since it is not relied upon.⁴ So it is held in many jurisdictions that exacting a warranty upon a matter concerning which a prior representation has been made, merges such representation, and prevents it, even if false, from amounting to fraud or misrepresentation.⁵ Thus a warranty as to the speed of a steamboat, inserted in a

² "It is an attempted contract, assuming the existence of an essential fact which does not exist, and therefore there has been no meeting of the minds in reality and no contract." *Nordyke & Marmon Co. v. Kehlor*, 155 Mo. 643, 655; 78 Am. St. Rep. 600; 56 S. W. 287; (citing *Gardner v. Lane*, 9 All. (Mass.) 492).

³ *Nordyke, etc., Co. v. Kehlor*, 155 Mo. 643; 78 Am. St. Rep. 600; 56 S. W. 287; (citing *Griffith v. Townley*, 69 Mo. 13; 33 Am. Rep. 476;

Third National Bank v. Allen, 59 Mo. 310; *Koontz v. Bank*, 51 Mo. 275; *Kingston Bank v. Eltinge*, 40 N. Y. 391; 100 Am. Dec. 516).

⁴ *St. Vrain Stone Co. v. R. R. Co.*, 18 Colo. 211; 32 Pac. 827; *Elphick v. Hoffman*, 49 Conn. 331; *Holdom v. Ayer*, 110 Ill. 448; *Lillienthal v. Brewing Co.*, 154 Mass. 185; 26 Am. St. Rep. 234; 12 L. R. A. 821; 28 N. E. 151.

⁵ *Andrus v. Refining Co.*, 130 U. S. 643; *Wright v. Phipps*, 90 Fed. 556. See § 116.

contract, prevents a prior false representation as to its speed from amounting to fraud.⁶ Other courts treat a false warranty as fraud.⁷ Whether the reliance was solely on the warranty, or in part on the warranty and in part on the fraudulent representation is treated as a question of fact.⁸ If a contract is conditioned on the existence of a given fact, the contract is discharged if such fact is not as stipulated; or if made a condition precedent, the contract never takes effect even if all the elements of operative fraud, mistake, misrepresentation, or non-disclosure, may be lacking. In the technically correct use of the term, misrepresentation concerns a matter which though material is not made one of the terms of the contract. If the false statement is carried into the contract and becomes one of the terms thereof, as a condition precedent,⁹ or a warranty,¹⁰ different questions arise from those found in mere misrepresentation. It is rather a case of breach, failure of a condition precedent, and the like. However such cases are often explained on the theory of misrepresentation. Thus a contract for the sale of realty expressly conditioned to be void if vendor's representations concerning it should prove untrue, may be avoided in that case even though such representations were made in good faith.¹¹ Among the most prominent examples of misrepresentations which are made terms of contracts are warranties in insurance contracts. A warranty in insurance is in effect a clause providing that the policy shall not be binding unless the statements warranted are literally true.¹² To enable a statement to amount to a warranty, the

⁶ *Williams Transportation Line v. Cole Co.*, 129 Mich. 209; 56 L. R. A. 939; 88 N. W. 473.

⁷ *Kimball v. Saguin*, 86 Ia. 186; 53 N. W. 116; *Breeding v. Flannery* (Ky.), 14 S. W. 907; *Piche v. Robbins*, 24 R. I. 325; 53 Atl. 92; *Rhode v. Alley*, 27 Tex. 443. See § 116.

⁸ A case of collateral guaranty. *Busch v. Wilcox*, 82 Mich. 315; 46 N. W. 940; rehearing denied, 82 Mich. 336; 21 Am. St. Rep. 563; 47 N. W. 328. See § 116.

⁹ See post, this section.

¹⁰ See post, this section.

¹¹ *Brett v. Van Auken*, 99 Ia. 553; 68 N. W. 891.

¹² *Moulou v. Ins. Co.*, 111 U. S. 335; *Alabama, etc., Ins. Co. v. Johnston*, 80 Ala. 467; 60 Am. Rep. 112; 2 So. 125; *Rogers v. Ins. Co.*, 121 Ind. 570; 23 N. E. 498; *Aloe v. Life Association*, 147 Mo. 561; 49 S. W. 553; *Aetna Ins. Co. v. Simmons*, 49 Neb. 811; 69 N. W. 125; *Chrisman v. Ins. Co.*, 16 Or. 283; 18 Pac. 466; *Phoenix Assurance Co. v.*

policy must contain a stipulation to that effect. It must not merely be made in the application.¹³ A warranty may be created by a clause expressly providing that the policy shall not take effect unless such facts are as stated,¹⁴ or by a clause warranting the truth of certain statements.¹⁵ Such a warranty, if made a part of the policy becomes a condition precedent.¹⁶ The effect of such warranties is to permit the insurance company to avoid the policy if the statement thus warranted is untrue, irrespective of other questions that would be important in fraud, misrepresentation, or mistake.¹⁷ A warranty in an insurance policy if broken avoids the contract by reason solely of the non-existence of the fact warranted, without any reference to the

Mfg. Co., 92 Tex. 297; 49 S. W. 222.

¹³ Mutual Benefit Life Ins. Co. v. Lehman, 132 Ala. 640; 32 So. 733; Royal Neighbors v. Wallace, 64 Neb. 330; 89 N. W. 758; modified on rehearing, — Neb. —; 92 N. W. 897.

¹⁴ John Hancock, etc., Ins. Co. v. Houpt, 113 Fed. 572; Triple Link, etc., Association v. Williams, 121 Ala. 138; 77 Am. St. Rep. 34; 26 So. 19; Gould v. Ins. Co., 47 Me. 403; 74 Am. Dec. 494; Cooper v. Ins. Co., 50 Pa. St. 299; 88 Am. Dec. 544.

¹⁵ Aloe v. Life Association, 147 Mo. 561; 49 S. W. 553.

¹⁶ Dimick v. Ins. Co., 67 N. J. L. 367; 51 Atl. 692; same case, — N. J. L. —; 55 Atl. 291.

¹⁷ Aetna Life Ins. Co. v. France, 91 U. S. 510; McClain v. Assurance Society, 105 Fed. 834; McKenzie v. Ins. Co., 112 Cal. 548; 44 Pac. 922; Noone v. Ins. Co., 88 Cal. 152; 26 Pac. 103; Peterson v. Life Association, 115 Ia. 668; 87 N. W. 397; Nelson v. Ins. Co., 110 Ia. 600; 81 N. W. 807; Wilkins v. Ins. Co., 57 Ia. 529; 10 N. W. 916; Petitpain v. Life Association, 52 La. Ann. 503; 27 So. 113; Cobb v. Benefit

Association, 153 Mass. 176; 25 Am. St. Rep. 619; 10 L. R. A. 666; 26 N. E. 619; Sheldon v. Ins. Co., 124 Mich. 303; 82 N. W. 1068; Chambers v. Ins. Co., 64 Minn. 495; 58 Am. St. Rep. 549; 67 N. W. 367; Van Cleave v. Surety Co., 82 Mo. App. 668; Metropolitan Life Ins. Co. v. McTague, 49 N. J. L. 587; 60 Am. Rep. 661; 9 Atl. 766; Meyers v. Woodmen of the World, 193 Pa. St. 470; 44 Atl. 563; March v. Ins. Co., 186 Pa. St. 629; 65 Am. St. Rep. 887; 40 Atl. 1100; Mengel v. Ins. Co., 176 Pa. St. 280; 35 Atl. 197; United Brethren, etc., Society v. O'Hara, 120 Pa. St. 256; 13 Atl. 932; Sweeney v. Ins. Co., 19 R. I. 171; 61 Am. St. Rep. 751; 36 Atl. 9; Ins. Co. v. Wicker, 93 Tex. 390; 55 S. W. 740; Mutual, etc., Ins. Co. v. Simpson, 88 Tex. 333; 53 Am. St. Rep. 757; 28 L. R. A. 765; 31 S. W. 501; Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338; 16 Am. St. Rep. 893; 7 L. R. A. 217; 12 S. W. 621; National Life Association v. Hopkins, 97 Va. 167; 33 S. E. 539; McGowan v. Supreme Court, 107 Wis. 462; 83 N. W. 775; Boyle v. Relief Association, 95 Wis. 312; 70 N. W. 351.

fraud of the insured.¹⁸ That he believes in good faith that the statement as made by him is true does not prevent the warranty from avoiding the policy.¹⁹ Breach of warranty avoids the policy even if the company through its agent is fully advised of the real state of facts.²⁰ Breach of warranty will in the absence of statute avoid a contract even if the fact warranted was immaterial.²¹ If material, the falsity of the statement thus warranted avoids the contract even more clearly. Thus in fire insurance the falsity of a warranty as to title;²² the existence²³ or

¹⁸ *Aetna Life Ins. Co. v. France*, 91 U. S. 510; *Standard, etc., Ins. Co. v. Sale*, 121 Fed. 664; 61 L. R. A. 337; 57 C. C. A. 418; *Mutual, etc., Ins. Co. v. Robison*, 58 Fed. 723; 22 L. R. A. 325; 7 C. C. A. 444; *Glendale Woollen Co. v. Ins. Co.*, 21 Conn. 19; 54 Am. Dec. 309; *Warren Deposit Bank v. Deposit Co.*, — Ky. —; 74 S. W. 1111; *Cobb v. Benefit Association*, 153 Mass. 176; 25 Am. St. Rep. 619; 10 L. R. A. 666; 26 N. E. 230; *Aloe v. Life Association*, 147 Mo. 561; 49 S. W. 553; *Dimick v. Ins. Co.* — N. J. L. —; 55 Atl. 291; same case, *Dimick v. Ins. Co.*, 67 N. J. L. 367; 51 Atl. 692; *Leonard v. Assurance Co.*, 24 R. I. 7; 96 Am. St. Rep. 698; 51 Atl. 1049. For discussion of representation and warranty, see *Reese v. Bates*, 94 Va. 321; 26 S. E. 865.

¹⁹ *Morris v. Ins. Co.*, 106 Ga. 461; 32 S. E. 595; *Cobb v. Benefit Association*, 153 Mass. 176; 25 Am. St. Rep. 619; 10 L. R. A. 666; 26 N. E. 230; *Clemans v. Supreme Assembly*, 131 N. Y. 485; 16 L. R. A. 33; 30 N. E. 496; *Ins. Co. v. Pyle*, 44 O. S. 19; 58 Am. Rep. 78; 4 N. E. 465; *Standard, etc., Ins. Co. v. Lauderdale*, 94 Tenn. 635; 30

S. W. 732; *National Fraternity v. Karnes*, 24 Tex. Civ. App. 607; 60 S. W. 576; *Fraser v. Ins. Co.*, 114 Wis. 510; 90 N. W. 476.

²⁰ *Triple Link, etc., Association v. Williams*, 121 Ala. 138; 77 Am. St. Rep. 34; 26 So. 19.

²¹ *Kelly v. Ins. Clearing Co.*, 113 Ala. 453; 21 So. 361; *McKenzie v. Ins. Co.*, 112 Cal. 548; 44 Pac. 922; *Germier v. Ins. Co.*, 109 La. 341; 33 So. 361; *Maine Beneficial Association v. Parks*, 81 Me. 79; 10 Am. St. Rep. 240; 16 Atl. 339; *Cobb v. Benefit Association*, 153 Mass. 176; 25 Am. St. Rep. 619; 10 L. R. A. 666; 26 N. E. 230; *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Cerys v. Ins. Co.*, 71 Minn. 338; 73 N. W. 849; *Graham v. Ins. Co.*, 87 N. Y. 69; 41 Am. Rep. 349; *Sweeney v. Ins. Co.*, 19 R. I. 171; 61 Am. St. Rep. 751; 36 Atl. 9; *Mutual Life Ins. Co. v. Simpson*, 88 Tex. 333; 53 Am. St. Rep. 757; 28 L. R. A. 765; 31 S. W. 501; *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195; 35 S. E. 719; affirming 35 S. E. 361.

²² *Ordway v. Chace*, 57 N. J. Eq. 478; 42 Atl. 149.

²³ *Seal v. Ins. Co.*, 59 Neb. 253; 80 N. W. 807.

amount²⁴ of incumbrances upon the property insured;²⁵ in life insurance the falsity of a warranted statement as to when insured consulted a physician,²⁶ or the occupation of insured,²⁷ or previous applications for insurance made by him,²⁸ and in guaranty insurance the amount of losses in the preceding year,²⁹ are all material and avoid the policy if false. The existence of a chattel mortgage has been held immaterial.³⁰ So the warranty may involve a future fact which could not be the subject of fraud.³¹ The effect of the doctrine of warranties in insurance has been so oppressive that they are not favored in construction. Wherever consistent with the intention of the parties a statement is construed as a representation rather than as a warranty.³² Even the use of the word "warrant" is not conclusive, if the context shows that the statement may be taken fairly as a representation.³³ This result is reached by treating the warranty as

²⁴ *Niles v. Ins. Co.*, 119 Mich. 252; 77 N. W. 933; *Johnston v. Ins. Co.*, 107 Wis. 337; 83 N. W. 641; *Stevens v. Ins. Co.*, 81 Wis. 335; 29 Am. St. Rep. 905; 51 N. W. 555.

²⁵ *Smith v. Ins. Co.*, 60 Vt. 682; 6 Am. St. Rep. 144; 1 L. R. A. 216; 15 Atl. 353.

²⁶ *Aloe v. Life Association*, 147 Mo. 561; 49 S. W. 553.

²⁷ *Triple Link, etc., Association v. Williams*, 121 Ala. 138; 77 Am. St. Rep. 34; 26 So. 19.

²⁸ *Jeffries v. Ins. Co.*, 22 Wall. (U. S.) 47; *Security Mutual Life Ins. Co. v. Webb*, 106 Fed. 808; 55 L. R. A. 122; 45 C. C. A. 648; *Kelly v. Clearing Co.*, 113 Ala. 453; 21 So. 361; *Clapp v. Benefit Association*, 146 Mass. 519; 16 N. E. 433; *Aloe v. Life Association*, 147 Mo. 561; 49 S. W. 553; *Mutual Life Ins. Co. v. Nichols* (Tex. Civ. App.), 26 S. W. 998; affirming 24 S. W. 910.

²⁹ *American, etc., Co. v. Mfg. Co.*, 95 Fed. 111; 36 C. C. A. 671.

³⁰ *Light, etc., Co. v. Ins. Co.*, 105 Tenn. 480; 58 S. W. 851.

³¹ *German Ins. Co. v. Russell*, 65 Kan. 373; 58 L. R. A. 234; 69 Pac. 345; *Liverpool, etc., Ins. Co. v. Lumber Co.*, 11 Okla. 585; 69 Pac. 938; *Leonard v. Assurance Co.*, 24 R. I. 7; 96 Am. St. Rep. 698; 51 Atl. 1049; *Findlay v. Ins. Co.*, 74 Vt. 211; 93 Am. St. Rep. 885; 52 Atl. 429.

³² *Mouler v. Ins. Co.*, 111 U. S. 335; *Kansas City First Nat. Bank v. Ins. Co.*, 95 U. S. 673; *McClain v. Assurance Society*, 110 Fed. 80; 49 C. C. A. 31; *Globe, etc., Ins. Association v. Wagner*, 188 Ill. 133; 80 Am. St. Rep. 169; 52 L. R. A. 649; 58 N. E. 970; affirming 90 Ill. App. 444; *Rogers v. Ins. Co.*, 121 Ind. 570; 23 N. E. 498; *Supreme Council v. Brashears*, 89 Md. 624; 73 Am. St. Rep. 244; 43 Atl. 866; *Aetna Ins. Co. v. Simmons*, 49 Neb. 811; 69 N. W. 125.

³³ *Fidelity Mutual Life Association v. Jeffords*, 107 Fed. 402; 53 L. R. A. 193; 46 C. C. A. 377; *McClain v. Assurance Society*, 110 Fed. 80; 49 C. C. A. 31; *National Bank v. Ins. Co.*, 88 Cal. 497; 22 Am. St.

a warranty of good faith only,³⁴ especially where the insurer knows that the insured has no personal knowledge of the facts stated,³⁵ unless it appears clearly that the insured intended to warrant the accuracy of his statements.

In order to protect innocent policy holders, legislation has provided in some states that to avoid the policy a representation³⁶ which is construed to include a warranty³⁷ or statements not essentially material which the parties agree on as material,³⁸ must be material; or that they must be made fraudulently.³⁹ By statute in some jurisdictions, falsity of a warranty is ground for avoiding the policy only if made fraudulently or if it increases the risk.⁴⁰ Other statutes make warranties as such

Rep. 324; 26 Pac. 509; *Globe, etc., Association v. Wagner*, 188 Ill. 133; 80 Am. St. Rep. 169; 58 N. E. 970; affirming 90 Ill. App. 444.

³⁴ *Connecticut, etc., Ins. Co. v. Trust Co.*, 112 U. S. 250; *Moulou v. Ins. Co.*, 111 U. S. 335; *Union Mutual Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467; 60 Am. Rep. 112; 59 Am. Rep. 816; 2 So. 125; *Bancroft v. Home Benefit Association*, 120 N. Y. 14; 8 L. R. A. 68; 23 N. E. 997; *Home Mutual Life Association v. Gillespie*, 110 Pa. St. 84; 1 Atl. 340.

³⁵ *Globe, etc., Ins. Association v. Wagner*, 188 Ill. 133; 80 Am. St. Rep. 169; 52 L. R. A. 649; 58 N. E. 970; *Henn v. Ins. Co.*, 67 N. J. L. 310; 51 Atl. 689.

³⁶ *Fidelity Mutual Life Association v. Miller*, 92 Fed. 63; 34 C. C. A. 211; *Supreme Council v. Brashears*, 89 Md. 624; 73 Am. St. Rep. 244; 43 Atl. 866; *Dolan v. Life Association*, 173 Mass. 197; 53 N. E. 398; *Jacobs v. Life Association*, 142 Mo. 49; 43 S. W. 375; *Insurance Co. v. Leslie*, 47 O. S. 409; 9 L. R. A. 45; 24 N. E. 1072; *March v. Ins. Co.*, 186 Pa. St. 629; 65 Am.

St. Rep. 887; 40 Atl. 1100; *Light & Co. v. Ins. Co.*, 105 Tenn. 480; 58 S. W. 851. Such a statute applies to mutual benefit societies. *Supreme Council v. Brashears*, 89 Md. 624; 73 Am. St. Rep. 244; 43 Atl. 866.

³⁷ *John Hancock, etc., Ins. Co. v. Warren*, 181 U. S. 73; affirming 59 O. S. 45; 51 N. E. 546; *Fidelity Mutual Life Association v. Miller*, 92 Fed. 63; 34 C. C. A. 211; *Dolan v. Life Association*, 173 Mass. 197; 53 N. E. 398.

³⁸ *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304; *Fidelity Mutual Life Association v. Miller*, 92 Fed. 63; 34 C. C. A. 211; *White v. Assurance Society*, 163 Mass. 108; 27 L. R. A. 398; 39 N. E. 771; *Herman v. Life Association*, 151 Pa. St. 17; 24 Atl. 1064.

³⁹ *McCarty v. Ins. Co.*, 126 N. C. 820; 36 S. E. 284; *Albert v. Ins. Co.*, 122 N. C. 92; 65 Am. St. Rep. 693; 30 S. E. 327.

⁴⁰ *Maryland Casualty Co. v. Gehrmann*, 96 Md. 634; 54 Atl. 678; *Price v. Ins. Co.*, — Minn. —; 95 N. W. 118; *First National Bank v. Guaranty Co.*, — Tenn. —; 75 S. W. 1076.

inoperative unless the matter misrepresented actually contributes to the contingency on which the policy becomes due.⁴¹ Other statutes make warranties inoperative unless material and made fraudulently.⁴² The beneficial effect of such statutes has been greatly lessened by holding that such provisions do not apply to conditions precedent to the attaching of liability under the policy.⁴³

⁴¹ *Franklin Life Ins. Co. v. Galligan*, — Ark. —; 73 S. W. 102; *Jenkins v. Ins. Co.*, 171 Mo. 375; 71 S. W. 688. For the construction of similar statutes, see *Penn, etc., Ins. Co. v. Trust Co.*, 72 Fed. 413; 38 L. R. A. 33; 19 C. C. A. 286; *McGannon v. Ins. Co.*, 127 Mich. 636; 89 Am. St. Rep. 501; 54 L. R. A.

739; 87 N. W. 61; *Hermany v. Life Association*, 151 Pa. St. 17; 24 Atl. 1064.

⁴² *John Hancock, etc., Ins. Co. v. Warren*, 59 O. S. 45; 51 N. E. 546; affirmed in *John Hancock, etc., Ins. Co. v. Warren*, 181 U. S. 73.

⁴³ *Metropolitan Life Ins. Co. v. Howle*, 62 O. S. 204; 56 N. E. 908.

CHAPTER V.

FRAUD, MISREPRESENTATION, MISTAKE AND NON-DISCLOSURE AS TO AN ESSENTIAL ELEMENT OF THE CONTRACT.

I.—FRAUD.

§62. Fraud as to an essential element of a contract.

Fraud as to an essential element of a contract exists where one party thereto intentionally misleads the other as to one of the elements of the contract into which they are entering. A fraudulent representation as to the identity of the subject matter,¹ as where, in addition to false statements as to quality, a tract of land is pointed out which is not the one conveyed,² or of the adversary party, where the identity of such party is material,³ each prevents the apparent offer and acceptance from constituting a contract. A fraudulent misstatement of the terms of an oral contract when so made as to deceive the adversary party avoids the contract. Thus X as agent for A had sold goods to B, payable on delivery. B represented to A that X had agreed for a sale on credit, and B sent A an alleged copy of a letter from X authorizing such credit. As X was absent when B wrote, A delivered the goods to B on credit. It was held that B could recover the goods.⁴

§63. Fraud — Contents of written contract.

The commonest form of fraud in the *factum* exists where

¹ Nelson v. Carlson, 54 Minn. 90; 465; Fox v. Tabel, 66 Conn. 397; 34 55 N. W. 821. Atl. 101; Rodliff v. Dallinger, 141

² Mitchell v. McDougal, 62 Ill. Mass. 1; 55 Am. Rep. 439; 4 N. E. 498; Nelson v. Carlson, 54 Minn. 805; Hamet v. Letcher, 37 O. S. 90; 55 N. W. 821; Nearen v. Bakewell, 110 Mo. 645; 19 S. W. 988. 356.

³ Gordon v. Street (1899), 2 Q. B. ⁴ Rauh v. Waterman, 29 Ind. App. 344; 63 N. E. 42.

641; Cundy v. Lindsay, L. R. 3 App.

an instrument in writing is drawn up and signed by one party under a false belief as to its contents, due to the fraud of the adversary party. In such case the contract is generally held to be void.¹ Hence such a contract need not be rescinded,² and the party seeking to avoid liability need not return what he has received thereunder.³ Thus substituting a quit-claim deed for a mortgage,⁴ or a deed for a power to collect rents,⁵ omission to read to mortgagor a clause assuming a mortgage,⁶ or inserting without the knowledge of the adversary party a clause making a certain pledge collateral security for all debts owing, instead of for the debt in question,⁷ a false statement as to the covenants

¹ *Folmar v. Siler*, 132 Ala. 297; 31 So. 719; *Beck, etc., Co. v. Houppert*, 104 Ala. 503; 53 Am. St. Rep. 77; 16 So. 522; *Bank v. Webb*, 108 Ala. 132; 19 So. 14; *Tillis v. Austin*, 117 Ala. 262; 22 So. 975; *Moore v. Copp*, 119 Cal. 429; 51 Pac. 630; *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 123; *McBride v. Publishing Co.*, 102 Ga. 422; 30 S. E. 999; *Indiana, etc., Ry. v. Fowler*, 201 Ill. 152; 94 Am. St. Rep. 158; 66 N. E. 394; affirming 103 Ill. App. 565; *Puffer v. Smith*, 57 Ill. 527; *Phelan v. Kuhn*, 51 Ill. App. 644; *Givan v. Masterson*, 152 Ind. 127; 51 N. E. 237; *Loucks v. Taylor*, 23 Ind. App. 245; 55 N. E. 238; *Haldeman v. Bank*, 19 Ky. Law Rep. 1691; 44 S. W. 383; *Whiting v. Price*, 172 Mass. 240; 70 Am. St. Rep. 262; 51 N. E. 1084; *Trambly v. Ricard*, 130 Mass. 259; *Shrimpton v. Netzorg*, 104 Mich. 225; 62 N. W. 343; *Kranich v. Sherwood*, 92 Mich. 397; 52 N. W. 741; *McGinn v. Tobey*, 62 Mich. 252; 4 Am. St. Rep. 848; 28 N. W. 818; *Alexander v. Brogley*, 62 N. J. L. 584; 41 Atl. 691; affirmed 63 N. J. L. 307; 43 Atl. 888; *Smith v. Smith*, 134 N. Y. 62; 30 Am. St. Rep. 617; 31 N. E. 258;

Albany City Savings Inst. v. Burdick, 87 N. Y. 40; *Clinch, etc., Co. v. Willing*, 180 Pa. St. 165; 57 Am. St. Rep. 626; 36 Atl. 737; *Rathbone v. Frost*, 9 Wash. 162; 37 Pac. 298; *Bostwick v. Ins. Co.*, 116 Wis. 392; 92 N. W. 246; modifying on rehearing 116 Wis. 392; 89 N. W. 538; *Warder, etc., Co. v. Whitish*, 77 Wis. 430; 46 N. W. 540.

² "It never had any binding force and there was nothing to rescind." *Indiana, etc., Ry. v. Fowler*, 201 Ill. 152; 94 Am. St. Rep. 158; 66 N. E. 394; affirming 103 Ill. App. 565; *Pawnee Coal Co. v. Royce*, 184 Ill. 402; 56 N. E. 621.

³ *Indiana, etc., Ry. v. Fowler*, 201 Ill. 152; 94 Am. St. Rep. 158; 66 N. E. 394; affirming 103 Ill. App. 565. *Contra*, that he must return what he has received. *Chicago, etc., R. R. v. Curtis*, 51 Neb. 442; 66 Am. St. Rep. 456; 71 N. W. 42.

⁴ *Givan v. Masterson*, 152 Ind. 127; 51 N. E. 237.

⁵ *Smith v. Smith*, 134 N. Y. 62; 30 Am. St. Rep. 617; 31 N. E. 258.

⁶ *Loucks v. Taylor*, 23 Ind. App. 245; 55 N. E. 238.

⁷ *Haldeman v. Bank*, 19 Ky. Law Rep. 1691; 44 S. W. 383.

in a written lease,⁸ or the amount of goods specified in a written order,⁹ or the manner of payment,¹⁰ each makes such instruments void. Whether fraud in the *factum* exists in the particular case is a question of fact.¹¹

§64. Negligence as affecting fraud in the execution.

If the party who has been induced to execute a written contract by fraudulent representations as to its contents seeks to avoid liability thereunder, it is clear that he has never in fact assented to the contract as written. Whether the circumstances attending the execution may not under some circumstances estop him from making this defense is a question upon which there is a conflict of authority. Some courts make the degree of care exercised by the defrauded party the test as to his liability. If the party defrauded is guilty of no negligence,¹ as where he is unable to read from illiteracy,² defective eye-

⁸ *Phelan v. Kuhn*, 51 Ill. App. 644.

⁹ *Shrimpton v. Netzorg*, 104 Mich. 225; 62 N. W. 343.

¹⁰ *Clinch, etc., Co. v. Willing*, 180 Pa. St. 163; 57 Am. St. Rep. 626; 36 Atl. 737.

¹¹ *Indiana, etc., Ry. v. Fowler*, 201 Ill. 152; 94 Am. St. Rep. 158; 66 N. E. 394; affirming 103 Ill. App. 565; *Pioneer Cooperage Co. v. Romanowicz*, 186 Ill. 9; 57 N. E. 864.

¹ *Linington v. Strong*, 107 Ill. 295; *Alfred Shrimpton & Sons v. Philbrick*, 53 Minn. 366; 55 N. W. 551; *Cottrill v. Krum*, 100 Mo. 397; 18 Am. St. Rep. 549; 13 S. W. 753; *Bridger v. Goldsmith*, 143 N. Y. 424; 38 N. E. 458; *Albany, etc., Institution v. Burdick*, 87 N. Y. 40.

² *Pigot's Case*, 6 Coke 47 (Part XI., 26b; *Thoroughgood's Case*, 1 Coke 435 (Part II., 5b); *Thoroughgood's Case*, 1 Coke 444 (Part II., 9a); *Meyer v. Haas*, 126 Cal. 560; 58 Pac. 1042 (citing *Mullen v. Railroad Co.*, 127

Mass. 86; 34 Am. Rep. 349; *Chicago, etc., Railway Co. v. Lewis*, 109 Ill. 120; *Senter v. Senter*, 70 Cal. 619; 11 Pac. 782; *Wilson v. Moriarty*, 77 Cal. 596; 20 Pac. 134; 88 Cal. 207; 26 Pac. 85; *Sullivan v. Moorhead*, 99 Cal. 157; 33 Pac. 796; distinguishing *Hawkins v. Hawkins*, 50 Cal. 558; *Metropolitan, etc., Association v. Esche*, 75 Cal. 513; 17 Pac. 675; *Rockford, etc., Ry. Co. v. Shunick*, 65 Ill. 223; *Union, etc., Ins. Co. v. Huyck*, 5 Ind. App. 474; 32 N. E. 580; *Green v. Wilkie*, 98 Ia. 74; 60 Am. St. Rep. 184; 36 L. R. A. 434; 66 N. W. 1046; *Winfield National Bank v. Croco*, 46 Kan. 620; 26 Pac. 939; *Sibley v. Holcomb*, 104 Ky. 670; 47 S. W. 765; *Schaller v. Borger*, 47 Minn. 357; 50 N. W. 247; *Campbell v. Doggett*, (Miss.); 23 So. 371; *Vandergrif v. Brock*, 89 Mo. App. 411; *Spelts v. Ward*, (Neb.), 96 N. W. 56; *Decker v. Hardin*, 5 N. J. L. 579. Even if illiterate he cannot in some jurisdictions rely on a state-

sight,³ or ignorance of the language in which the instrument is written,⁴ or if the party who makes the fraudulent representations prevents him from reading the instrument by some trick or artifice, as by claiming that if he stops to read it, the other party will miss his train,⁵ or by putting terms in very small type,⁶ or by getting him, while dazed by the shock of a railroad accident to sign a release of all damages, stating that it was a receipt for a new suit of clothes to replace those torn,⁷ the instrument is clearly void.

If on the other hand the party to whom the false statement is made reads the instrument, no fraud exists,⁸ as he has full knowledge of all material facts.⁹ So if the party alleging fraud is advised of such facts as should put him especially upon inquiry, as where he knows that an assignment has been prepared by the assignee and forwarded to the latter's attorneys,¹⁰ he cannot allege fraud where he omits to read the instrument.

If the party defrauded could read, has a chance to read, and omits to read the instrument relying on the adversary party's statement of its contents, the instrument should on principle be

ment of the legal effect of the contract as distinguished from the reading of it. *Georgia Home Ins. Co. v. Warten*, 113 Ala. 479; 59 Am. St. Rep. 129; 22 So. 288; *Hawkins v. Hawkins*, 50 Cal. 558.

³ *Loucks v. Taylor*, 23 Ind. App. 245; 55 N. E. 238; *Dashiel v. Harshman*, 113 Ia. 283; 85 N. W. 85; *Winfield National Bank v. Croco*, 46 Kan. 620; 26 Pac. 939; *First National Bank v. Deal*, 55 Mich. 592; 22 N. W. 53.

⁴ *Meyer v. Haas*, 126 Cal. 560; 58 Pac. 1042; *R. J. Gunning v. Cusack*, 50 Ill. App. 290; *Adolph v. Ry. Co.*, 58 Minn. 178; 59 N. W. 959; *Beck, etc., Co. v. Obert*, 54 Mo. App. 240.

⁵ *Wood v. Safe, etc., Co.*, 96 Ga. 120; 22 S. E. 909; *McBride v. Publishing Co.*, 102 Ga. 422; 30 S. E. 999.

⁶ *Keller v. Ins. Co.*, 28 Ind. 170.

⁷ *Bliss v. R. R.*, 160 Mass. 447; 39

Am. St. Rep. 504; 36 N. E. 65. See for similar facts *Och v. Ry.*, 130 Mo. 27; 36 L. R. A. 442; 31 S. W. 962.

⁸ *Oliphant v. Liversidge*, 142 Ill. 160; 30 N. E. 334; *James v. Dalbey*, 107 Ia. 463; 78 N. W. 51 (citing *Reid, etc., Co. v. Bradley*, 105 Ia. 220; 74 N. W. 896; *Chicago Cottage Organ Co. v. Caldwell*, 94 Ia. 584; 63 N. W. 336; *Jenkins v. Coal Co.*, 82 Ia. 618; 48 N. W. 970; *Roundy v. Kent*, 75 Ia. 662; 37 N. W. 146; *McKinney v. Herrick*, 66 Ia. 414; 23 N. W. 767; *McCormack v. Molburg*, 43 Ia. 561).

⁹ See § 117.

¹⁰ *Terry v. Ins. Co.*, 116 Ala. 242; 22 So. 532. Even though such attorneys tell assignor that it is the release that he had agreed to sign he cannot allege fraud where he omits to read the instrument.

treated as void, as between the parties thereto, since it should be no defense for the party committing the fraud to say that the other party was negligent in believing him. The majority of the courts take this view of such cases;¹¹ but other courts hold that such party can have no relief since his negligence is the cause of his damage.¹²

§65. Relations of special trust and confidence.

Even where false representations as to the contents of a written contract are not treated as fraud in the absence of special

¹¹ *Bates v. Harte*, 124 Ala. 427; 82 Am. St. Rep. 186; 26 So. 898 (obiter); *Beck, etc., Co. v. Houppert*, 104 Ala. 503; 53 Am. St. Rep. 77; 16 So. 522; *Bank v. Webb*, 108 Ala. 132; 19 So. 14; *Tillis v. Austin*, 117 Ala. 262; 22 So. 975; *Cannon v. Lindsey*, 85 Ala. 198; 7 Am. St. Rep. 38; 3 So. 676; *Davis v. Snider*, 70 Ala. 315; *Foster v. Johnson*, 70 Ala. 249; *Wenzel v. Schulz*, 78 Cal. 221; 20 Pac. 404; *Brooks v. Matthews*, 78 Ga. 739; 3 S. E. 627; *Givan v. Masterson*, 152 Ind. 127; 51 N. E. 237; *Whiting v. Price*, 172 Mass. 240; 70 Am. St. Rep. 262; 51 N. E. 1084; *Freedley v. French*, 154 Mass. 339; 28 N. E. 272; *First National Bank v. Deal*, 55 Mich. 592; 22 N. W. 53; *Anderson v. Walter*, 34 Mich. 113; *Maxfield v. Schwartz*, 45 Minn. 150; 10 L. R. A. 606; 47 N. W. 448; *Story v. Gammell*, — Neb. —; 94 N. W. 982; *Cole Bros. v. Williams*, 12 Neb. 440; 11 N. W. 875; *Alexander v. Brogley*, 62 N. J. L. 584; 41 Atl. 691; affirmed 63 N. J. L. 307; 43 Atl. 888; *Smith v. Smith*, 134 N. Y. 62; 30 Am. St. Rep. 617; 31 N. E. 258.

¹² *Taylor v. Fleckenstein*, 30 Fed. 99; *Hazard v. Griswold*, 21 Fed. 178; *Georgia Home Ins. Co. v. Warten* 113 Ala. 479; 59 Am. St. Rep. 129; 22 So. 288; *Dunham Lumber*

Co. v. Holt, 123 Ala. 336; 26 So. 663; *Kimmell v. Skelly*, 130 Cal. 555; 62 Pac. 1067; *Chicago, etc., Co. v. Summerour*, 101 Ga. 820; 29 S. E. 291; *Ruddell v. Dillman*, 73 Ind. 518; 38 Am. Rep. 152; *Woollen v. Whitacre*, 73 Ind. 198; *Fisher v. Von Behren*, 70 Ind. 19; 36 Am. Rep. 162; *Woollen v. Ulrich*, 64 Ind. 120; *Nebeker v. Cutsinger*, 48 Ind. 436; *Bannister v. McIntire*, 112 Ia. 600; 84 N. W. 707; *Reid v. Bradley*, 105 Ia. 220; 74 N. W. 896; *Wallace v. Ry.*, 67 Ia. 547; 25 N. W. 772; *Gullihier v. Ry.*, 59 Ia. 416; 13 N. W. 429; *McCormack v. Molburg*, 43 Ia. 561; *Maine, etc., Ins. Co. v. Hodgkins*, 66 Me. 109; *Magee v. Verity*, 97 Mo. App. 486; 71 S. W. 472; *Dellinger v. Gillespie*, 118 N. C. 737; 24 S. E. 538; *Baum v. Raley*, 53 S. Car. 32; 30 S. E. 713; *Gibson v. Brown* (Tex. Civ. App.), 24 S. W. 574; *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109; 84 N. W. 14; *Standard Mfg. Co. v. Slot*, — Wis. —; 98 N. W. 923. "While persons on the faith of another's word alone, every day sign contracts without reading them, the law has ever adjudged this such indifference as will preclude a remedy in event of deception." *Bonnot Co. v. Newman*, 108 Ia. 158; 78 N. W. 817; quoted in *Bannister v. McIntire*, 112 Ia. 600; 84 N. W. 707.

circumstances, a different result is reached if the parties to the contract are in relations of special trust and confidence towards each other. The doctrine here involved is a special application of constructive fraud. As will be discussed hereafter,¹ many statements which would not amount to actual fraud if made by one party who is dealing with the other at arm's length, do amount to constructive fraud when made by one who occupies relations of special trust and confidence towards another. Hence even in jurisdictions where representation as to the contents of a written contract is held not to be fraud if the adversary party has a fair opportunity to read such contract and the parties are dealing at arm's length, such representations are treated as amounting to fraud if made by the superior in a relation of special trust and confidence.² Thus where a child relies on statements of its parent as to the contents of a written contract,³ or a nephew relies on the statements of an aunt who was *in loco parentis* to him,⁴ or a client relies on the statements of his attorney,⁵ fraud exists though the party reposing such confidence had an opportunity to read the contract in question.

§66. Rights of bona fide holder of negotiable contract.

If the instrument is negotiable, and is in the hands of *bona fide* holder, the question of negligence is held the test of liability. If the maker signed without knowing the nature of the instrument and was free from negligence,¹ as in case of illiteracy,² as where he could not read, and a note of one thousand dollars was read to him as one hundred dollars, and the name

¹ See § 199.

² *Moore v. Copp*, 119 Cal. 429; 51 Pac. 630; *Robinson v. Glass*, 94 Ind. 211; *Rider v. Kelso*, 53 Ia. 367; 5 N. W. 509; *Smith v. Smith*, 134 N. Y. 62; 30 Am. St. Rep. 617; 31 N. E. 258; *McGinn v. Tobey*, 62 Mich. 252; 28 N. W. 818; *Bowen v. Wolff*, 23 R. I. 56; 49 Atl. 395.

³ *Rider v. Kelso*, 53 Ia. 367; 5 N. W. 509.

⁴ *Smith v. Smith*, 134 N. Y. 62; 30 Am. St. Rep. 617; 31 N. E. 258.

⁵ *McGinn v. Tobey*, 62 Mich. 252; 28 N. W. 818.

¹ *Willard v. Nelson*, 35 Neb. 651; 37 Am. St. Rep. 455; 53 N. W. 572; *De Camp v. Hamma*, 29 O. S. 467; *Walker v. Ebert*, 29 Wis. 194; 9 Am. Rep. 548.

² *Keller v. Ruppold*, 115 Wis. 636; 95 Am. St. Rep. 974; 92 N. W. 364.

of the payee was changed,³ the note is unenforceable even in the hands of a *bona fide* holder.

If the maker signed through negligence, he is liable to a *bona fide holder* of such paper.⁴ An assignee who takes with notice of the fraud cannot enforce it against the maker.⁵

§67. Effect of fraud of third person.

One who signs a written contract in ignorance of its contents, being able to read but relying on the representations of a third party, is bound thereby,¹ as the doctrines of mistake apply, and not those of fraud.² Thus where A signed a guaranty payable to B, relying on the representation of C, the principal debtor, that it was an application for a license, A cannot avoid liability on the contract of guaranty.³ If the third party, however, is the agent of the adversary party to the contract, his fraud will be considered to be that of his principal.⁴

§68. Reformation for fraud in execution.

While the relief generally sought in such cases is to have the contract held void, such fraud may be treated as at least equivalent to mistake and the contract may be reformed, so as to ex-

³ *Green v. Wilkie*, 98 Ia. 74; 60 Am. St. Rep. 184; 36 L. R. A. 434; 66 N. W. 1046.

⁴ *Dinsmore v. Stimbert*, 12 Neb. 433; 11 N. W. 872; *Mackey v. Peterson*, 29 Minn. 298; 43 Am. Rep. 211; 13 N. W. 132; *Shirts v. Overjohn*, 60 Mo. 305; *Ross v. Doland*, 29 O. S. 473; *Winchell v. Crider*, 29 O. S. 480.

⁵ *Martindale v. Harris*, 26 O. S. 379.

¹ *Wagner v. Insurance Co.*, 90 Fed. 395; 33 C. C. A. 121 (citing *Upton v. Tribilcock*, 91 U. S. 45; *Rogers v. Place*, 29 Ind. 577; *Insurance Co. v. McWhorter*, 78 Ind. 136; *Robinson v. Glass*, 94 Ind. 211; *Meka v. Brown*, 84 Ia. 711; *sub nomine*,

Meca v. Brown, in 45 N. W. 1041; 50 N. W. 46; *Roach v. Karr*, 18 Kan. 529; 26 Am. Rep. 788; *Greenfield's Estate*, 14 Pa. St. 489; *Pennsylvania Ry. Co. v. Shay*, 82 Pa. St. 198; *Bishop v. Allen*, 55 Vt. 423; *Sanger v. Dun*, 47 Wis. 615; 32 Am. Rep. 789; 3 N. W. 388.

See to the same effect *Spurgin v. Traub*, 65 Ill. 170 (*semble*); *Page v. Krekey*, 137 N. Y. 307; 33 Am. St. Rep. 731; 21 L. R. A. 409; 33 N. E. 311.

² See § 129.

³ *Page v. Krekey*, 137 N. Y. 307; 33 Am. St. Rep. 731; 21 L. R. A. 409; 33 N. E. 311.

⁴ *La Marche v. Ins. Co.*, 126 Cal. 498; 58 Pac. 1053.

press the contract into which the defrauded party was induced to believe that he was entering.¹ Thus where by fraudulent misrepresentation of the contents of a lease, lessor is induced to execute a lease, it may be reformed to express the oral agreement.²

II. MISREPRESENTATION.

§69. Misrepresentation as to an essential element of the contract.

Misrepresentation of an essential element of a contract, as distinguished from mistake on the one side and fraud on the other, is necessarily quite rare. Indeed in the cases decided on that topic it is often hard to determine whether the misrepresentation does not amount to fraud. The difficulty is further complicated by the use which some courts make of the term "legal fraud" to designate misrepresentation.¹ When the question of the effect of misrepresentation as to an essential element is presented for adjudication, it seems clear both from the authorities as well as on principle, that error as to an essential element of the contract, due to misrepresentation by the adversary party, makes a contract void no less than mistake not due to misrepresentation. Thus a misrepresentation as to the contents of a written instrument will avoid it.² So misrep-

¹ Moore v. Copp, 119 Cal. 429; 51 Pac. 630; Hansford v. Freeman, 99 Ga. 376; 27 S. E. 706; Williams v. Hamilton, 104 Ia. 423; 73 N. W. 1029; 65 Am. St. Rep. 475; Bowen v. Wolff, 23 R. I. 56; 49 Atl. 395; Conn v. Hagan, 93 Tex. 334; 55 S. W. 323; Pioneer, etc., Co. v. Baumann (Tex. Civ. App.), 58 S. W. 49; American, etc., Co. v. Pace, 23 Tex. Civ. App. 222; 56 S. W. 377.

² Moore v. Copp, 119 Cal. 429; 51 Pac. 630; Bowen v. Wolff, 23 R. I. 56; 49 Atl. 395.

¹ Zunker v. Kuehn, 113 Wis. 421; 88 N. W. 605.

² Bates v. Harte, 124 Ala. 427; 82 Am. St. Rep. 186; 26 So. 898;

Bank v. Webb, 108 Ala. 132; 19 So. 14; Beck, etc., Co. v. Houppert, 104 Ala. 503; 53 Am. St. Rep. 77; 16 So. 522; Cannon v. Lindsey, 85 Ala. 198; 7 Am. St. Rep. 38; 3 So. 676; Moore v. Copp, 119 Cal. 429; 51 Pac. 630; Haubert v. Mausshardt, 89 Cal. 433; 26 Pac. 899; Callaway v. Mellett, 15 Ind. App. 366; 57 Am. St. Rep. 238; 44 N. E. 198; Williams v. Hamilton 104 Ia. 423; 65 Am. St. Rep. 475; 73 N. W. 1029; Alexander v. Brogley, 63 N. J. L. 307; 43 Atl. 888; Bowen v. Wolff, 23 R. I. 56; 49 Atl. 395; American, etc., Co. v. Pace, 23 Tex. Civ. App. 222; 56 S. W. 377; Biggs v. Bailey, 49 W. Va. 188; 38 S. E. 499.

resentation as to the existence of the liability or property which is the subject matter of the contract, as where A represented that a parcel of money entrusted to B to be delivered to A had not been so delivered,³ or that there was a large amount of growing timber on a given tract of land,⁴ or as to the nature and kind of a bond sold by one party to the other,⁵ or as to the amount of such liability,⁶ as where an indebtedness incurred before the time covered by a bond of indemnity was represented to have been incurred during such time,⁷ may be ground for rescission. So a misrepresentation as to the identity of all,⁸ or a part,⁹ of a tract of realty conveyed, is ground for rescission. In some of these cases formal rescission in equity has been granted,¹⁰ and in others, informal rescission at law by allowing recovery of the purchase money on tendering a reconveyance.¹¹ If the misrepresentation concerns an essential element of the contract, such as the subject-matter, it is material even if the subject-matter actually in existence is as valuable as that represented.¹²

§70. Negligence as affecting a misrepresentation in the execution.

The chief difference between misrepresentation as to the contents of a written contract and mere mistake, is that in mistake

³ *Houser v. McGinnas*, 108 N. C. 631; 13 S. E. 139.

⁴ *Thwing v. Hall, etc., Co.*, 40 Minn. 184; 41 N. W. 815. As the timber was really what the parties intended to sell, such mistake may be classed as concerning the existence of the subject-matter, though if thought of as a sale of the land, it may seem a case of misrepresentation in the inducement.

⁵ *Ripley v. Case*, 86 Mich. 261; 49 N. W. 46.

⁶ *Steere v. Oakley*, 186 Pa. St. 582; 40 Atl. 815.

⁷ *Beland v. Brewing Association*, 157 Mo. 593; 58 S. W. 1.

⁸ *Clapp v. Greenlee*, 100 Ia. 586; 69 N. W. 1049; *Crowe v. Lewin*, 95

N. Y. 423; *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178; 6 L. R. A. 121; 43 N. W. 800.

⁹ *Bigham v. Madison*, 103 Tenn. 358; 47 L. R. A. 267; 52 S. W. 1074; *Zunker v. Kuehn*, 113 Wis. 421; 88 N. W. 605.

¹⁰ *Clapp v. Greenlee*, 100 Ia. 586; 69 N. W. 1049; *Bigham v. Madison*, 103 Tenn. 358; 47 L. R. A. 267; 52 S. W. 1074.

¹¹ *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178; 6 L. R. A. 121; 43 N. W. 800 (and see *Law v. Grant*, 37 Wis. 548).

¹² Misrepresentation as to the identity of realty. *Clapp v. Greenlee*, 100 Ia. 586; 69 N. W. 1049.

the negligence of the party misled by mistake to ascertain the contents of the written contract may prevent him from obtaining relief,¹ while in misrepresentation we find substantially the same conflict of authority as in cases of fraud as to the contents of a written contract. In some cases of misrepresentation as to the contents of a written contract, it is held the negligence of the party misled does not prevent him from treating the contract as void in an action between the immediate parties to such contract.² In other jurisdictions misrepresentations as to the contents of a written contract are held not to make the contract void even as between the immediate parties to such contract, if the party misled was guilty of negligence in not ascertaining the contents of the instrument.³ Thus where A who could read and had agreed to sign a guaranty to B for X to cover future indebtedness, signed an instrument from which a clause containing a guaranty for past indebtedness was not erased, cannot avoid liability on such covenant though B had told A that all the clauses assuming such liability were erased and had showed A what clauses to erase from the printed form.⁴ In any event, if

¹ See § 74.

² Bank v. Webb, 108 Ala. 132; 19 So. 14; Beck, etc., Co. v. Houppert, 104 Ala. 503; 53 Am. St. Rep. 77; 16 So. 522; Cannon v. Lindsey, 85 Ala. 198; 7 Am. St. Rep. 38; 3 So. 676; Davis v. Snider, 70 Ala. 315; Foster v. Johnson, 70 Ala. 249; Haubert v. Mausschart 89 Cal. 433; 26 Pac. 899; Spitze v. R. R., 75 Md. 162; 32 Am. St. Rep. 378; 23 Atl. 307; Alexander v. Brogley, 63 N. J. L. 307; 43 Atl. 888; American, etc., Co. v. Pace, 23 Tex. Civ. App. 222; 56 S. W. 377; Pioneer, etc., Co. v. Baumann (Tex. Civ. App.), 58 S. W. 49. For the distinction in this respect between mistake and misrepresentation see *obiter* in Bates v. Harte, 124 Ala. 427; 82 Am. St. Rep. 186; 26 So. 898. See also the following expression of opinion: "Plaintiff did not know, so far as

appears, that defendant had not read and compared the two. He had a right to presume he had, and cannot be held responsible by defendant for reposing too much confidence in his assurances." Haubert v. Mausschart, 89 Cal. 433, 436; 26 Pac. 899.

³ History Co. v. Dougherty, (Ariz.), 29 Pac. 649; Walton Guano Co. v. Capelan, 112 Ga. 319; 52 L. R. A. 268; 37 S. E. 411; Reid v. Bradley, 105 Ia. 220; 74 N. W. 896; Bostwick v. Ins. Co., 116 Wis. 392; 92 N. W. 246; modifying on rehearing 116 Wis. 392; 89 N. W. 538.

⁴ The court said: "The defendant does not state that plaintiffs used any artifice to prevent him from reading the contract, nor does he state that he was unacquainted with the English language or that he could not read. In fact no excuse whatever is given, except that he

the person misled was not negligent in relying on the representations of the adversary party as to the contents of the contract, he may avoid it.⁵ Thus where the agent of a railroad company sold A a ticket alleged to be correct in form, but the time limit of which had in fact expired, and A was unable to read the ticket because the station was dimly lighted, A is not bound by the terms of the ticket.⁶

So where a misrepresentation is made concerning an essential feature of the contract, the negligence of the party to whom such representation is made, whereby he is misled by it, does not prevent him from obtaining relief.⁷ Thus where A sold B a worthless bond, representing it to be of a kind that B knew was good, B may avoid the sale though he had a chance to inspect the bond.⁸ If the party seeking rescission has been careless in omitting to investigate the truth of the statements made to him, rescission may be had at his costs.⁹

III. MISTAKE.

§71. Mistake as to an essential element of the contract.

A contract entered into because of mistake as to an essential element is void.¹ While this general rule is substantially unquestioned, considerable difficulty is found in determining

signed the contract relying on the representation of plaintiff as to its contents. This is inexcusable neglect and the defendant must suffer the consequences of his own folly. The effect of such a rule as that claimed by appellant would be to render written contracts of but little practical value over those existing in parol only." *McCormack v. Molburg*, 43 Ia. 561, 562; quoted in *Reid v. Bradley*, 105 Ia. 220; 74 N. W. 896; so *Glenn v. Statler*, 42 Ia. 107.

⁵ *Callaway v. Mellett*, 15 Ind. App. 366; 57 Am. St. Rep. 238; 44 N. E. 198.

⁶ *Callaway v. Mellett*, 15 Ind.

App. 366; 57 Am. St. Rep. 238; 44 N. E. 198.

⁷ *Ripley v. Case*, 86 Mich. 261; 49 N. W. 46; *Beland v. Brewing Association*, 157 Mo. 593; 58 S. W. 1; *Houser v. McGinnas*, 108 N. C. 631; 13 S. E. 139; *Steere v. Oakley*, 186 Pa. St. 582; 40 Atl. 815.

⁸ *Ripley v. Case*, 86 Mich. 261; 49 N. W. 46.

⁹ *Sutton v. Morgan*, 158 Pa. St. 204; 38 Am. St. Rep. 841; 27 Atl. 894.

¹ *Gordon v. Street* (1899), 2 Q. B. 641; *Allen v. Hammond*, 11 Pet. (U. S.) 63; *Alexander v. Swockhamer*, 105 Ind. 81; 55 Am. Rep. 180; 4 N. E. 433; 5 N. E. 908; *Neal v.*

whether mistake applies to an essential feature of a contract or a collateral matter.² A detailed discussion of the forms of mistake in an essential feature of a contract is therefore necessary, including mistakes as to the identity of the adversary party, as to the identity or existence of the subject-matter and as to the terms and contents of the contract.

§72. Mistake as to existence of subject-matter or consideration.

If the parties to a contract enter into it under the belief that the subject-matter or consideration is in existence, and in effect condition their contract thereon, no contract exists if the subject-matter is not then in existence.¹ Thus a lease of property to be used for manufacturing purposes can be avoided where entered into under a mistake as to water rights which were

Coburn, 92 Me. 139; 69 Am. St. Rep. 495; 42 Atl. 348; Gawntlett v. Ins. Co. 127 Mich. 504; 86 N. W. 1047; Strong v. Lane, 66 Minn. 94; 68 N. W. 765; Nordyke, etc., Co. v. Kehlor, 155 Mo. 643; 78 Am. St. Rep. 600; 56 S. W. 287; Russel v. Clough, 71 N. H. 177; 93 Am. St. Rep. 507; 51 Atl. 632; Concord Coal Co. v. Ferrin, 71 N. H. 331; 93 Am. St. Rep. 496; 51 Atl. 283; Duncan v. Ins. Co., 138 N. Y. 88; 20 L. R. A. 386; 33 N. E. 730; Burton v. Mfg. Co., 132 N. C. 17; 43 S. E. 480; Hamet v. Letcher, 37 O. S. 356; Fink v. Smith, 170 Pa. St. 124; 50 Am. St. Rep. 750; 32 Atl. 566; Walker v. Ebert, 29 Wis. 194; 9 Am. Rep. 548. This general rule is subject to some qualification as to the effect of negligence. See § 75.

² "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration."

Kennedy v. Mail Co., L. R. 2 Q. B. 580, 588; quoted in Sherwood v. Walker, 66 Mich. 568, 577; 11 Am. St. Rep. 531; 33 N. W. 919.

¹ Couturier v. Hastie, 5 H. L. 673; Smidt v. Tiden, L. R. 9 Q. B. 446; Allen v. Hammond, 11 Pet. (U. S.) 63; Koenig v. Haddix, 21 Ill. App. 53; Blakemore v. Blakemore (Ky.), 44 S. W. 96; Neal v. Coburn, 92 Me. 139; 69 Am. St. Rep. 495; 42 Atl. 348; Gould v. Emerson, 160 Mass. 438; 39 Am. St. Rep. 501; 35 N. E. 1065; Gauntlett v. Ins. Co., 127 Mich. 504; 86 N. W. 1047; Gibson v. Pelkie, 37 Mich. 380; Beland v. Brewing Association, 157 Mo. 593; 58 S. W. 1; Fisher v. During, 53 Mo. App. 548; Duncan v. Ins. Co., 138 N. Y. 88; 20 L. R. A. 386; 33 N. E. 730; Fink v. Smith, 170 Pa. St. 124; 50 Am. St. Rep. 750; 32 Atl. 566; Riegel v. Ins. Co., 153 Pa. St. 134; 19 L. R. A. 166; 25 Atl. 1070; same case, 140 Pa. St. 193; 23 Am. St. Rep. 225; 11 L. R. A. 857; 21 Atl. 392; Bedell v. Wilder, 65 Vt. 406; 36 Am. St. Rep. 871; 26 Atl. 589.

thought to be easements appurtenant to such realty and without which it could not be used for such purposes.² Thus a release made in ignorance of the existence of a claim,³ or as to the existence of an estate contracted for⁴ does not affect such right. If A, with whom goods have been deposited is unable to find them, believes that they are lost, and so gives his check therefor, he may, on discovering the goods on the day following, and before payment of the check, stop such payment.⁵ So if A gives his note to B, thinking that there is a balance due from him to B for which such note is given, when in fact nothing is due, such note may be avoided as to B or an indorsee with notice.⁶ Thus if A is mistaken as to the amount of his indebtedness and under such mistake gives a note for too large an amount, equity will give rescission and cancel the note on payment of the amount due,⁷ and if he has overpaid his debt will decree repayment of such excess.⁸ A similar rule exists where one by mistake assumes a debt due him to be smaller than it is.⁹ So where X had forged A's name to a note to B, and induced A to borrow money from B and to give a note therefor and a mortgage securing such note "together with any sums that I now owe" B, A not knowing of the existence of the forged note, it was held that the mortgage could not be enforced against A for the forged note.¹⁰ So if under a mistaken belief that no credit had been given for a payment which had been made, and in fact credited, the creditor gives a receipt in full on payment of less than the real amount due in pursuance of a contract settling the account, he may recover such difference.¹¹ Any other contract entered into

² *Bedell v. Wilder*, 65 Vt. 406; 36 Am. St. Rep. 871; 26 Atl. 589.

³ *Cooper v. Hayward*, 71 Minn. 374; 70 Am. St. Rep. 330; 74 N. W. 152.

⁴ *Pegues v. Haden*, 76 Tex. 94; 13 S. W. 171.

⁵ *State Savings Bank v. Buhl*, 129 Mich. 193; 56 L. R. A. 944; 88 N. W. 471.

⁶ *Wilderman v. Donnelly*, 86 Minn. 184; 90 N. W. 366.

⁷ *Thompson v. Hudgins*, 116 Ala. 93; 22 So. 632; *Beland v. Brewing Association* 157 Mo. 593; 58 S. W. 1.

⁸ *Gould v. Emerson*, 160 Mass. 438; 39 Am. St. Rep. 501; 35 N. E. 1065.

⁹ *McCurdy v. Breathitt*, 5 T. B. Mon. (Ky.) 232; 17 Am. Dec. 65.

¹⁰ *Nourse v. Jennings*, 180 Mass. 592; 62 N. E. 974.

¹¹ *Russell v. Stevenson*, — Wash. —; 75 Pac. 627.

under mistake as to the amount due on a pre-existing liability and based thereon, may be avoided for such mistake.¹² Where A has valid insurance on B's life, and thinking B still alive, and being unable to continue paying the premiums, surrenders it ten days after B's death for a paid-up policy, A may avoid the surrender and enforce the policy,¹³ and a like rule applies where insurance on a vessel is cancelled after the loss, in ignorance of such loss,¹⁴ or where insurance is effected on a vessel already lost, the insured knowing of the loss and the insurer being ignorant thereof.¹⁵

This proposition implies that the parties are not in ignorance whether the subject-matter is in existence or not, deliberately assuming the risk of its non-existence. Where the parties are aware that the existence of the subject matter is doubtful, and contract with reference thereto, each party taking the chances of the event's being adverse to himself, the contract is valid.¹⁶

§73. Mistake as to identity of adversary party.

If the identity of the adversary party is material, no contract exists where one party to the contract is mistaken as to the identity of such adversary party.¹ Such identity is material where

¹²Sweeny v. Water Supply Co., 121 Ala. 454; 25 So. 575; Aultman v. Graham, 29 Ill. App. 77; Powell v. Plant (Miss.), 23 So. 399; Scott v. Hall, 58 N. J. Eq. 42; 43 Atl. 50.

¹³Riegel v. Ins. Co., 153 Pa. St. 134; 19 L. R. A. 166; 25 Atl. 1070; same case, 140 Pa. St. 193; 23 Am. St. Rep. 225; 11 L. R. A. 857; 21 Atl. 392.

¹⁴Duncan v. Ins. Co., 138 N. Y. 88; 20 L. R. A. 386; 33 N. E. 730, (insurance for a round trip was effected but insured when he thought that the vessel had reached her destination cancelled the policy for the return trip and received back part of the premium).

¹⁵Gauntlett v. Ins. Co., 127 Mich.

504; 86 N. W. 1047.

¹⁶Sears v. Grand Lodge, 163 N. Y. 374; 50 L. R. A. 204; 57 N. E. 618. See § 77.

¹Gordon v. Street (1899), 2 Q. B. 641; Cundy v. Lindsay, L. R. 3 App. Cas. 459; Smith v. Wheatcraft, 9 Ch. Div. 223; Hardman v. Booth, 1 Hurl. & C. 803; La Salle Pressed Brick Co. v. Coe, 53 Ill. App. 506; Alexander v. Swackhamer, 105 Ind. 81; 55 Am. Rep. 180; 4 N. E. 433; 5 N. E. 908; Rodliff v. Dallinger, 141 Mass. 1; 55 Am. Rep. 439; 4 N. E. 805; Boston Ice Co. v. Potter, 123 Mass. 28; Winchester v. Howard, 97 Mass. 303; 93 Am. Dec. 93; Newberry v. R. R. 133 N. C. 45; 45 S. E. 356; Hamet v. Letcher, 37 O. S. 356.

the personality of the adversary party is a factor in inducing the one party to enter into the contract; as where credit is extended and the financial responsibility of the party thus becomes an important element,² or if he is for any reason unwilling to deal with the party as to whose identity he was mistaken and who is seeking to enforce the contract, as where such adversary party is a notorious usurer, whom the other party was seeking to avoid in business and with whom he had refused to deal;³ or where for any reason he has refused to deal with him.⁴

A common example of this mistake is found where A makes an offer to B, and C accepts it, claiming that he is B. In such case, if B's identity is material, no title passes to property delivered by A to C under the contract,⁵ and A can recover the property or its value, even from a *bona fide* purchaser⁶ or pledgee,⁷ claiming title under C.

The vendee is not bound where the personality of the vendor is material, and vendee is mistaken as to his identity.⁸ Thus where A had bought ice from B and had quit doing business with him because he was dissatisfied with him and bought from C; and C sold his business to B, who without notifying A of the change, continued to deliver ice to him, B was not allowed to recover the price of the ice thus delivered.⁹ So a mistake in

² *Cundy v. Lindsay*, L. R. 3 App. Cas. 459; *Hardman v. Booth*, 1 Hurl. & C., 803; *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180; 4 N. E. 433; 5 N. E. 908; *Rodliff v. Dallinger*, 141 Mass. 1; 55 Am. Rep. 439; 4 N. E. 805; *Hamet v. Letcher*, 37 O. S. 356; *Boston Ice Co. v. Potter*, 123 Mass. 28; 25 Am. Rep. 9; *Winchester v. Howard*, 97 Mass. 303; 93 Am. Dec. 93.

³ *Gordon v. Street* (1899) 2 Q. B. 641.

⁴ *Rodliff v. Dallinger*, 141 Mass. 1; 55 Am. Rep. 439; 4 N. E. 805; *Boston Ice Co. v. Potter*, 123 Mass. 28; 25 Am. Rep. 9.

⁵ *Hollins v. Fowler*, L. R. 7 H. L. 757; *Hardman v. Booth*, 1 Hurl. & C. 803.

⁶ *Cundy v. Lindsay*, L. R. 3 App. Cas. 459; *La Salle Pressed Brick Co. v. Coe*, 53 Ill. App. 506; *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180; 4 N. E. 433; 5 N. E. 908; *Rodliff v. Dallinger*, 141 Mass. 1; 55 Am. Rep. 439; 4 N. E. 805; *Edmunds v. Merchants', etc., Co.*, 135 Mass. 283; *Hamet v. Letcher*, 37 O. S. 356; *Dean v. Yates*, 22 O. S. 388; *Barker v. Dinsmore*, 72 Pa. St. 427; 13 Am. Rep. 697.

⁷ *Rodliff v. Dallinger*, 141 Mass. 1; 55 Am. Rep. 439; 4 N. E. 805.

⁸ *Winchester v. Howard*, 97 Mass. 303; 93 Am. Dec. 93.

⁹ *Boston Ice Co. v. Potter*, 123 Mass. 28; 25 Am. Rep. 9.

the identity of the opposite party, the real party being a corporation with a small capital, and the supposed party being a firm with a large capital, the names being identical, is ground for rescinding an executory contract.¹⁰ So where A had dealt with a firm of which B was agent, and the firm had incorporated without A's knowledge, and B as agent for the new corporation did not disclose the incorporation to A, A was allowed to hold the members of the corporation as partners.¹¹

On the other hand, if the identity of the adversary party is not material, mistake therein does not affect the validity of the contract.¹² Thus where A was ready to contract with anyone having authority to lease a certain canal boat, he could not avoid his contract because he was mistaken as to who the real owner was.¹³ So if A makes an offer to B, and C delivers his own property in performance of the contract, A cannot avoid liability under the contract if he knows that C is delivering his own property.¹⁴ Thus a principal cannot refuse to pay commissions to his broker because the latter has concealed the identity of the real party from his principal where it does not appear that his identity was material.¹⁵

In any event, if the contract is a nullity because of mistake as to the identity of the adversary party, acquiescence in a contract fully executed for an unreasonable time, with full knowledge of the facts will prevent the party from obtaining relief.¹⁶ Thus making use, after notice of mistake, of goods furnished under such mistake makes the party so using them liable therefor.¹⁷

¹⁰ Consumers' Ice Co. v. Webster, 53 N. Y. Supp. 56; 32 App. Div. 592.

¹¹ Haines v. Starkey, 82 Minn. 230; 84 N. W. 910.

¹² Smith v. Wheatercroft, 9 Ch. Div. 223; Dunbar v. Weston, 93 Fed. 472; Veasey v. Carson, 177 Mass. 117; 53 L. R. A. 241; 58 N. E. 177; Haines v. Starkey, 82 Minn. 230; 84 N. W. 910; Hand v. Power Co., 167 N. Y. 142; 60 N. E. 425.

¹³ Dunbar v. Weston, 93 Fed. 472.

¹⁴ Randolph Iron Co. v. Elliott, 34 N. J. L. 184.

¹⁵ Veasey v. Carson, 177 Mass. 117; 53 L. R. A. 241; 58 N. E. 177.

¹⁶ Marsh v. Whitmore, 21 Wall. (U. S.) 178; Barnes v. Shoemaker, 112 Ind. 512; 14 N. E. 367; Randolph Iron Co. v. Elliott, 34 N. J. L. 184.

¹⁷ Barnes v. Shoemaker, 112 Ind. 512; 14 N. E. 367; Randolph Iron Co. v. Elliott, 34 N. J. L. 184.

§74. Mistake as to identity of subject-matter or consideration.

If A makes an offer to B concerning a given subject-matter, X; and B understands that A is making an offer concerning Y, and accepts the offer concerning Y, no contract exists.¹ Thus where A, an auctioneer, offered lot 24, and B, understanding that it was lot 25, made a bid thereon which was accepted, no valid contract was made.² So where A offered to sell B a lot, and X, a stranger to the contract, pointed out the wrong piece of land, and B accepted, A's offer under such mistaken impression, no contract existed.³ So a mistake as to the tract of land agreed upon,⁴ or as to the location of a boundary line if "so material as to go to the essence of the contract,"⁵ prevents any contract from existing. A mistake as to the amount of a note, assumed as part of the purchase price of stock, does not make the contract void, if the amount is less than the party assuming it agreed to pay.⁶ In this connection, it must be noted that if B accepts the offer, knowing that he does not know exactly where the land is located, he cannot make his ignorance a means of avoiding liability.⁷ Where the parties are mistaken as to the identity of the property contracted for, one of them cannot have the contract, if in writing, reformed so as to express his understanding of what the property was.⁸ Mistake as to the identity of the subject-matter may affect a part of the property contracted for, and not the whole of it.⁹ Thus if the

¹ *Raffles v. Wichelhaus*, 2 Hurl, etc., 906; *Haddon v. Neighbarger*, 9 Kan. App. 529; 58 Pac. 568; *Kyle v. Kavanaugh*, 103 Mass. 356; 4 Am. Rep. 560; *Spurr v. Benedict*, 99 Mass. 463; *Strong v. Lane*, 66 Minn. 94; 68 N. W. 765; *Sheldon v. Capron*, 3 R. I. 171.

² *Sheldon v. Capron*, 3 R. I. 171.

³ *Strong v. Lane*, 66 Minn. 94; 68 N. W. 765. But see *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178; 6 L. R. A. 121; 43 N. W. 800, where it was held that B could not take advantage of such mistake if X was not A's agent. In *Thwing v. Lumber Co.*, 40 Minn. 184; 41

N. W. 815, a contract was avoided under a similar state of facts where B's agent mislocated the property; but in this case A had misrepresented the amount of timber on it.

⁴ *Page v. Higgins*, 150 Mass. 27; 5 L. R. A. 152; 22 N. E. 63.

⁵ *Bigham v. Madison*, 103 Tenn. 358; 47 L. R. A. 267; 52 S. W. 1074.

⁶ *Kaufman v. Bank*, 31 Neb. 661; 48 N. W. 738.

⁷ *Beebe v. Birkett*, 109 Mich. 663; 67 N. W. 996. See § 77.

⁸ *Haddon v. Neighbarger*, 9 Kan. App. 529; 58 Pac. 568.

⁹ *Tyson v. Passmore*, 2 Pa. St. 122; 44 Am. Dec. 181.

boundaries of a tract conveyed are known, the general rule is that a slightly erroneous estimate of its area is not such mistake as to call for rescission.¹⁰ A considerable deficiency in area, however, has been treated as a mistake which will justify rescission, as where the contract of sale of a farm containing 135 acres is entered into under the mistaken belief that it contains "about two hundred acres."¹¹ So A sold land to B, both understanding that the tract contained two hundred fifty acres. B had it surveyed, and the surveyor, by an error in computation estimated the tract at one hundred ninety-eight acres. To make up this deficiency A agreed to deed B fifty acres more, and did so. B sold the original tract to C, who surveyed it and found two hundred fifty acres. A sued B and it was held that B must return the fifty-acre tract or make compensation.¹² Other appropriate relief is given for a material deficiency or excess in quantity, as quieting title to the excess, leaving it in vendor,¹³ or allowing compensation for a deficiency¹⁴ or excess.¹⁵ Occasionally we find relief refused in cases of this class on the ground that the party seeking relief has been guilty of negligence in not ascertaining the area in advance.¹⁶

Mistake as to the existence of part of the subject-matter may be made in transactions other than sales of realty. So where A by mistake handed B a ten-dollar gold piece of private coinage by mistake for a half dollar,¹⁷ or where A made a settlement with B for milk shipped by B to A, A assuming that the cans of milk contained five gallons each, when in fact they held

¹⁰ Wier v. Johns, 14 Colo. 493; 24 Pac. 262; Wilson v. Gunning, 80 Ia. 331; 45 N. W. 920; Rodgers v. Ols-hoffsky, 110 Pa. St. 147; 2 Atl. 44.

¹¹ Newton v. Tolles, 66 N. H. 136; 49 Am. St. Rep. 593; 9 L. R. A. 50; 19 Atl. 1092.

¹² Calhoun v. Teal, 106 La. 47; 30 So. 288.

¹³ Ladd v. Pleasants, 39 Tex. 415.

¹⁴ Yost v. Mallicote, 77 Va. 610.

¹⁵ Pratt v. Bowman, 37 W. Va. 715; 17 S. E. 210. The vendee had sold the land to a *bona fide* purchaser.

¹⁶ Iverson v. Wilburn, 65 Ga. 103.

¹⁷ Chapman v. Cole, 12 Gray (Mass.) 141; 71 Am. Dec. 739. In this case B had handed the same piece of money on to C under the same mistake. As it was not legal tender or negotiable, A was allowed to recover \$9.50 from C, the court saying that it was a case of "mistake as to the identity of the subject of the agreement," and that there was "no assent of the parties."

less, some being spilled *in transitu*,¹⁸ or A agreed to deliver a certain amount of powder for B, by mistake as to the number of kegs and the weight of each keg,¹⁹ such mistake avoids each of these contracts.

§75. Mistake as to contents of written contract.

If the contract is in writing and a party who has signed it wishes to avoid liability thereon on the ground that he did not know its contents, the question, in the absence of misrepresentation, fraud, undue influence and the like, turns on whether he was guilty of negligence in signing without knowing its contents. If he is not guilty of negligence,¹ as where he cannot read at all,² or cannot read or speak the language in which the instrument is written,³ or is practically blind,⁴ he is not bound by the contract if he signs it in mistake as to the contents

¹⁸ Devine v. Edwards, 101 Ill. 738.

¹⁹ Lyle v. Williamson, 6 T. B. Mon. (Ky.) 142. This was treated by the court of equity as substantially a case for reformation; though the actual relief given was enjoining a judgment at law rendered on the contract.

¹ Thoroughgood's Case, 1 Coke 435 (Part II., 5b); Thoroughgood's Case, 1 Coke 444 (Part II., 9a); Foster v. McKinnon, L. R. 4 C. P. 704; Davis v. Snider, 70 Ala. 315; Dickinson v. Lewis, 34 Ala. 638; Paysant v. Ware, 1 Ala. 160; Maxson v. Llewelyn, 122 Cal. 195; 54 Pac. 732; Moore v. Copp, 119 Cal. 429; 51 Pac. 630; Meyer v. Haas, 126 Cal. 560; 58 Pac. 1042; Germania Life Ins. Co. v. Lunkenheimer, 127 Ind. 536; 26 N. E. 1082; Williams v. Hamilton, 104 Ia. 423; 65 Am. St. Rep. 475; 73 N. W. 1029; Fitchner v. Association, 103 Ia. 276; 72 N. W. 530; Bigelow v. Wilson, 99 Ia. 456; 68 N. W. 798; Miotke v. Ins. Co., 113 Mich. 166;

71 N. W. 463; Shurte v. Fletcher, 111 Mich. 84; 69 N. W. 233; Gibbs v. Linabury, 22 Mich. 479; 7 Am. Rep. 675; Krueger v. Ry., 68 Minn. 445; 64 Am. St. Rep. 487; 71 N. W. 683; Phillip v. Gallant, 62 N. Y. 256; Bean v. Ry., 107 N. Car. 731; 12 S. E. 600; De Camp v. Hamma, 29 O. S. 467; Loewenberg v. Glover, 19 Wash. 544; 53 Pac. 839; Lord v. Accident Association, 89 Wis. 19; 46 Am. St. Rep. 815; 26 L. R. A. 741; 61 N. W. 293.

² Thoroughgood's Case, 1 Coke 435 (Part II., 5b); Bean v. Ry., 107 N. Car. 731; 12 S. E. 600.

³ Meyer v. Haas, 126 Cal. 560; 58 Pac. 1042; Miotke v. Ins. Co., 113 Mich. 166; 71 N. W. 463; Walker v. Ebert, 29 Wis. 194; 9 Am. Rep. 548. *Contra*, if no unfair means are used. Muller v. Kelly, 116 Fed. 545; Stewart v. Ry., 141 Ind. 55; 40 N. E. 67.

⁴ Shurte v. Fletcher, 111 Mich. 84; 69 N. W. 233.

of the contract; as where the instrument is misread.⁵ So one who signs a contract at a place indicated is not bound by a provision on a following page, of which he did not know and to which his attention was not called.⁶ Where free from negligence, he has been allowed to interpose the defense of mistake of this sort even as against a *bona fide* holder for value of a negotiable instrument.⁷

§76. Negligence as affecting mistake in execution.

On the other hand, if he can read or is otherwise guilty of negligence in not informing himself as to the contents of the written contract, and signs or accepts it with full opportunity of informing himself as to its contents, he cannot avoid liability on the ground that he was mistaken as to its contents, in the absence of fraud or misrepresentation.¹ The application of this rule is clearest where the party who signs the instrument is

⁵ *Cole v. Williams*, 12 Neb. 440; 11 N. W. 875.

⁶ *Lilly v. Pearson*, 168 Pa. St. 219; 32 Atl. 23.

⁷ *De Camp v. Hamma*, 29 O. S. 467; *Walker v. Ebert*, 29 Wis. 194; 9 Am. Rep. 548.

¹ *Boylan v. Hot Springs, etc., R. R.*, 132 U. S. 146; *Barker v. Ry.*, 65 Fed. 460; *Bates v. Harte*, 124 Ala. 427; 82 Am. St. Rep. 186; 26 So. 898; *Dunham Lumber Co. v. Holt*, 123 Ala. 336; 26 So. 663; *Martin v. Smith*, 116 Ala. 639; 22 So. 917; *Terry v. Ins. Co.*, 116 Ala. 242; 22 So. 532; *Bank v. Webb*, 108 Ala. 132; 19 So. 14; *Beck, etc., Co. v. Houppert*, 104 Ala. 503; 53 Am. St. Rep. 77; 16 So. 522; *Jones v. Ry.*, 89 Ala. 376; 8 So. 61; *Campbell v. Larmore*, 84 Ala. 499; 4 So. 593; *Pacific Guano Co. v. Anglin*, 82 Ala. 492; 1 So. 852; *Burroughs v. Guano Co.*, 81 Ala. 255; 1 So. 212; *Foster v. Johnson*, 70 Ala. 249; *Goetter, etc., Co. v. Pickett*, 61 Ala. 387; *Blum & Co. v. Mitchell*, 59 Ala.

535; *Placer County Bank v. Freeman*, 126 Cal. 90; 58 Pac. 388; *Metropolitan Loan Association v. Esche*, 75 Cal. 513; 17 Pac. 675; *Harrison v. Lumber Co.*, — Ga. —; 45 S. E. 730; *Georgia Medicine Co. v. Hyman*, 117 Ga. 851; 45 S. E. 238; *Walton Guano Co. v. Copelan*, 112 Ga. 319; 52 L. R. A. 268; 37 S. E. 411; *Jossey v. Ry.*, 109 Ga. 439; 34 S. E. 664; *Chicago, etc., Mfg. Co. v. Summerour*, 101 Ga. 820; 29 S. E. 291; *Boynton v. McDaniel*, 97 Ga. 400; 23 S. E. 824; *Fuller v. Buice*, 80 Ga. 395; 6 S. E. 17; *Macpherson v. Morrill*, 190 Ill. 194; 60 N. E. 86; *Stewart v. Ry.*, 141 Ind. 55; 40 N. E. 67; *Miller v. Powers*, 119 Ind. 79; 4 L. R. A. 483; 21 N. E. 455; *Wood v. Wack*, — Ind. App. —; 67 N. E. 562; *Beist v. Sipe*, 16 Ind. App. 4; 44 N. E. 762; *Norris v. Scott*, 6 Ind. App. 18, 22; 32 N. E. 103, 865; *Chicago Cottage Organ Co. v. Caldwell*, 94 Ia. 584; 63 N. W. 336; *Chicago, etc., Co. v. Smyth*, 94 Ia. 401; 62 N. W. 792; *Jen-*

able to read, has an opportunity to read the instrument and merely neglects to read.² Thus where A signs a note containing a power of attorney to confess judgment, A being able to read, and there being no fraud or misrepresentation, he

kins v. Coal Co., 82 Ia. 618; 48 N. W. 970; Minneapolis, etc., Ry. v. Cox, 76 Ia. 306; 14 Am. St. Rep. 216; 41 N. W. 24; Wallace v. Ry., 67 Ia. 547; 25 N. W. 772; Garden Grove Bank v. Ry., 67 Ia. 526; 25 N. W. 761; Hewitt v. Ry., 63 Ia. 611; 19 N. 790; Robinson v. Transportation Co., 45 Ia. 470; Mulligan v. Ry., 36 Ia. 181; 14 Am. Rep. 514; Eldridge v. R. R., 88 Me. 191; 33 Atl. 974; Condon v. Rice, 88 Md. 720; 44 Atl. 169; Condon v. Mutual Reserve Association, 89 Md. 99; 73 Am. St. Rep. 169; 44 L. R. A. 149; 42 Atl. 944; Spitze v. R. R., 75 Md. 162; 32 Am. St. Rep. 378; 23 Atl. 307; Clark v. Boston, 179 Mass. 409; 60 N. E. 793; Fonseca v. Cunard Steamship Co., 153 Mass. 553; 25 Am. St. Rep. 660; 12 L. R. A. 340; 27 N. E. 665; Rahilly v. St. Paul, 66 Minn. 153; 68 N. W. 853; Quimby v. Shearer, 56 Minn. 534; 58 N. W. 155; Alabama, etc., Ry. v. Jones, 73 Miss. 110; 55 Am. St. Rep. 488; 19 So. 105; Benn v. Pritchett, 163 Mo. 560; 63 S. W. 1103; Crim v. Crim, 162 Mo. 544; 54 L. R. A. 502; 63 S. W. 489; Och. v. Ry., 130 Mo. 27; 36 L. R. A. 442; 31 S. W. 962; Campbell v. Van Houten, 44 Mo. App. 231; Matter v. Ry., 105 Mo. 320; 16 S. W. 839; Goldstein v. Curtis, 63 N. J. Eq. 454; 52 Atl. 218; Atkinson v. Farrington Co. (N. J. Eq.), 28 Atl. 315; Gage v. Phillips, 21 Nev. 150; 37 Am. St. Rep. 494; 26 Pac. 60; Little v. Little, 2 N. D. 175; 49 N. W. 736; Fivey v. R. R., 67 N. J. L. 627; 91 Am. St. Rep. 445; 52 Atl. 472; Ross v.

Doland, 29 O. S. 473; Winchell v. Crider, 29 O. S. 480; Weller's Appeal, 103 Pa. St. 594; Pennsylvania R. R. v. Shay, 82 Pa. St. 198; Wylie v. Bank, 63 S. C. 406; 41 S. E. 504; Sloan v. Courtenay, 54 S. Car. 314; 32 S. E. 431; Robertson v. Smith, 11 Tex. 211; 60 Am. Dec. 234; Pederson v. Ry., 6 Wash. 202; 33 Pac. 351; 34 Pac. 665; Ferrell v. Ferrell, 53 W. Va. 515; 44 S. E. 187; Pennybacker v. Laidley, 33 W. Va. 624; 11 S. E. 39; Bostwick v. Ins. Co., 116 Wis. 392; 92 N. W. 246; modifying on rehearing 116 Wis. 392; 89 N. W. 538; Albrecht v. Milwaukee Co., 87 Wis. 105; 41 Am. St. Rep. 30; 58 N. W. 72. "When a man executes a contract, the bare fact that he did not read it or know its contents will not relieve him from it. If it would, written contracts would be on a very insecure footing." Quimby v. Shearer, 56 Minn. 534, 539; 58 N. W. 155. "The mistake of one party to a contract will not entitle him to relief, unless the other party induced him to act under such mistake." Benn v. Pritchett, 163 Mo. 560, 571; 63 S. W. 1103. "Courts have gone far enough in relieving men from their obligations upon the plea of ignorance." Weller's Appeal, 103 Pa.-St. 594, 599.

² Stewart v. Ry., 141 Ind. 55; 40 N. E. 67; Chicago Cottage Organ Co. v. Caldwell, 94 Ia. 584; 63 N. W. 336; Eldridge v. Ry., 88 Me. 191; 33 Atl. 974; Crim v. Crim, 162 Mo. 544; 54 L. R. A. 502; 63 S. W. 489.

cannot have relief from a judgment thereon on the ground that he did not know that it contained a power of attorney.³ Nor can A avoid a release of damages for an injury where he signed it without reading it, thinking it a receipt for money paid him for the time lost by such injury;⁴ or knowing it is a receipt for money paid from a relief fund, but not knowing that it provides for a release of the railroad from liability;⁵ nor can A avoid a contract which he signed without striking out a clause which he intended to strike out, B being ignorant of such intention.⁶ So where A signed and acknowledged an assignment of an insurance policy, indorsed on such policy, she could not have such assignment set aside on the ground that she had not read it and thought it was a receipt for money.⁷ If the written contract is read correctly, a party executing it cannot avoid liability because he himself was not able to read.⁸ Nor can one who neither tries to read the contract nor have it read to him avoid the contract on the ground of his own illiteracy.⁹ So where the party signing the contract is able to read, and there is no misrepresentation, undue influence, and the like, the fact that he was "worried in mind and did not read it" does not release him from liability thereon.¹⁰ The same rule applies if one reads the contract and misinterprets

³ *Crim v. Crim*, 162 Mo. 544; 54 L. R. A. 502; 63 S. W. 489.

⁴ *Jossey v. Ry.*, 109 Ga. 439; 34 S. E. 664.

⁵ *Fivey v. R. R.*, 67 N. J. L. 627; 91 Am. St. Rep. 445; 52 Atl. 472.

⁶ *Crane v. McCormick*, 92 Cal. 176; 28 Pac. 222.

⁷ *Miller v. Powers*, 119 Ind. 79; 4 L. R. A. 483; 21 N. E. 455.

⁸ "There is no pretense that the plaintiff was induced to sign the release through fraud or misrepresentation, or that any deception was practised by misreading it to him. His inability to read English or to understand the contents of the paper is no excuse. This was his own negligence. He could and should have sought the assistance of some

one capable of properly informing him. . . It cannot be tolerated that a man shall execute a written instrument and when called upon to abide by its terms, say, merely, that he did not read it or know what it contained." *Albrecht v. Ry.*, 87 Wis. 105, 109; 41 Am. St. Rep. 30; 58 N. W. 72 (citing *Fuller v. Ins. Co.*, 36 Wis. 599; *Sanger v. Dun*, 47 Wis. 615; 32 Am. Rep. 789; 3 N. W. 388; *Sheanon v. Ins. Co.*, 83 Wis. 507; 53 N. W. 878; *Upton v. Tribilcock*, 91 U. S. 45).

⁹ *Stewart v. Ry.*, 141 Ind. 55; 40 N. E. 67; *Weller's Appeal*, 103 Pa. St. 594.

¹⁰ *Condon v. Rice*, 88 Md. 720; 44 Atl. 169.

its meaning.¹¹ A misrepresentation by X of the contents of a contract executed by X and A in favor of B, whereby A signs it in ignorance of its contents, does not prevent B from enforcing the contract.¹²

§77. Mistake in terms — oral contract.

If A makes an offer in certain terms, and B accepts terms different from those offered, no contract exists, although each party may, for the time being, believe that the contract as understood by himself is in force.¹ Thus where the parties misunderstand the price on which they think they have agreed, as where A offers to sell two lots at \$2,500 each, and B understanding it to be \$2,500 for the two, accepts,² or where A makes an offer to B for \$165, and B accepts, understanding the offer to be \$65,³ or where A makes an offer of sale to B for \$850, and B accepts, thinking that the offer is for \$750,⁴ or where A asks the freight to a given station X, and the agent of the railroad understands that the station in question is Y, and gives a rate to Y, which is six dollars less than the rate to X,⁵ or where A asks the rate for a carload of melons and grapes, and the agent of the railroad company understands that the car is to contain melons and vegetables, and accordingly gives a lower rate,⁶ or where A asks the price for transporting five

¹¹ *Maginnis v. Oil Co.*, 47 La. Ann. 1489; 18 So. 459.

¹² *Kuhn v. Foster*, 16 Tex. Civ. App. 465; 41 S. W. 716.

¹ *Rowland v. Ry.*, 61 Conn. 103; 29 Am. St. Rep. 175; 23 Atl. 755; *Hartford, etc., R. R. v. Jackson*, 24 Conn. 514; 63 Am. Dec. 177; *Werner v. Rawson*, 89 Ga. 619; 15 S. E. 813; *Rupley v. Daggett*, 74 Ill. 351; *Bancharel v. Patterson*, 64 Minn. 454; 67 N. W. 356; *Norton v. Bohart*, 105 Mo. 615; 16 S. W. 598; *Gulf, etc., Ry. v. Dawson*, — Tex. Civ. App. —; 24 S. W. 566.

² *Werner v. Rawson*, 89 Ga. 619; 15 S. E. 813 (the fact that A signed a deed and delivered it on receiving

a check for \$2,500 did not bring the case within the rule as to written contracts. See § 75. But A could not read without his glasses, and he was carrying something in each hand. He put the check into his hat, walked over to the bank to get it cashed, and on learning the amount, returned it within fifteen minutes after he received it, took back the deed and destroyed it).

³ *Rupley v. Daggett*, 74 Ill. 351.

⁴ *Rovegno v. Defferari*, 40 Cal. 459.

⁵ *Rowland v. Ry.*, 61 Conn. 103; 29 Am. St. Rep. 175; 23 Atl. 755.

⁶ *Gulf, etc., Ry. v. Dawson*, (Tex. Civ. App.); 24 S. W. 566.

hundred bundles of lath, and B, the agent of the carrier, understands that only one hundred bundles of lath are to be transported, and gives him a rate accordingly,⁷ no contract exists.

Since no contract exists, the one party cannot have the written contract made in accordance with the supposed oral contract reformed so as to express his own understanding,⁸ but rescission may be had.⁹

If each party can be placed *in statu quo*, rescission is the only remedy where the contract is performed by one party in whole or in part.¹⁰ If the parties cannot be placed *in statu quo*, the one who has received property or services of value must pay a reasonable compensation therefor irrespective of what his understanding of the terms was.¹¹ Thus where under a misunderstanding as to freight rates, a railroad transports goods for A, A must pay a reasonable price therefor, though higher than the rate which A understood.¹² Similar considerations have induced the courts to hold that there was no contract where an offer was changed by mistake in transmitting a telegram from \$1.70 to \$1.07,¹³ or where, by an ambiguity in A's letter, A's offer of \$2,000 was understood by B as an offer of \$35 an acre for sixty acres.¹⁴

⁷ Hartford, etc., R. R. v. Jackson, 24 Conn. 514; 63 Am. Dec. 177.

⁸ Bancharel v. Patterson, 64 Minn. 454; 67 N. W. 356.

⁹ Werner v. Rawson, 89 Ga. 619; 15 S. E. 813; Bancharel v. Patterson, 64 Minn. 454; 67 N. W. 356.

¹⁰ Norton v. Bohart, 105 Mo. 615; 16 S. W. 598.

¹¹ Rowland v. Ry., 61 Conn. 103; 29 Am. St. Rep. 175; 23 Atl. 755; Gulf, etc., Ry. v. Dawson, (Tex. Civ. App.), 24 S. W. 566.

¹² Rowland v. Ry., 61 Conn. 103; 29 Am. St. Rep. 175; 23 Atl. 755.

¹³ Postal Telegraph Cable Co. v. Schaefer, 110 Ky. 907; 23 Ky. Law Rep. 344; 62 S. W. 1119.

¹⁴ Burkhalter v. Jones, 32 Kan. 5; 3 Pac. 559. A stated that he did

not want to pay over \$2,000 and thought \$35 an acre a big price and that was what it would cost with taxes. B accepted, thinking that his offer was for \$2,100. On B's refusing to deliver the deed without receiving \$2,100, A sued for specific performance which was refused; the court seeming to hold that A might have a right of action at law, and saying: "In strict law and by the words of the letters of the parties, we think the parties made a contract; but we also think that in fact and in equity, the minds of the parties never came together; that they really never agreed to the same thing; and therefore in equity and good conscience they did not make a contract or at least they did not

§78. Conscious ignorance as mistake.

If A enters into a contract knowing that he has not sufficient or exact knowledge of a material fact, he cannot avoid such contract on the ground of mistake because such fact turns out differently from what he had hoped.¹ Where a woman releases dower, consciously ignorant whether she has a dower interest in the property released or not,² or releases a claim for personal injuries, consciously ignorant whether she is pregnant or not,³ or where a vendee buys land he has never seen, consciously ignorant of its location or quality,⁴ none of them can avoid the contract because the event results differently from their anticipations. So where A's life was insured by X in favor of B, and after A had disappeared and been absent a long time, B sued X, and to compromise the suit X agreed to pay a certain sum down and a further sum in a certain time, X

make such a contract as equity should adjudge to be specifically enforced." *Burkhalter v. Jones*, 32 Kan. 5, 13; 3 Pac. 559.

¹ *Woodside v. Lippold*, 113 Ga. 877; 84 Am. St. Rep. 267; 39 S. E. 400; *Moore v. Scott*, 47 Neb. 346; 66 N. W. 441; *Gormby v. Gormby*, 130 Pa. St. 467; 18 Atl. 727; *Houston, etc., Ry. v. McCarty*, 94 Tex. 298; 86 Am. St. Rep. 854; 53 L. R. A. 507; 60 S. W. 429; reversing 21 Tex. Civ. App. 568; 54 S. W. 421; *Persinger v. Chapman*, 93 Va. 349; 25 S. E. 5; *Kowalke v. Light Co.*, 103 Wis. 472; 74 Am. St. Rep. 877; 79 N. W. 762. "Where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake in the legal sense." *Kowalke v. Light Co.*, 103 Wis. 472; 74 Am. St. Rep. 877; 79 N. W. 762; citing *Hurd v. Hall*, 12 Wis. 112, which was decided on the authority of *Kelly v. Solari*, 9 Mees. & W. 54.

² *Gormby v. Gormby*, 130 Pa. St. 467; 18 Atl. 727; *Pennybacker v. Laidley*, 33 W. Va. 624; 11 S. E. 39.

³ *Kowalke v. Light Co.*, 103 Wis. 472; 74 Am. St. Rep. 877; 79 N. W. 762. So where one injured in an accident releases damages knowing that the extent of his injuries cannot be determined accurately. *Houston, etc., Ry. v. McCarty*, 94 Tex. 298; 86 Am. St. Rep. 854; 53 L. R. A. 507; 60 S. W. 429; reversing 21 Tex. Civ. App. 568; 54 S. W. 421; (citing *Alabama, etc., R. R. v. Turnbull*, 71 Miss. 1029; 16 So. 346; *Homuth v. Ry.*, 129 Mo. 629; 31 S. W. 903; *Seeley v. Traction Co.*, 179 Pa. St. 334; 36 Atl. 229; *Gilliam v. Alford*, 69 Tex. 267; 6 S. W. 757; *Kowalke v. Light Co.*, 103 Wis. 472; 74 Am. St. Rep. 877; 79 N. W. 762; distinguishing *Lumley v. R. R.*, 76 Fed. 66; 22 C. C. A. 60).

⁴ *Moore v. Scott*, 47 Neb. 346; 66 N. W. 441; *Crist v. Dice*, 18 O. S. 536.

is bound to make such payment, though before it falls due, it is learned that A is alive, since while both parties thought it probable that he was dead, both knew that they were really ignorant as to the fact.⁵ This principle, however, is not always adhered in those cases which depart from the general rule and allow rescission for a mistake of fact in the inducement.⁶ Thus where a county sold a claim for swamp lands, of doubtful validity, it was allowed to avoid such sale where an allowance of a large tract had been made on such claim shortly before the sale, unknown to the county.⁷

§79. Party bound by effect of voluntary acts.

The general rules on the subject of this class of mistake are subject to the following qualifications. Every sane person is held to intend the legal consequences of his voluntary acts. Accordingly, if a person of legal capacity, and not acting under fraud, misrepresentation, duress, or undue influence, goes through the outward form of binding himself by contract, he cannot avoid liability thereon by claiming that unknown to the adversary party, he made his offer or acceptance under mistake of fact, and that he did not intend to make such offer.¹

⁵ *Sears v. Grand Lodge*, 163 N. Y. 374; 50 L. R. A. 204; 57 N. E. 618.

⁶ See § 156.

⁷ *Montgomery County v. Emigrant Co.*, 47 Ia. 91. The county agreed to sell "all the rest and residue of the swamp land claim and the swamp land interest of said county in law and in equity, of whatever the same may consist and to as full and to as great an extent as the county may hold or be entitled to the same at and for the further sum of \$3,000." 47 Ia. 93. The court, in holding that rescission should be allowed in equity, said that the county "supposed and had reason to suppose not only that no such allowance had been made but that it was doubtful whether it ever would

be made." 47 Ia. 96. This reasoning would lead to the conclusion that rescission could not be had if the authorities cited earlier in this section are to be regarded as correct. A complicating fact in this case is that the vendee of the county knew of such allowance and did not disclose it. See ch. IX.

¹ *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. 846; 30 C. C. A. 430; *Crilly v. Board of Education*, 54 Ill. App. 371; *Griffin v. O'Neil*, 48 Kan. 117; 29 Pac. 143. (Where A offered B nineteen head of cattle at a rate which would have amounted to \$595, but by mistake in calculation made his offer for \$488.) *Durgin v. Smith*, Mich. ; 94 N. W. 1044; *Haubelt v. Mill Co.*, 77

Thus where A makes an offer, lower than he intended, through his miscalculation² or that of his agent,³ or where the mistake arises in sending a telegram from a general agent to a local agent,⁴ or in sending a telegram from the principal to his agent by reason of which the agent makes a contract on behalf of his principal, different from that intended by the latter,⁵ or A orders more than he intends to,⁶ and B accepts without knowledge of A's mistake, A is bound. If through mistake of the offerer's agent, the offer is made in terms different from that authorized by the offerer, and the offeree accepts it without knowing of such mistake, the offerer is bound by the terms of the offer as made.⁷ Thus where the agent of a railroad company offered a rate of sixty-nine and one-half cents per hundred pounds for cotton, the rate being really eighty-nine and one-half cents, the railroad was bound by the offer if accepted before revocation.⁸ If the offerer makes an offer by telegram and his offer is transmitted incorrectly, a question arises as to whether he is bound by its acceptance in the altered form. Some courts hold that for this purpose the telegraph company is the agent of the offerer, and that he is bound.⁹ The question usually arises in an action by the offerer against the telegraph company for damages. If he is bound by the offer as

Mo. App. 672; *Borden v. Ry.*, 113 N. Car. 570; 37 Am. St. Rep. 632; 18 S. E. 392; *Putnam v. McLeod*, 23 R. I. 373; 50 Atl. 646; *Coates v. Early*, 46 S. Car. 220; 24 S. E. 305. "If without the plaintiff's knowledge H did understand the transaction to be different from that which his words plainly expressed, it is immaterial as his obligation must be measured by his overt acts." *Mansfield v. Hodgdon*, 147 Mass. 304, 306; 17 N. E. 544; citing, *O'Donnell v. Clinton*, 145 Mass. 461; 14 N. E. 747; *Western R. R. v. Babcock*, 6 Met. (Mass.) 346.

² *Crilly v. Board of Education*, 54 Ill. App. 371; *Griffin v. O'Neil*, 48 Kan. 117; 29 Pac. 143; *Brown v.*

Levy, 29 Tex. Civ. App. 389; 69 S. W. 255.

³ *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. 846; 30 C. C. A. 430.

⁴ *Boruen v. Ry.*, 113 N. Car. 570; 37 Am. St. Rep. 632; 18 S. E. 392.

⁵ *Hasbrouck v. Telegraph Co.*, 107 Ia. 160; 70 Am. St. Rep. 181; 77 N. W. 1034.

⁶ *Coates v. Earley*, 46 S. Car. 220; 24 S. E. 305.

⁷ *Borden v. R. R.*, 113 N. C. 570; 37 Am. St. Rep. 632; 18 S. E. 392.

⁸ *Borden v. R. R.*, 113 N. C. 570; 37 Am. St. Rep. 632; 18 S. E. 392.

⁹ *Anheuser-Busch Brewing Co. v. Hutmacher*, 127 Ill. 652; 4 L. R. A. 575; 21 N. E. 626; *Haubelt v. Mill Co.*, 77 Mo. App. 672.

accepted, he is allowed to recover if the telegraph company is negligent.¹⁰ Some courts have allowed the offerer to recover even if he might possibly have avoided the contract, holding that he was not bound to engage in "long and doubtful litigation" in attempting to rescind.¹¹ In other jurisdictions the offerer is not allowed to recover on the theory that he is not bound.¹² If the mistake is evident on the face of the telegram the offerer is not bound.¹³ Some authorities allow greater latitude in relieving against mistakes of the class discussed in this section. Thus where A, a member of a firm of quarrymen, did not himself know the price of monuments, and relied on the estimates of the foreman, relief was given where such foreman made a mistake in computation.¹⁴

§80. Effect of negligence other than in execution.

Some courts lay it down as a broad principle that one who enters into a contract under mistake of fact due to his own negligence, concerning which he could with reasonable diligence have learned the truth, cannot have relief.¹ This rule has

¹⁰ *Western Union Telegraph Co. v. Lumber Co.*, 114 Ga. 576; 88 Am. St. Rep. 36; 40 S. E. 815; *Western Union Telegraph Co. v. Shotter*, 71 Ga. 760; *Reed v. Telegraph Co.*, 125 Mo. 661; 58 Am. St. Rep. 609; 34 L. R. A. 492; 37 S. W. 904; *Rittenhouse v. Independent Line*, 44 N. Y. 263; 4 Am. Rep. 673.

¹¹ *Hasbrouck v. Telegraph Co.*, 107 Ia. 160; 70 Am. St. Rep. 181; 77 N. W. 1034.

¹² *Postal Telegraph Cable Co. v. Schaefer*, 110 Ky. 907; 23 Ky. Law Rep. 344; 62 S. W. 1119; *Pegram v. Telegraph Co.*, 100 N. Car. 28; 6 Am. St. Rep. 557; 6 S. E. 770.

¹³ See § 85.

¹⁴ *Everson v. Granite Co.*, 65 Vt. 658; 27 Atl. 320.

¹ *Grymes v. Sanders*, 93 U. S. 55; *Pope v. Hoopes*, 90 Fed. 451; 33 C. C. A. 595; *Barker v. Ry.*, 65 Fed.

460; *Woodside v. Lippold*, 113 Ga. 877; 84 Am. St. Rep. 267; 39 S. E. 400; *Iverson v. Wilburn*, 65 Ga. 103; *Bonney v. Stoughton*, 122 Ill. 536; 13 N. E. 833; *Miller v. Powers*, 119 Ind. 79; 4 L. R. A. 483; 21 N. E. 455; *Atkinson v. Farrington Co.* (N. J. Eq.); 28 Atl. 315; *Voorhis v. Murphy*, 26 N. J. Eq. 435; *Haggerty v. McCanna*, 25 N. J. Eq. 48; *Foster v. Schmeer*, 15 Or. 363; 15 Pac. 626; *Coates v. Early*, 46 S. C. 220; 24 S. E. 305; *Pearce v. Suggs*, 85 Tenn. 724; 4 S. W. 526; *McDaniels v. Bank*, 29 Vt. 230; 70 Am. Dec. 406; *Persinger v. Chapman*, 93 Va. 349; 25 S. E. 5. "If the law were otherwise, contracts, instead of being binding, would be as unstable as water." *Bridges v. Robinson*, 2 Tenn. Ch. 720. 724; quoted in *Pearce v. Suggs*, 85 Tenn. 724; 4 S. W. 526. "There was a mistake of

been applied to mistakes as to area² or boundary³ of land; as to the amount of assets in a firm where one partner is buying out another,⁴ and to the amount due on a note in the possession of the party alleging mistake.⁵ When this rule is invoked, the facts usually show that the party alleging mistake either knew the facts before entering into the contract,⁶ or that the mistake was really one of law,⁷ or as to a matter of inducement,⁸ or that the mistake was as to the contents of a written contract,⁹ or that he entered into the contract in conscious ignorance of the facts,¹⁰ or that the mistake was as to an immaterial matter,¹¹ or that the evidence failed to prove mistake,¹² and such cases do not therefor rest solely on the ground of negligence. Thus where A, the holder of the first mortgage, believes that B, the holder of the second mortgage, has abandoned his rights under his mortgage, and A accordingly takes security for his debt which is subsequent to B's mortgage and cancels his first mortgage, without making any inquiry as to B's having abandoned his second mortgage, he cannot have the cancellation of his first mortgage set aside.¹³

On the other hand, many courts allow relief for mistake in

fact, on a collateral point, and this fact was unknown to both parties, and the sources of information were open alike to both. It is well settled that this will not afford ground for the rescission of the contract." *Sample v. Bridgforth*, 72 Miss. 293, 296; 16 So. 876; citing *Wise v. Brooks*, 69 Miss. 891; 13 So. 836; *Hall v. Thompson*, 1 S. & M. 443; *Ayres v. Mitchell*, 3 S. & M. 683.

² *Iverson v. Wilburn*, 65 Ga. 103.

³ *Grymes v. Sanders*, 93 U. S. 55.

⁴ *Bonney v. Stoughton*, 122 Ill. 536; 13 N. E. 833; *Pearce v. Suggs*, 85 Tenn. 724; 4 S. W. 526.

⁵ *McDaniels v. Bank*, 29 Vt. 230; 70 Am. Dec. 406.

⁶ *Pope v. Hoopes*, 90 Fed. 451; 33 C. C. A. 595; *Phipps v. The Nicanor*, 44 Fed. 504.

⁷ *Bonney v. Stoughton*, 122 Ill.

536; 13 N. E. 833; *Haggerty v. McCanna*, 25 N. J. Eq. 48; *McDaniels v. Bank*, 29 Vt. 230; 70 Am. Dec. 406.

⁸ *Sample v. Bridgforth*, 72 Miss. 293; 16 So. 876.

⁹ *Barker v. Ry.*, 65 Fed. 460; *Miller v. Powers*, 119 Ind. 79; 4 L. R. A. 483; 21 N. E. 455; *Voorhis v. Murphy*, 26 N. J. Eq. 435.

¹⁰ *Woodside v. Lippold*, 113 Ga. 877; 84 Am. St. Rep. 267; 39 S. E. 400; *McDaniels v. Bank*, 29 Vt. 230; 70 Am. Dec. 406; *Persinger v. Chapman*, 93 Va. 349; 25 S. E. 5.

¹¹ *Grymes v. Sanders*, 93 U. S. 55.

¹² *Atkinson v. Farrington* (N. J. Eq.); 28 Atl. 315.

¹³ *Woodside v. Lippold*, 113 Ga. 877; 84 Am. St. Rep. 267; 39 S. E. 400.

an essential element even if the party seeking relief might with diligence have discovered the truth;¹⁴ as where the vendee settled for milk sold and delivered to him, on the erroneous assumption that the cans in which it was shipped each contained eight gallons.¹⁵ So where A, a warehouseman, was unable to find property stored with him by B, and after full opportunity for investigation, A came to the conclusion that the property had been stolen, and gave B his check therefor, it was held that he could stop payment of the check on finding the property soon after the check was given.¹⁶

The effect of negligence in omitting to learn the terms of a written contract has been discussed elsewhere.¹⁷

Since mistake in inducement is not a ground for relief,¹⁸ the question of the negligence of the party seeking relief is necessarily immaterial.

§81. Forgetfulness as mistake.

If a party to a contract has known of a material fact and has entered into such contract because he has forgotten such fact, he is not given relief on the ground of mistake.¹ Thus forgetfulness by vendor of subsisting equities in property belonging to another does not entitle vendor to relief,² nor does forgetfulness of the insolvency of a corporation.³ There is, however, some authority for treating forgetfulness as mistake. Thus where A sold land to B, meaning to reserve an easement in an aqueduct thereon, of which aqueduct B had no knowledge when he bought the land and which was worth much more than the cost of the land, it was held that A might have the easement or rescission at B's election.⁴

¹⁴ Devine v. Edwards, 101 Ill. 138.

¹⁵ Devine v. Edwards, 101 Ill. 138; same case, 87 Ill. 177.

¹⁶ State Savings Bank v. Buhl, 129 Mich. 193; 56 L. R. A. 944; 88 N. W. 471.

¹⁷ See § 76.

¹⁸ See § 155.

¹ Dewey v. Whitney, 93 Fed. 533;

35 C. C. A. 414; affirming, 85 Fed. 325; Pickett v. Casualty Co., 60 S. Car. 477; 38 S. E. 160, 629.

² Dewey v. Whitney, 93 Fed. 533; 35 C. C. A. 414; affirming, 85 Fed. 325.

³ Pickett v. Casualty Co., 60 S. C. 477; 38 S. E. 160, 629.

⁴ Brown v. Lamphear, 35 Vt. 252.

§82. Materiality of mistake.

Whatever the relation of the mistake to the contract, if it concerns a matter which is not material thereto, no relief is given on the ground of mistake.¹ Thus a slight mistake as to area² or boundary line³ is held not to justify rescission. So a mistake as to one boundary line, the vendee believing that the tract in question included an abandoned shaft once used for mining gold, is not ground for relief where the evidence shows that the land was sold for mining purposes and that the existence of such shaft would not in any way increase its value, and did not in any way affect vendee.⁴ On the other hand, a serious discrepancy in area, as where a tract of one hundred thirty-five acres was thought to contain two hundred acres,⁵ or a tract of two hundred fifty acres was thought to contain only one hundred ninety-eight,⁶ may be ground for rescission.

§83. Ratification and laches.

A contract entered into under mistake as to an essential element is, properly speaking, void. At the same time courts sometimes speak of ratifying it. Strictly speaking, this is a contradiction in terms, as a void contract is not subject to ratification. What is meant by ratification is that the original transaction may be treated as at least an offer to the party affected by the mistake, which may be accepted by him if not withdrawn by the adversary party, and his acquiescence therein with full knowledge of the facts is such acceptance.¹ Thus where grantee accepted a deed under mistake as to the identity

¹ *Grymes v. Sanders*, 93 U. S. 55; *Wilson v. Gunning*, 80 Ia. 331; 45 N. W. 920; *Mattingly v. Stone* (Ky.), 12 S. W. 467; 12 Ky. Law Rep. 72; *Wood v. Evans*, 43 Mo. App. 230; *Lyman v. Campbell*, 34 Mo. App. 213; *Nicholson v. Jane-way*, 16 N. J. Eq. 285; *Southwick v. Bank*, 84 N. Y. 420; *Trigg v. Read*, 5 Humph. (Tenn.) 529; 42 Am. Dec. 447; *Rogers v. Pattie*, 96 Va. 498; 31 S. E. 897.

² *Wilson v. Gunning*, 80 Ia. 331; 45 N. W. 920.

³ *Rogers v. Pattie*, 96 Va. 498; 31 S. E. 897.

⁴ *Grymes v. Sanders*, 93 U. S. 55.

⁵ *Newton v. Tolles*, 66 N. H. 136; 49 Am. St. Rep. 593; 9 L. R. A. 50; 19 Atl. 1092.

⁶ *Calhoun v. Teal*, 106 La. 47; 30 So. 288.

¹ *Simmons v. Palmer*, 93 Va. 389; 25 S. E. 6.

of the realty conveyed, and after learning of such mistake, he retains such realty until the price of the realty goes down, he cannot then avoid the conveyance.² Where a mistake in the inducement is not ground for avoiding a contract, ratification is, of course, not necessary.³

Mistake in the expression is said to be cured by subsequent ratification.⁴ Strictly speaking, this means that the parties may by acquiescence substitute the contract, as written, for their original contract. Thus where a note has been renewed several times, a deed intended as a mortgage cannot be avoided because given to the president of the bank instead of to the bank.⁵ So accepting an insurance policy waives mistake as to its date.⁶ Where mistake exists of a type to justify rescission, the party seeking rescission may have it if he seeks it promptly on discovering the mistake;⁷ while if he delays unreasonably,⁸ and the adversary party changes his position so that he cannot be placed *in statu quo*,⁹ rescission will be denied.¹⁰ An alteration in position not affecting substantial rights does not of itself prevent rescission. Thus where a vendee of State school lands paid no interest to the State, but the State did not attempt to forfeit such lands therefor, rescission of a conveyance of such lands was allowed.¹¹ If the party against whom rescission is sought knew of the adversary party's mistake and

² *Simmons v. Palmer*, 93 Va. 389; 25 S. E. 6.

³ See § 155.

⁴ *New York, etc., Ins. Co. v. McMaster*, 87 Fed. 63; 30 C. C. A. 532; *Dotterer v. Freeman*, 88 Ga. 479; 14 S. E. 863.

⁵ *Dotterer v. Freeman*, 88 Ga. 479; 14 S. E. 863.

⁶ *New York, etc., Ins. Co. v. McMaster*, 87 Fed. 63; 30 C. C. A. 532.

⁷ *Sweeny v. Water Supply Co.*, 121 Ala. 454; 25 So. 575; *Werner v. Rawson*, 89 Ga. 619; 15 S. E. 813.

⁸ *Murphy v. Bank*, 95 Ia. 325; 63 N. W. 702.

⁹ *Connecticut, etc., Ins. Co. v. Stewart*, 95 Ind. 588; *Truesdale v.*

Side, 65 Minn. 315; 67 N. W. 1004.

¹⁰ "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted." *Grymes v. Sanders*, 93 U. S. 55. 62.

¹¹ *Culbertson v. Blanchard*, 79 Tex. 486; 15 S. W. 700.

took advantage of it, rescission may be had against him even where he cannot be placed *in statu quo*.¹² Thus, A was executor of X's will, and in payment of a legacy given by X to Y, A sent a check to Y's address. Unknown to A, Y had died before X, and the legacy had lapsed. B, Y's administrator, indorsed the check and paid the proceeds to Y's next of kin. A was allowed to recover from B.¹³ But no valid waiver or ratification can be made unless it is shown that the party alleged to have ratified was then aware of the mistake.¹⁴

§84. Mutuality of mistake.

It is often said that mistake must be mutual, which seems to mean that both parties must make the same mistake, or one must make it and the other must know and take advantage of it. Like many other general propositions concerning mistake, this does not prove a satisfactory guide on analysis. Of the mistakes as to an essential feature of the contract, mistake as to the identity of the adversary party can scarcely be conceived of as mutual. As to mistakes concerning the subject-matter, courts differ; some holding that such mistakes must be mutual to be operative;¹ others that they need not be.² Mistake as to the terms of a contract cannot be mutual, yet it often is operative.³ Mistake in the inducement is not usually operative; hence the necessity of its being mutual need not be considered.⁴ Mistake in expression, to be operative as such must be mutual.⁵ The term "mutual" in this sense has a peculiar meaning.⁶ Doubtless the rule originated in this class of mistake, and its

¹² Phetteplace v. Bucklin, 18 R. I. 297; 27 Atl. 211.

¹³ Phetteplace v. Bucklin, 18 R. I. 297; 27 Atl. 211.

¹⁴ Williams v. Hamilton, 104 Ia. 423; 65 Am. St. Rep. 475; 73 N. W. 1029.

¹ Thus if A is buying land from B and X points out the wrong land and A makes no further inquiry A's right to take advantage of such mistake depends on whether X is B's

agent; in which case A can avoid the contract; or is not, in which case A cannot. McKinnon v. Vollmar, 75 Wis. 82; 17 Am. St. Rep. 178; 6 L. R. A. 121; 43 N. W. 800; (obiter) Law v. Grant, 37 Wis. 548.

² Strong v. Lane, 66 Minn. 94; 68 N. W. 765.

³ See § 77.

⁴ See § 155.

⁵ See § 1238.

⁶ See §§ 1238, 1239.

application to other classes is partly due to a loose and indiscriminating statement of such rule as a general proposition. Payment by mistake of fact has the same effect whether the mistake is mutual or not.⁷

IV. NON-DISCLOSURE.

§85. Non-disclosure as to essential element of contract.

If A is mistaken as to an essential element of a contract, and B, the adversary party, knows of such mistake and does not correct it, no contract exists.¹ So if A, an insurance company, pays a claim to B, the insured, for the loss of B's property by reason of the negligence of X, a railway company, and B does not disclose to A that he has settled with X, thereby defeating A's right of subrogation, A can recover the payment.² So if tenants who are to pay a less rent than the regular rate if a lower rate is charged for the adjoining premises, pay the regular rate because the lessor does not disclose that he has made a reduction in the rent of such adjoining premises, they may recover such excess.³ Examples of such non-disclosure have been given under mistake.⁴ Non-disclosure of this type is a peculiar form of mistake. It differs from pure mistake chiefly in this: that while in pure mistake no relief can be given ordinarily where one party has by mistake expressed his intention in terms differing from those intended;⁵ a different rule applies where the adversary party knew of such mistake and did not disclose it.

§86. Advantage taken of known mistake.

If the offeree knows that the terms of the offer do not express the real intention of the offerer, and the offeree seeks to take advantage of such mistake by accepting the offer, no contract

⁷ See § 827.

² Chickasaw, etc., Ins. Co. v. Wel-

¹ Wilson v. Moriarty, 88 Cal. 207; 26 Pac. 85; Corson v. Berson, 86 Cal. 433; 25 Pac. 7; Chickasaw, etc., Ins. Co. v. Weller, 98 Ia. 731; 68 N. W. 443; Manter v. Truesdale, 57 Mo. App. 435.

ler, 98 Ia. 731; 68 N. W. 443.

³ Corson v. Berson, 86 Cal. 433; 25 Pac. 7.

⁴ See §§ 71-77.

⁵ See § 78.

exists.¹ Thus if a telegram, as transmitted, shows on its face that some error has been made, the offeree cannot accept and bind the offerer; nor can he hold the telegraph company liable.² Thus an offer by telegraph as received was so worded as to imply that the price of certain oranges was one dollar and sixty cents; but the party receiving it knew that it meant two dollars and sixty cents. It was held that he could not accept such offer and bind the sender; and that accordingly if the sender accepted the price of one dollar and sixty cents he could not throw the loss on the telegraph company.³ So A offered to sell bolting cloth to B at "five cents a yard that (another vendor) would charge you." The word, "less," was omitted, and "that" was written in place of "than." B knew that such mistake had been made, but tried to bind A, by accepting the offer, to sell the cloth at five cents a yard. It was held that no binding contract existed.⁴ A made a written offer to a city to construct a public work. By a clerical mistake of A's engineer, certain items were bid at too low a price, in one instance the bid being one dollar and fifty cents a cubic yard for work fairly worth fifteen dollars a cubic yard, which was the bid intended. The city knew of such mistake, and attempted to accept the offer as written. Before such acceptance, A notified the city of the mistake and demanded that the bid be corrected, or that it be withdrawn. It was held that no contract was created by such attempted acceptance.⁵ Even after performance, the party making such mis-

¹ *Moffett, etc., Co. v. Rochester*, 178 U. S. 373; reversing 91 Fed. 28; 33 C. C. A. 319; which reversed 82 Fed. 255; *Germain Fruit Co. v. Telegraph Co.*, 137 Cal. 598; 59 L. R. A. 575; 70 Pac. 658; *Singer v. Match Co.*, 117 Ga. 86; 43 S. E. 755; *Mummenhoff v. Randall*, 19 Ind. App. 44; 49 N. E. 40. (Where by a clerical mistake of a stenographer an offer of potatoes was made at 35 instead of 55); *Smith v. Mackin*, 4 Lans. (N. Y.) 41; *Butler v. Moses*, 43 O. S. 166; 1 N. E. 316.

² *Germain Fruit Co. v. Telegraph Co.*, 137 Cal. 598; 59 L. R. A. 575; 70 Pac. 658; *Manly Mfg. Co. v. Telegraph Co.*, 105 Ga. 235; 31 S. E. 156.

³ *Germain Fruit Co. v. Telegraph Co.*, 137 Cal. 598; 59 L. R. A. 575; 70 Pac. 658.

⁴ *Butler v. Moses*, 43 O. S. 166; 1 N. E. 316.

⁵ *Moffett, etc., Co. v. Rochester*, 178 U. S. 373; reversing 91 Fed. 28; 33 C. C. A. 319; which reversed 82 Fed. 255.

take is not bound by the contract, but may recover a reasonable compensation.⁶ The same principle applies if the offerer knows that the offeree misunderstands the terms of the offer, and allows the offeree to accept under such mistake.⁷ So in written contracts, if by fair construction, the intention of the party thus misled can be given effect, such effect will be given to it.⁸ But if the contract is in writing and unambiguous, the parole evidence rule⁹ prevents relief from being given to the party misled, unless circumstances of fraud and the like intervene. In some jurisdictions, negligence of the mistaken party has a different effect in non-disclosure of this type from that which it has in pure mistake. If A is mistaken as to the contents of a written contract through failure to pay attention to it when read, and B knows of A's mistake, A's negligence does not prevent him from obtaining relief.¹⁰ Where differing from pure mistake, non-disclosure of this type has legal effects like fraud.¹¹

⁶ *Butler v. Moses*, 43 O. S. 166; 1 N. E. 316.

⁷ *Wilson v. Moriarty*, 88 Cal. 207; 26 Pac. 85; *Manter v. Truesdale*, 57 Mo. App. 435.

⁸ See §§ 1121, 1122, 1127; see also *Goulding v. Hammond*, 49 Fed. 443.

⁹ See Ch. Ivi.

¹⁰ *Wilson v. Moriarty*, 88 Cal. 207; 26 Pac. 85.

¹¹ It is sometimes called fraud. "The only fraud necessary to sustain the judgment is such as may be inferred from the failure of the defendant to correct the mistake of the plaintiff known to or suspected by the former." *Wilson v. Moriarty*, 88 Cal. 207, 212; 26 Pac. 85.

CHAPTER VI.

FRAUD IN THE INDUCEMENT.

I. NATURE OF FRAUD.

§87. False representation.

Fraud in the inducement exists where the defrauded party understands the identity of the adversary party, the consideration, the subject-matter, and the terms of the contract; and he is willing to enter into the contract in question; but his willingness so to enter is caused by a fraudulent misrepresentation of the adversary party as to a material fact. What a false representation is, is a question involving in part some elements elsewhere discussed.¹ Unless a false representation is made fraud cannot exist.² Where there is no false representation, "earnest solicitation" cannot amount to fraud.³ The mere fact that a contract is an unwise or a foolish one does not establish the existence of fraud.⁴

§88. Form of false representations.

The form in which such representation is made is immaterial.¹ It may consist of actual false statements,² of statements partly true, but so framed as to mislead,³ or of either words or conduct which prevent the adversary party from discovering the truth.⁴ Non-disclosure, as distinguished from active concealment is discussed subsequently.⁵

¹ For non-disclosure and concealment, see § 89, 157 *et seq.* For what facts or opinions may be the subject of such representation, see § 95 *et seq.*

² *State Bank v. Gates*, 114 Ia. 323; 86 N. W. 311.

³ *Ross v. Webster*, 63 Conn. 24; 26 Atl. 476.

⁴ *Equitable, etc., Co. v. Waring*,

117 Ga. 599; 97 Am. St. Rep. 177; 62 L. R. A. 93; 44 S. E. 320.

⁵ *Watson v. Brown*, 113 Ia. 308; 85 N. W. 28; *Herron v. Dibrell*, 87 Va. 289; 12 S. E. 674.

² See cases cited in § 94 *et seq.*

³ See § 90.

⁴ See § 89.

⁵ See Ch. ix.

§89. Fraud committed by acts.

Fraud may be committed as well by acts as by express words.¹ Many of the cases illustrating this principle are also examples of active concealment.² Any conduct intended to deceive may be fraud if the other necessary elements are present; as giving a check on a bank in which the drawer has no funds.³

§90. Active concealment.

Active concealment of material facts, as distinguished from innocent non-disclosure, amounts to fraud.¹ Thus fraud was held to exist where a judgment of over seven thousand dollars was bought for four hundred dollars, the vendee not disclosing that the judgment debtor was dead, leaving an estate worth six thousand dollars,² where a vendor of personalty packed it so as to conceal defects,³ where a vendor of a horse affected with glanders said that it had distemper, a much less serious disease, which explained the apparent symptoms,⁴ or where the vendor hitched his horse short to keep him from "cribbing" and explained it by saying that it was done to keep the horse

¹ Robinson v. McKenna, 21 R. I. 117; 79 Am. St. Rep. 793; 42 Atl. 510.

² See § 89.

³ Peterson v. Bank, 52 Pa. St. 206; 91 Am. Dec. 146.

⁴ Stewart v. Rancho Co., 128 U. S. 383; Southern Development Co. v. Silva, 125 U. S. 247; Wainseott v. Loan Association, 98 Cal. 253; 33 Pac. 88; Kenner v. Harding, 85 Ill. 264; 28 Am. Rep. 615; Bowman v. Bates, 2 Bibb. (Ky.) 47; 4 Am. Dec. 677; Brady v. Finn, 162 Mass. 260; 38 N. E. 506; Gottschalk v. Kircher, 109 Mo. 170; 17 S. W. 905; Gruber v. Baker, 20 Nev. 453; 9 L. R. A. 302; 23 Pac. 858; Clark v. Clark, 55 N. J. Eq. 814; 42 Atl. 98; Brotherton v. Reynolds, 164 Pa. St. 134; 30 Atl. 234; Merchants' Bank v. Campbell, 75 Va. 455; "mere silence

is quite different from concealment; *aluid est tacere, aluid celare*," Stewart v. Rancho Co., 128 U. S. 383, quoted in Farrar v. Churchill, 135 U. S. 609. "*Aluid est celare, aluid tacere*," Roseman v. Canovan, 43 Cal. 110, 118. For the effect of innocent non-disclosure, see § 84.

² Gottschalk v. Kircher, 109 Mo. 170; 17 S. W. 905. (Vendee further represented that the judgment debtor was alive and execution-proof.)

³ Roseman v. Canovan, 43 Cal. 110; (sale of wool in sacks); Singleton v. Kennedy, 9 B. Mon. (Ky.) 222; (sale of cotton bagging of inferior grade "plated" with that of standard grade).

⁴ George v. Johnson, 6 Humph. (Tenn.) 36; 44 Am. Dec. 288; Howard v. Gould, 28 Vt. 523; 67 Am. Dec. 728.

from rubbing his saddle,⁵ where vendor warned vendee that a mule kicked, and thereby prevented an examination that would have disclosed malformation and lameness,⁶ or vendor requests vendee not to inquire of vendor's foreman, and thereby prevents vendee from learning of a misstatement as to the number of cattle branded in the previous year.⁷ So fraud exists where vendee kept vendor's agent from notifying vendor of the discovery of a salt spring on vendor's land, the vendor living in another state, by representing that he had sent a messenger five days before to buy the land;⁸ or where vendee discovered Luray Cavern on land offered at public sale, and sealed up the mouth of the cavern, and said it was a mud-hole,⁹ or where a part-owner of a mine covered up a rich vein of ore that had just been discovered, and bought out the interest of a part-owner for much less than its real value.¹⁰ Active concealment of the kinds set forth has been held to be fraud, both at law,¹¹ as in an action of deceit,¹² or in equity in an action of rescission.¹³

§91. Partial disclosure.

Even where disclosure is not required, a partial disclosure in such form as to mislead the party to whom it is made con-

⁵ Croyle v. Moses, 90 Pa. St. 250; 35 Am. Rep. 654.

⁶ Kenner v. Harding, 85 Ill. 264; 28 Am. Rep. 615.

⁷ Stewart v. Rancho Co., 128 U. S. 383.

⁸ Bowman v. Bates, 2 Bibb. (Ky.) 47; 4 Am. Dec. 677. (Vendee did not disclose the existence of the spring and bought the land for perhaps one per cent of its value.)

⁹ Merchants' Bank v. Campbell, 75 Va. 455. (Thereby acquiring the land for four per cent of what one bidder offered to start the sale on when the existence of the cavern was discovered.)

¹⁰ Gruber v. Baker, 20 Nev. 453; 9 L. R. A. 302; 23 Pac. 858.

¹¹ George v. Johnson, 6 Humph. (Tenn.) 36; 44 Am. Dec. 288.

¹² Stewart v. Rancho Co., 128 U. S. 383; Roseman v. Canovan, 43 Cal. 110; Kenner v. Harding, 85 Ill. 264; 28 Am. Rep. 615; Singleton v. Kennedy, 9 B. Mon. (Ky.) 222; Howard v. Gould, 28 Vt. 523; 67 Am. Dec. 728.

¹³ Bowman v. Bates, 2 Bibb. (Ky.) 47; 4 Am. Dec. 677; Gottschalk v. Kircher, 109 Mo. 170; 17 S. W. 905; Clark v. Clark, 55 N. J. Eq. 814; 42 Atl. 98; Merchants' Bank v. Campbell, 75 Va. 455.

stitutes fraud.¹ Thus a disclosure to a vendee of stock, of the names of existing subscribers without disclosing that one of them has subscribed conditionally,² or is to have his stock for nothing,³ a statement as to the location and condition of realty made by the vendee to the vendor, omitting certain facts which add to its value;⁴ a statement by A to B of C's financial condition omitting to disclose C's indebtedness to A;⁵ a statement by A of the existence of one lien on his property, A omitting to disclose the existence of fifteen others;⁶ a representation by A of his share in his father's estate, A omitting to disclose that he had received his share in advancements during his father's lifetime;⁷ a disclosure of title to realty, without disclosing the insanity of a grantor in the chain of title,⁸ or the pendency of an action to review a judgment on which the title to the realty is based;⁹ a statement by a woman on becoming engaged, that she had obtained a divorce from her former husband for his aggression, she omitting to disclose that he had also obtained a divorce upon a cross-bill charging cruelty and profanity;¹⁰ a statement by A to B, C's wife, showing that C was likely to be arrested for debt, but not disclosing that such arrest was not imminent, and thereby, knowing such belief, inducing B to secure such debt at once, without opportunity for delibera-

¹ *Craig v. Hamilton*, 118 Ind. 565; 21 N. E. 315; *Coles v. Kennedy*, 81 Ia. 360; 25 Am. St. Rep. 503; 46 N. W. 1088; *Burns v. Dockray*, 156 Mass. 135; 30 N. E. 551; *Short v. Currier*, 153 Mass. 182; 26 N. E. 444; *Zabel v. Telephone Co.*, 127 Mich. 402; 86 N. W. 949; *Traber v. Hicks*, 131 Mo. 180; 32 S. W. 1145; *Clark v. Clark*, 55 N. J. Eq. 814; 42 Atl. 98; *Haviland v. Willets*, 141 N. Y. 35; 35 N. E. 958; *Devoe v. Brandt*, 53 N. Y. 462; *Manley v. Carl*, 11 Ohio C. D. 1; *Remington Sewing Machine Co. v. Kezertee*, 49 Wis. 409; 5 N. W. 809.

² *Zabel v. Telephone Co.*, 127 Mich. 402; 86 N. W. 949.

³ *Coles v. Kennedy*, 81 Ia. 360; 25 Am. St. Rep. 503; 46 N. W. 1088.

⁴ *Manley v. Carl*, 11 Ohio C. D. 1.

⁵ *Browning v. Bank*, 13 App. D. C. 1; *Remington Sewing Machine Co. v. Kezertee*, 49 Wis. 409; 5 N. W. 809.

⁶ *Spencer v. Sandusky*, 46 W. Va. 582; 33 S. E. 221.

⁷ *Craig v. Hamilton*, 118 Ind. 565; 21 N. E. 315.

⁸ *Burns v. Dockray*, 156 Mass. 135; 30 N. E. 551.

⁹ *Atwood v. Chapman*, 68 Me. 38; 28 Am. Rep. 5.

¹⁰ *Van Houten v. Morse*, 162 Mass. 414; 44 Am. St. Rep. 373; 26 L. R. A. 430; 38 N. E. 705. (She had made statements also concerning the standing of her family in their home in the South, omitting to disclose that she was in part of negro ancestry.)

tion,¹¹ or a disclosure of a defect in an animal, omitting to disclose a similar defect,¹² have each been held to amount to fraud. So where A had agreed to sell realty to B for a cash payment, A to waive his lien for the purchase price and to allow B to borrow a sum of money from X with which B and X had agreed that such realty should be improved, it was held fraud for B and X to omit to disclose to A that the cash payment made by B to A came out of the money loaned by X to B.¹³

§92. Fraud affecting written contracts.

Fraud consisting of oral misrepresentations may avoid a contract in writing.¹ The so-called Parol Evidence Rule has no application to extrinsic evidence when used to attack the validity of the contract.²

§93. Fraud affecting contracts within the Statute of Frauds.

Even if the contract is one which by the statute of frauds must be in writing, or some note or memorandum thereof must be in writing, oral misrepresentations if containing the other requisite elements may constitute fraud.¹ This rule is usually invoked when the contract has been performed, and the fraud is treated as a tort.²

§94. Representations as a credit of third person.

A false representation as to the credit, character and the like of a third person is not within that clause of the statute of fraud which refers to contracts "to answer for the debt, default

¹¹ *Lomerson v. Johnston*, 47 N. J. Eq. 312; 24 Am. St. Rep. 410; 20 Atl. 675.

¹² *Baker v. Seahorn*, 1 Swan (Tenn.) 54; 55 Am. Dec. 724.

¹³ *Traber v. Hicks*, 131 Mo. 180; 32 S. W. 1145.

¹ *Antle v. Sexton*, 137 Ill. 410; 27 N. E. 691; affirming 32 Ill. App. 437.

² See § 1211.

¹ *Maddox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535; *Tate v. Watts*, 42 Ill. App. 103; *Corder v. O'Neill*, 176 Mo. 401; 75 S. W. 764; *Grove v. Fulsome*, 16 Mo. 543; 57 Am. Dec. 247; *Bork v. Martin*, 132 N. Y. 280; 28 Am. St. Rep. 570; 30 N. E. 584; *Foss v. Newbury*, 20 Or. 257; 25 Pac. 669.

² *Tate v. Watts*, 42 Ill. App. 103.

or miscarriage of another," and need not be in writing.¹ The liability contemplated by the statute is one on contract. If any liability is sought to be enforced by reason of false representations, it is one in tort. It is for this reason that the statute does not apply. The result is, in some respects, peculiar. By false oral representation as to B's credit, A may become personally liable; while he would not be personally liable if he had specifically contracted to discharge B's liability if B was unable to do so.² Thus a representation made by an officer of the bank to a depositor with reference to the solvency of the bank may be actionable fraud though not in writing.³

In some states, however, such representations are, by special statute, not actionable unless in writing, if made for the purpose of procuring extension of credit to such third person; and in some States this statute is incorporated into the statute of frauds.⁴ Under the Indiana statute, no action can be maintained to charge a person by reason of any representation made concerning the "character, conduct, credit, ability, trade or dealings of any other person," unless such representation is in writing and signed by the party to be charged thereby or some one legally authorized by him.⁵ Thus an oral representation by the president of a corporation as to its solvency,⁶ or by the agent of a natural person as to his principal's solvency,⁷ is not actionable so as to impose a liability upon the person making such representation.

¹ Pasley v. Freeman, 3 T. R. 51; Haycraft v. Creasy, 2 East 92; Iasigi v. Brown, 17 How. (U. S.) 183; Kemp v. Bank, 109 Fed. 48; 48 C. C. A. 213; Endsley v. Johns, 120 Ill. 469; 60 Am. Rep. 572; 12 N. E. 247; Robbins v. Barton, 50 Kan. 120; 31 Pac. 686; Hess v. Culver, 77 Mich. 598; 18 Am. St. Rep. 421; 6 L. R. A. 498; 43 N. W. 994; Cowley v. Smyth, 46 N. J. L. 380; 50 Am. Rep. 432; Westervelt v. Demarest, 46 N. J. L. 37; 50 Am. Rep. 400; Upton v. Vail, 6 Johns. (N. Y.) 181; 5 Am. Dec. 210.

² See § 611 *et seq.*

³ Kemp v. Bank, 109 Fed. 48; 48 C. C. A. 213.

⁴ Brown v. Kimball, 84 Me. 280; 24 Atl. 847; Hunter v. Randall, 62 Me. 423; 16 Am. Rep. 490; McKinney v. Whiting, 8 All. (Mass.) 207; Wells v. Prince, 15 Gray (Mass.) 562; St. Johns National Bank v. Steel, Mich. ; 97 N. W. 704.

⁵ Heintz v. Mueller, 19 Ind. App. 240; 49 N. E. 293; (holding that "any other person" includes a private corporation.)

⁶ Brown v. Kimball, 84 Me. 280; 24 Atl. 847.

⁷ Hunter v. Randall, 62 Me. 423;

Such statutes do not apply where the party who makes such false representations does so for his own advantage without procuring the extension of credit to the person whose credit is in question.⁸ Thus an oral representation that a given corporation has paid large dividends, made by a stockholder therein for the purpose of selling his stock is actionable fraud.⁹ So a fraudulent conspiracy between A and X, whereby A misrepresents to B the utility of an alleged patent right owned by X, and A induces B to purchase such patent right by pretending to execute the contract as joint maker with B, is not within the statute.¹⁰ If the personal advantage to accrue to the party making the false representation is to come solely through extension of credit to such third person, the statute applies. Thus where the person making the false representation gains advantage as an officer of a corporation, to which he procures the extension of credit by false representations,¹¹ or as a stockholder, where by fraud he induces a sale of stock by the corporation to a third person,¹² or where he receives a commission for making the contract on behalf of his principal, which he induces by false representations,¹³ the statute applies.

II. REPRESENTATIONS OF FACT.

§95. Material fact — What is fact.

The second question to consider in discussing the elements of fraud is what is a material fact. The false representation must be of a fact as distinguished from statements, such as opinions and promises which are not facts.¹ What representations are representations of fact may be better illustrated by examples than stated as an abstract rule. Thus statements con-

16 Am. Rep. 490. Even if money is paid to such agent and by him transmitted to his principal.

⁸ Hess v. Culver, 77 Mich. 598; 18 Am. St. Rep. 421; 6 L. R. A. 498; 43 N. W. 994.

⁹ Hubbard v. Long, 105 Mich. 442; 63 N. W. 644 (opinion substituted for 60 N. W. 50).

¹⁰ Coulter v. Clark, Ind. ; 66 N. E. 739.

¹¹ Brown v. Kimball, 84 Me. 280; 24 Atl. 847; McKinney v. Whiting, 8 All. (Mass.) 207.

¹² Heintz v. Mueller, 19 Ind. App. 240; 49 N. E. 293.

¹³ Wells v. Prince, 15 Gray (Mass.) 562.

¹ See §§ 95, 97, 98.

cerning title,² or encumbrances,³ or false representations as to agency,⁴ are material. A statement as to the area of a specific tract,⁵ that it is located on a street⁶ that is above the established grade of the street,⁷ or is in a large city,⁸ or within a certain distance of a railway station,⁹ that the water-right sold with the land is sufficient to irrigate it all,¹⁰ that lands leased are tiled wherever needed,¹¹ that realty is high and dry and located at a designated place,¹² that a stream never overflowed on the land sold,¹³ that a certain amount of hay has been cut from the land,¹⁴ or other facts affecting the condition, quality, and the like of realty,¹⁵ are material facts. Still more is fraudulently designating a different and more valuable tract, fraud.¹⁶ So false statements of the existence of minerals on the realty,¹⁷ or of the amount of timber thereon,¹⁸ are material facts. State-

² See § 105.

³ See §§ 105, 119.

⁴ See § 975.

⁵ *Morris v. Courtney*, 120 Cal. 63; 52 Pac. 129; *Peake v. Walton*, 52 Ill. App. 90; *Moore v. Harmon*, 142 Ind. 555; 41 N. E. 599; *Beardsley v. Duntley*, 69 N. Y. 577; *Heald v. Yumisko*, 7 N. D. 422; 75 N. W. 806; *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; 17 Atl. 673; even if the words "more or less" are inserted in the deed; *Moore v. Harmon*, 142 Ind. 555; 41 N. E. 599; or if as between the government and the first purchaser, the official survey conclusively but erroneously fixes the area at that stated. *Heald v. Yumisko*, 7 N. D. 422; 75 N. W. 806; so as to a representation as to the area of a carpet, *Lewis v. Jewell*, 151 Mass. 345; 21 Am. St. Rep. 454; 24 N. E. 52.

⁶ *Durkin v. Cobleigh*, 156 Mass. 108; 32 Am. St. Rep. 436; 17 L. R. A. 270; 30 N. E. 474; *Hoock v. Bowman*, 42 Neb. 80; 47 Am. St. Rep. 691; 60 N. W. 389.

⁷ *Dinwiddie v. Stone*, 21 Ky. Law Rep. 584; 52 S. W. 814.

⁸ *Powers v. Fowler*, 157 Mass. 318; 32 N. E. 166.

⁹ *Holst v. Stewart*, 161 Mass. 516; 42 Am. St. Rep. 442; 37 N. E. 755; (and that trains in and out of the city stop at such station at stated intervals).

¹⁰ *Hill v. Wilson*, 88 Cal. 92; 25 Pac. 1105.

¹¹ *Baker v. Fawcett*, 69 Ill. App. 300.

¹² *Hecht v. Metzler*, 14 Utah 408; 60 Am. St. Rep. 906; 48 Pac. 37.

¹³ *Oakes v. Miller*, 11 Colo. App. 374; 55 Pac. 193.

¹⁴ *Coon v. Atwell*, 46 N. H. 510.

¹⁵ *Stevens v. Allen*, 51 Kan. 144; 32 Pac. 922.

¹⁶ *Gunther v. Ullrich*, 82 Wis. 222; 33 Am. St. Rep. 32; 52 N. W. 88.

¹⁷ *Green v. Turner*, 80 Fed. 41; *Perkins v. Rice*; Lit. Sel. Case. (Ky.) 218; 12 Am. Dec. 298; *Hasse v. Freud*, 119 Mich. 358; 78 N. W. 131. Still more is adding silver to samples of ore, thereby showing a much richer grade of ore on analysis than exists. *Mudsill Mining Co. v. Watrous*, 61 Fed. 163.

¹⁸ *Glaspie v. Keator*, 56 Fed. 203;

ments concerning the value and utility of a patent-right,¹⁹ that the patented article has had a certain sale,²⁰ or is satisfactory to those using it,²¹ or that certain results can be obtained thereby,²² are material facts. The authorities are not unanimous on the question of statements as to patented articles, and they have been treated as mere opinions.²³ A statement as to assets and debts of a business,²⁴ a false statement by one selling out an express business as to number of customers, monthly receipts and net annual receipts,²⁵ a statement as to dividends paid,²⁶ misdescribing overdrafts as "loans and discounts,"²⁷ a false statement as to the persons who have bought stock in a given corporation,²⁸ or as to an offer made for stock, said to have been refused;²⁹ a statement as to the amount of an estate,³⁰ as where the share of the

Chase v. Boughton, 93 Mich. 285; 54 N. W. 44.

¹⁹ Coulter v. Clark, — Ind. —; 66 N. E. 739.

²⁰ King v. White, 119 Ala. 429; 24 So. 710; Scholfield, etc., Co. v. Scholfield, 71 Conn. 1; 40 Atl. 1046.

²¹ Scholfield, etc., Co. v. Scholfield, 71 Conn. 1; 40 Atl. 1046; Pyroloium Appliance Co. v. Williamsport, etc., Co., 169 Pa. St. 440; 32 Atl. 458.

²² Rice v. Gilbreath, 119 Ala. 424; 24 So. 421; Merillat v. Plummer, 111 Ia. 643; 82 N. W. 1020; Pyroloium Appliance Co. v. Williamsport, etc., Co., 169 Pa. St. 440; 32 Atl. 458; as that the strainer of a patent churn would "separate the butter from the milk without handling," Rice v. Gilbreath, 119 Ala. 424; 24 So. 421.

²³ Dillman v. Nadlehoffer, 119 Ill. 567; 7 N. E. 88; Neidefer v. Chastain, 71 Ind. 363; 36 Am. Rep. 198; Hunter v. McLaughlin, 43 Ind. 38; Kimball v. Bangs, 144 Mass. 321; 11 N. E. 113.

²⁴ Nevada Bank v. National Bank, 59 Fed. 338; Mayberry v. Rogers, 81 Ill. App. 581; Garrison v. Electric Works, 55 N. J. Eq. 708; 37 Atl.

741; Townsend v. Felthousen, 156 N. Y. 618; 51 N. E. 279; Gainesville National Bank v. Bamberger, 77 Tex. 48; 19 Am. St. Rep. 738; 13 S. W. 959; Hume v. Steele (Tex. Civ. App.); 59 S. W. 812.

²⁵ Boles v. Merrill, 173 Mass. 491; 73 Am. St. Rep. 308; 53 N. E. 894.

²⁶ Shelton v. Healy, 74 Conn. 265; 50 Atl. 742; Beckwith v. Ryan, 66 Conn. 589; 34 Atl. 488; Mayberry v. Rogers, 81 Ill. App. 581; Redding v. Wright, 49 Minn. 322; 51 N. W. 1056; Handy v. Waldron, 19 R. I. 618; 35 Atl. 884; same case, 18 R. I. 567; 49 Am. St. Rep. 794; 29 Atl. 143; DeFrees v. Carr, 8 Utah 488; 33 Pac. 217.

²⁷ Gerner v. Yates, 61 Neb. 100; 84 N. W. 596.

²⁸ Bank v. Halsey, 109 Ala. 196; 19 So. 522; Penn, etc., Insurance Co. v. Crane, 134 Mass. 56; 45 Am. Rep. 282; Hedden v. Griffin, 136 Mass. 229; 49 Am. Rep. 25.

²⁹ Moline Plow Co. v. Carson, 72 Fed. 387 (where such offer was withdrawn on learning the facts).

³⁰ Wilson v. Nichols, 72 Conn. 173; 43 Atl. 1052; Wenegar v. Boltenbach, 180 Ill. 222; 54 N. E. 192;

heir is understated and the debts are overstated,³¹ or as to the number and amount of payments made upon a mortgage debt which is being assigned,³² are all material facts. A false statement as to solvency either of a party to the transaction or of a third person,³³ as that "the mill is doing well,"³⁴ or a bank is in "a safe, sound, prosperous, and solvent condition,"³⁵ or that one is "perfectly safe,"³⁶ or that a maker of a note is insolvent,³⁷ or fraudulently concealing the illegality of the transaction,³⁸ as by representing that Jameson's raid into the Transvaal was authorized by the British government,³⁹ are each material facts.

A statement as to the qualities of an animal by one who had owned it for some time,⁴⁰ or as to its pedigree,⁴¹ or freedom from disease,⁴² or weight,⁴³ are material facts. So a false statement as to the amount shown to be due on balancing an account is a material fact.⁴⁴

§96. Opinions.

Many statements are made on which persons in practical life rely, on which they have no right in law to rely, since they

Hulett v. Kennedy, 4 Ind. App. 33; 30 N. E. 310; Winston v. Young, 47 Minn. 80; 49 N. W. 521.

³¹ Wenegar v. Bollenbach, 180 Ill. 222; 54 N. E. 192.

³² Hexter v. Bast, 125 Pa. St. 52; 11 Am. St. Rep. 874; 17 Atl. 252.

³³ Bank of Paton (H. L.) (1896) A. C. 381; 65 L. J. P. C. N. S. 73; Merritt v. Ehrman, 116 Ala. 278; 22 So. 514; Williamson v. Tyson, 105 Ala. 644; 17 So. 336; Goodale v. Middaugh, 8 Colo. App. 223; 46 Pac. 11; Freeman v. Topkis, 1 Marv. (Del.) 174; 40 Atl. 948; P. Cox Shoe Co. v. Adams, 105 Ia. 402; 75 N. W. 316; Hubbard v. Weare, 79 Ia. 678; 44 N. W. 915; Henry v. Dennis, 93 Me. 106; 44 Atl. 369; Felix v. Shirey, 60 Mo. App. 621; Frost v. Lowry, 15 Ohio 200; Childs v. Merrill, 63 Vt. 463; 14 L. R. A. 264; 22 Atl. 626; Gates v. Moldstad, 14 Wash. 419; 44 Pac. 881.

³⁴ Henry v. Dennis, 93 Me. 106 44 Atl. 369.

³⁵ Hubbard v. Briggs, 31 N. Y. 518.

³⁶ Felix v. Shirey, 60 Mo. App. 621.

³⁷ Meier v. Jackson, 78 Mo. App. 396.

³⁸ Davidson v. Hobson, 59 Mo. App. 130.

³⁹ Burrow v. Rhodes (1899), 1 Q. B. 816.

⁴⁰ Darling v. Stuart, 63 Vt. 570; 22 Atl. 634.

⁴¹ Scroggin v. Wood, 87 Ia. 497; 54 N. W. 437; McFarland v. McGill, 16 Tex. Civ. App. 298; 41 S. W. 402.

⁴² Moncrief v. Wilkinson, 93 Ala. 373; 9 So. 159; Scroggin v. Wood, 87 Ia. 497; 54 N. W. 437; Stevens v. Bradley, 89 Ia. 174; 56 N. W. 429.

⁴³ Birdsey v. Butterfield, 34 Wis. 52 (where weighed shortly before the statement was made).

⁴⁴ Dickerson v. Thomas, 67 Miss. 777; 7 So. 503.

are not statements of facts. Where a statement is merely a conclusion from facts in the knowledge of both parties, it is the opinion of the one expressing it, and even if untrue cannot be fraud.¹ Certain statements, no matter how strongly made, show on their face that they are merely opinions.² A false statement as to when shares in a building and loan association will reach their full value and what the rate of interest will be,³ or a statement as to the amount of surplus that would accrue on an insurance policy;⁴ a statement of the amount unpaid on a bond, where such amount is a matter of calculation

¹ *Reeves v. Corning*, 51 Fed. 774; *Hansen v. Packing Co.*, 86 Fed. 832; *Patten v. Glatz*, 87 Fed. 283; *Birmingham, etc., Co. v. Land Co.*, 93 Ala. 549; 9 So. 235; *Bradfield v. Land Co.*, 93 Ala. 527; 8 So. 383; *Griel v. Lomax*, 94 Ala. 641; 10 So. 232; *Piedmont, etc. Co. v. Machine Co.*, 96 Ala. 389; 11 So. 332; *Lloyd v. Kehl*, 132 Cal. 107; 64 Pac. 125; *Nounnan v. Land Co.*, 81 Cal. 1; 6 L. R. A. 219; 22 Pac. 515; *Holton v. Noble*, 83 Cal. 7; 23 Pac. 58; *Wrenn v. Truitt*, 116 Ga. 708; 43 S. E. 52; *Miller v. Young*, 33 Ill. 354; *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572; 12 N. E. 247; *Wightman v. Tucker*, 50 Ill. App. 75; *Neideer v. Chastain*, 71 Ind. 363; 36 Am. Rep. 198; *Eastern Granite Co. v. Heim*, 89 Ia. 698; 57 N. W. 437; *Barnard v. Coffin*, 138 Mass. 37; *Wade v. Ringo*, 122 Mo. 322; 25 S. W. 901; *Saunders v. McClintock*, 46 Mo. App. 216; *Hamilton-Brown Shoe Co. v. Milliken*, 62 Neb. 116; 86 N. W. 913; *Esterly Harvesting, etc., Co. v. Berg*, 52 Neb. 147; 71 N. W. 952; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379; *Aetna Ins. Co. v. Reed*, 33 O. S. 283; *Curran v. Hauser*, 4 Ohio Dec. 449; *Barrett v. Featherstone*, 89 Tex. 567; 36 S. W. 245; affirming (*Tex. Civ. App.*) 35 S. W. 11; *Rorer Iron Co. v.*

Trout, 83 Va. 397; 5 Am. St. Rep. 285; 2 S. E. 713; *Fromer, etc., Co. v. Stanley*, 95 Wis. 56; 69 N. W. 820; *Fowler v. McCann*, 86 Wis. 427; 56 N. W. 1085. In Alabama an erroneous opinion is no ground for rescission unless intentionally false. *Bradfield v. Land Co.*, 93 Ala. 527; 8 So. 383; *Birmingham, etc., Co. v. Land Co.*, 93 Ala. 549; 9 So. 235; *Piedmont, etc., Co. v. Machine Co.*, 96 Ala. 389; 11 So. 332; *Cooke v. Cook*, 100 Ala. 175; 14 So. 171; apparently so in Michigan, *French v. Ryan*, 104 Mich. 625; 62 N. W. 1016.

² *Johnson v. Loan Association*, 125 Ala. 465; 82 Am. St. Rep. 257; 28 So. 2.

³ *Myers v. Loan Association*, 117 Mich. 389; 75 N. W. 944; *Hunter v. Loan Association*, 24 Tex. Civ. App. 453; 59 S. W. 596.

⁴ *Donoho v. Assurance Society*, 22 Tex. Civ. App. 192; 54 S. W. 645; (citing, *Little v. Allen*, 56 Tex. 133; *Jackson v. Stockbridge*, 29 Tex. 394; *Gordon v. Butler*, 105 U. S. 553; *Sawyer v. Prickett*, 19 Wall. 146; *Southern Development Co. v. Silva*, 125 U. S. 247; *Page v. Bent*, 2 Metc. (Mass.) 371-374; *Livermore v. Town-Lands Co.*, 106 Ky. 140; 50 S. W. 6.

from facts known to both parties;⁵ a statement that a bond sold was an "A No. 1 bond" and that "the railroad was good security;"⁶ that a breeding stallion would not beget sorrel colts;⁷ that certain willow-cuttings would live;⁸ a representation as to the quantity of apples that an orchard bore and that it was cheap at the rent;⁹ or that a certain stream would develop a certain horse power,¹⁰ are each merely expressions of opinion. So a statement of opinion as to the possible use of realty for building,¹¹ or the area,¹² or title to realty, the facts being known, from which either party could deduce an opinion,¹³ cannot be fraud. A statement as to the quality of land has been held to be a statement of opinion.¹⁴ Express disclaimer of knowledge by the party making the representation shows that it is an expression of opinion only.¹⁵ A statement which is ordinarily one of fact, such as financial condition, will be merely an opinion where the party states it as a mere matter of opinion or belief;¹⁶ such as a statement that he considers himself worth from ten to twenty thousand dollars clear.¹⁷ Thus a

⁵ *Banfield v. Banfield*, 24 Or. 571; 34 Pac. 659.

⁶ *Deming v. Darling*, 148 Mass. 504; 2 L. R. A. 743; 20 N. E. 107.

⁷ *Scroggin v. Wood*, 87 Ia. 497; 54 N. W. 437.

⁸ *Pike v. Fay*, 101 Mass. 134.

⁹ *Merritt v. Dufue*, 99 Ia. 211; 68 N. W. 553; *So Holton v. Noble*, 83 Cal. 7; 23 Pac. 58; but see § 94 as to a similar statement as to the amount of hay cut.

¹⁰ *Lloyd v. Kehl*, 132 Cal. 107; 64 Pac. 125. (The statement not being made by an hydraulic expert.)

¹¹ *Lake v. Tyree*, 90 Va. 719; 19 S. E. 787; *Wren v. Moncure*, 95 Va. 369; 28 S. E. 588; (citing *Gordon v. Butler*, 105 U. S. 553; *Parker v. Moulton*, 114 Mass. 99; 19 Am. Rep. 315).

¹² *Bankson v. Lagerlaf* (Ia.), 75 N. W. 661; *Lancaster v. Richardson*, 13 Tex. Civ. App. 682; 35 S. W. 749.

¹³ *Cooper v. Hunter*, 8 Colo. App. 101; 44 Pac. 944; *Pence v. Young*, 22 Ind. App. 427; 53 N. E. 1060; *Fellows v. Evans*, 33 Or. 30; 53 Pac. 491; *Hawkins v. Wells*, 17 Tex. Civ. App. 360; 43 S. W. 816.

¹⁴ *Tryce v. Dittus*, 199 Ill. 189; 65 N. E. 220.

¹⁵ *Hunt v. Blanton*, 89 Ind. 38; *Robbins v. Barton*, 50 Kan. 120; 31 Pac. 686; *Watts v. Cummins*, 59 Pa. St. 84; *Fromer, etc., Co. v. Stanley*, 95 Wis. 56; 69 N. W. 820.

¹⁶ *Robbins v. Barton*, 50 Kan. 120; 31 Pac. 686; *Grimes Dry Goods Co. v. Jordan*, 7 Kan. App. 192; 53 Pac. 186; *Redpath v. Lawrence*, 42 Mo. App. 101; *Friedman v. Peters*, 18 Tex. Civ. App. 11; 44 S. W. 572; *Fromer & Co. v. Stanley*, 95 Wis. 56; 69 N. W. 820.

¹⁷ *Fromer & Co. v. Stanley*, 95 Wis. 56; 69 N. W. 820.

statement of the "estimated" amount of losses unadjusted, in suspense and in litigation, in a statement of an insurance company is a mere matter of opinion.¹⁸ Thus where defendant and plaintiff neither knew nor had means of knowing how many head of cattle defendant had and plaintiff knew all the facts an action for false representations will not lie where defendant agrees to deliver one thousand and delivers only two hundred and fifty.¹⁹

§97. Opinions involving material facts.

A statement which by itself might be a mere expression of opinion may be so connected with a statement of a material fact as to amount to fraud. A statement of value involving and coupled with a statement of a material fact is fraud.¹ Thus a statement that land is well timbered,² or that it is in a bad location out from the city, where vendee thus induces vendor, whose agent he is, to sell him the land at one-sixth of its value;³ or that a warehouse is "fire proof,"⁴ may each amount to fraud. So a statement as to the value of certain kinds of personal property, such as notes⁵ or bonds⁶ involves a positive statement as to the solvency of the debtor and can be fraud.

¹⁸ Warfield v. Clark, 118 Ia. 69;
91 N. W. 833.

¹⁹ Cole v. Smith, 26 Colo. 506; 58
Pac. 1086.

¹ Russ, etc., Co. v. Water Co.,
120 Cal. 521; 65 Am. St. Rep. 186;
52 Pac. 995; Peffley v. Noland, 80
Ind. 164; Bolds v. Woods, 9 Ind.
App. 657; 36 N. E. 933; Lofgren v.
Peterson, 54 Minn. 343; 56 N. W.
44; Haven v. Neal, 43 Minn. 315;
45 N. W. 612; Brown v. Lyon, 81
Miss. 438; 33 So. 284; Union Na-
tional Bank v. Hunt, 76 Mo. 439;
Bradbury v. Haines, 60 N. H. 123;
Schumaker v. Mather, 133 N. Y.
590; 30 N. E. 755; Sutton v. Mor-
gan, 158 Pa. St. 204; 38 Am. St.
Rep. 841; 27 Atl. 894.

² Armstrong v. White, 9 Ind. App.
588; 37 N. E. 28.

³ Lofgren v. Peterson, 54 Minn.

343; 56 N. W. 44.

⁴ Hickey v. Morrell, 102 N. Y.
454; 55 Am. Rep. 824; 7 N. E.
321.

⁵ A representation that certain
notes were as "good as gold" can be
fraud, Andrews v. Jackson, 168
Mass. 266; 60 Am. St. Rep. 390;
37 L. R. A. 402; 47 N. E. 412; or
that they are "perfectly good."
Crane v. Elder, 48 Kan. 259; 15 L.
R. A. 795; 29 Pac. 151; (*contra* as to
subscriptions to books, Casselberry
v. Warren, 40 Ill. App. 626); or that
they are good and well secured, Bish
v. Beatty, 111 Ind. 403; 12 N. E.
523; (apparently *contra*, Deming v.
Darling, 148 Mass. 504; 2 L. R. A.
743; 20 N. E. 107).

⁶ Handy v. Waldron, 18 R. I. 567;
49 Am. St. Rep. 794; 29 Atl. 143.

So a statement that a certain stock is worth more than par can be fraud under some circumstances.⁷ So a statement as to the value of goods⁸ may be fraud. A specific statement as to one's own financial condition is a fact.⁹ So a statement by a vendee that he is in as good financial condition and has as good credit at the bank as ever may be fraud.¹⁰ So a statement as to amount of annual accumulations on stock,¹¹ or a statement of the number of monthly payments necessary to discharge a building association mortgage,¹² or a statement as to the successful operation of a machine,¹³ or that a machine is well adapted for a certain purpose,¹⁴ are facts. Accordingly, where a statement might in one view of the evidence be an expression of an opinion and in another be a statement involving a fact, it is a question of fact which meaning was intended and understood.¹⁵

⁷ Where the stock was in a corporation apparently formed for legal business, but intended to do an unlawful loan business, under a contract with a bank such that all its assets would ultimately pass over to the bank, a statement by the president of such bank that the stock in such corporation was worth more than par and that it would yield certain dividends was held fraud. *Murray v. Tolman*, 162 Ill. 417; 44 N. E. 748.

⁸ As where old and shop-worn goods were represented as new, and their price overstated by means of a false invoice. *Strand v. Griffith*, 97 Fed. 854; 38 C. C. A. 444. See for similar facts *McDowell v. Caldwell*, 116 Ia. 475; 89 N. W. 1111.

⁹ *Fecheimer v. Baum*, 37 Fed. 167; 2 L. R. A. 153; *Richmond v. Mississippi Mills*, 52 Ark. 30; 4 L. R. A. 413; 11 S. W. 960; *Brown v. Norman*, 65 Miss. 369; 7 Am. St. Rep. 663; 4 So. 293; *Chamberlin v. Fuller*, 59 Vt. 247; 9 Atl. 832; *Fitz-*

simmons v. Joslin, 21 Vt. 129; 52 Am. Dec. 46.

¹⁰ *Clark v. Munroe Co.*, 127 Mich. 300; 86 N. W. 816.

¹¹ *Hunter v. Loan Association*, 24 Tex. Civ. App. 453; 59 S. W. 596.

¹² *Loucks v. Taylor*, 23 Ind. App. 245; 55 N. E. 238.

¹³ *Scholfield, etc., Co. v. Scholfield*, 71 Conn. 1; 40 Atl. 1046.

¹⁴ *Dowagiac Mfg. Co. v. Gibson*, 73 Ia. 525; 5 Am. St. Rep. 697; 35 N. W. 603.

¹⁵ *Stewart v. Rancho Co.*, 128 U. S. 383; *Reeves v. Corning*, 51 Fed. 774; *Cruess v. Fessler*, 39 Cal. 336; *Allen v. Hart*, 72 Ill. 104; *Cheney v. Gleason*, 125 Mass. 166; *Moon v. McKinstry*, 107 Mich. 668; 65 N. W. 546; *Nowlin v. Snow*, 40 Mich. 699; *Picard v. McCormick*, 11 Mich. 68; *Hickey v. Morrell*, 102 N. Y. 454; 55 Am. Rep. 824; 7 N. E. 321; *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523; *Warner v. Benjamin*, 89 Wis. 290; 62 N. W. 179.

§98. Predictions.

A statement as to what will happen in the future is clearly a matter of opinion, not of fact.¹ Thus a statement as to the profits that would be made, or dividends that would be declared in a given business,² as a statement that "you will make 60 cents on the dollar" and "the business is all right,"³ or a statement that a mine was rich in silver, that the ore on the dump would pay the value of the stock, and that large

¹ *Wagner v. Ins. Co.*, 90 Fed. 395; *Hansen v. Baltimore, etc., Co.*, 86 Fed. 832; *Green v. Societe, etc.*, 81 Fed. 64; *Vandervelden v. Ry. Co.*, 61 Fed. 54; *Lawrence v. Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29; 20 Pac. 382; *Brady v. Cole*, 164 Ill. 116; 45 N. E. 438; *Emmerson v. Hutchinson*, 63 Ill. App. 203; *Cornant v. Bank*, 121 Ind. 323; 22 N. E. 250; *Swan v. Mathre*, 103 Ia. 261; 72 N. W. 522; *Sweeney v. Davidson*, 68 Ia. 386; 27 N. W. 278; *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282; 15 N. E. 127; *Alabama, etc., Ry. Co. v. Turnbull*, 71 Miss. 1029; 16 So. 346; *Kley v. Healy*, 149 N. Y. 346; 44 N. E. 150; *Kelly v. Gould*, 141 N. Y. 596; 36 N. E. 320; *Sanborn v. Plowman*, 13 Tex. Civ. App. 95; 35 S. W. 193; *Watkins v. Land, etc., Co.*, 92 Va. 1; 22 S. E. 554; *Land, etc., Co. v. Brady*, 92 Va. 71; 22 S. E. 845; *West Seattle, etc., Co. v. Herren*, 16 Wash. 665; 48 Pac. 341.

² *Beard v. Bliley*, 3 Colo. App. 479; 34 Pa. 271; *Weston v. Ry. Co.*, 90 Ga. 289; 15 S. E. 773; *Terhune v. Coker*, 107 Ga. 352; 33 S. E. 394; *Crockèr v. Manley*, 164 Ill. 282; 56 Am. St. Rep. 196; 45 N. E. 577; *Brady v. Cole*, 164 Ill. 116; 45 N. E. 438; *Mumford v. Tolman*, 157 Ill. 258; 41 N. E. 617; affirming 54 Ill. App. 471; but see *Musick v. Gatzmeyer*, 47 Ill. App. 329; *Swan*

v. Mathre, 103 Ia. 261; 72 N. W. 522; *Davis v. Campbell*, 93 Ia. 524; 61 N. W. 1053; *Robertson v. Parks*, 76 Md. 118; 24 Atl. 411; *Pedrick v. Porter*, 5 All. (Mass.) 324; *Western Electric Co. v. Hart*, 103 Mich. 477; 61 N. W. 867; *Walker v. Ry. Co.*, 34 Miss. 245; *Markel v. Moudy*, 11 Neb. 213; 7 N. W. 853; *Belmont Mining Co. v. Rogers*, 10 Ohio C. C. 305; 3 Ohio Dec. 453; *Riley v. Treanor* (Tex. Civ. App.), 25 S. W. 1054; *Spence v. Geilfuss*, 89 Wis. 499; 62 N. W. 529; *Warner v. Benjamin*, 89 Wis. 290; 62 N. W. 179.

³ *Terhune v. Coker*, 107 Ga. 352; 33 S. E. 394. The court said, "the loose statement that the business was 'all right' can not be regarded as equivalent to a positive declaration that the corporation was a perfectly solvent and paying concern. Mere 'puffing' does not constitute legal fraud, the same not being calculated to really mislead a purchaser, especially when he is afforded a full opportunity to form his own independent opinion as to the advisability of becoming a purchaser." But a statement concerning future dividends purporting to be based on the present condition and past history of the corporation may be fraud. *Beckwith v. Ryan*, 66 Conn. 589; 34 Atl. 488.

dividends would be paid;⁴ statements as to the number of fish that would be caught,⁵ as to the future growth of a town,⁶ as to the number of men that would be employed in industries near the land sold,⁷ that a certain person was about to become a partner,⁸ that a corporation would be able to raise certain funds,⁹ or that certain improvements would be made on adjoining land,¹⁰ or that certain articles could be put on the market at a certain price,¹¹ or that the principal debtor would discharge the note and free the surety from all liability,¹² or that a third person would pay a given debt,¹³ are each mere predictions and hence matters of opinion only. Whether such statements are a part of the contract is, of course, a different question.¹⁴

§99. Promises.

A promise to do an act in the future may or may not be a contract for the breach of which damages can be recovered, but mere non-performance is not fraud.¹ Thus a promise by a

⁴ *Crocker v. Manley*, 164 Ill. 282; 56 Am. St. Rep. 196; 45 N. E. 577.

⁵ *Hansen v. Baltimore, etc., Co.*, 86 Fed. 832.

⁶ *West Seattle, etc., Co. v. Herren*, 16 Wash. 665; 48 Pac. 341.

⁷ *Land, etc., Co. v. Brady*, 92 Va. 71; 22 S. E. 845.

⁸ *Kley v. Healy*, 149 N. Y. 346; 44 N. E. 150.

⁹ *Kelly v. Gould*, 141 N. Y. 596; 36 N. E. 320.

¹⁰ *Cooke v. Cook*, 100 Ala. 175; 14 So. 171; *Day v. Ft. Scott, etc., Co.*, 153 Ill. 293; 38 N. E. 567; affirming 53 Ill. App. 165; *Davidson v. Hobson*, 59 Mo. App. 130; *Canon v. Bank (Neb.)*, 91 N. W. 585; *Watkins v. Land, etc., Co.*, 92 Va. 1; 22 S. E. 554; *Moore v. Barksdall (Va.)*; 25 S. E. 529; *Buena Vista Co. v. Billmyer*, 48 W. Va. 382; 37 S. E. 583; *Washington, etc., Co. v. Newlands*, 11 Wash. 212; 39 Pac. 366.

¹¹ *Macklem v. Fales*, 130 Mich.

66; 89 N. W. 581. (Future cost of making a harrow.)

¹² *Robinson v. Larson*, 112 Ia. 173; 83 N. W. 900.

¹³ *Taylor v. Bank*, 174 N. Y. 181; 95 Am. St. Rep. 564; 66 N. E. 726.

¹⁴ See § 61.

¹ *Jorden v. Money*, 5 H. L. Cas. 185; *Bartol v. Walton, etc., Co.*, 92 Fed. 13; *Huber v. Gugenheim*, 89 Fed. 598; (distinguishing *Telegraph Co. v. Rubber Co.*, 10 Ch. App. 515); *White v. Ewing*, 69 Fed. 451; 16 C. C. A. 296; *Union Pacific Ry. Co. v. Barnes*, 64 Fed. 80; *Stacey v. Walter*, 125 Ala. 291; 28 So. 89; *Ansley v. Bank*, 113 Ala. 467; 59 Am. St. Rep. 122; 21 So. 59; *Feeney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; 4 L. R. A. 826; 21 Pac. 984; *Adams v. Schiffer*, 11 Colo. 15; 7 Am. St. Rep. 202; 17 Pac. 21; *Frantz v. Trust Co.*, 2 Penn. (Del.) 447; 47 Atl. 1000; *Harrington v. Rutherford*, 38 Fla. 321; 21 So.

mortgagee with reference to enforcing the mortgage,² a promise by a grantee as to paying for³ or improving the property conveyed,⁴ a promise by a land company to grade streets and construct water-works,⁵ a promise that a bridge will be built and a hotel erected,⁶ or that a street-car line will be extended past

283; *Chattanooga, etc., Ry. Co. v. Warthen*, 98 Ga. 599; 25 S. E. 988; *Haenni v. Bleisch*, 146 Ill. 262; 34 N. E. 153; *Gage v. Lewis*, 68 Ill. 604; *Murray v. Smith*, 42 Ill. App. 548; *Armstrong v. Lewis*, 38 Ill. App. 164; *Smith v. Parker*, 148 Ind. 127; 45 N. E. 770; *Fouty v. Fouty*, 34 Ind. 433; *Kain v. Rinker*, 1 Ind. App. 86; 27 N. E. 328; *State v. Carlisle*, 21 Ind. App. 438; 52 N. E. 711; *State Bank v. Gates*, 114 Ia. 323; 86 N. W. 311; *Kramer v. Messner*, 101 Ia. 88; 69 N. W. 1142; *Slatton v. Konrath*, 1 Kan. App. 636; 42 Pac. 399; *Iron Co. v. Ford* (Ky.), 50 S. W. 27; *Long v. Woodman*, 58 Me. 49; *Gaither v. Slack*, 89 Md. 727; 43 Atl. 915; *Melville v. Gary*, 76 Md. 221; 24 Atl. 604; *Buschman v. Codd*, 52 Md. 202; *Watson v. Silsby*, 166 Mass. 57; 43 N. E. 1117; *Dawe v. Morris*, 149 Mass. 188; 14 Am. St. Rep. 404; 4 L. R. A. 158; 21 N. E. 313; *Langdon v. Doud*, 10 All. (Mass.) 433; *Hodsden v. Hodsden*, 69 Minn. 486; 72 N. W. 562; *Bay View Land Co. v. Myers*, 62 Minn. 265; 64 N. W. 816; *Slagle v. Goodnow*, 45 Minn. 531; 48 N. W. 402; *Bullock v. Woolridge*, 42 Mo. App. 356; *Manheimer v. Harrington*, 20 Mo. App. 297; *American, etc., Association v. Rainbolt*, 48 Neb. 434; 67 N. W. 493; *American, etc., Association v. Bear*, 48 Neb. 455; 67 N. W. 500; *Cohn v. Broadhead*, 51 Neb. 834; 71 N. W. 747; *Knitting Co. v. Blanchard*, N. H. ; 43 Atl. 637; *Witt v. Cuenod*, 9 N. M. 143; 50 Pac. 328;

Hotchkin v. Bank, 127 N. Y. 329; 27 N. E. 1050; *Morris v. Talcott*, 96 N. Y. 100; *Armstrong v. Karshner*, 47 O. S. 276; 24 N. E. 897; *Swift v. Rounds*, 19 R. I. 527; 61 Am. St. Rep. 791; 33 L. R. A. 561; 35 Atl. 45; *Lyons v. Briggs*, 14 R. I. 222; 51 Am. Rep. 372; *Farrar v. Bridges*, 3 Humph. (Tenn.) 566; *Chicago, etc., Ry. Co. v. Titterington*, 84 Tex. 218; 31 Am. St. Rep. 39; 19 S. W. 472; *Allen v. Hodge*, 51 Vt. 392; *Jude v. Woodburn*, 27 Vt. 415; *Redington v. Roberts*, 25 Vt. 686; *Orr v. Goodloe*, 93 Va. 263; 24 S. E. 1014; *Anderson v. Land Co.*, 96 Va. 257; 31 S. E. 82; *Love v. Teter*, 24 W. Va. 741; *Sheldon v. Davidson*, 85 Wis. 138; 55 N. W. 161; *Tufts v. Weinfeld*, 88 Wis. 647; 60 N. W. 992; *Fromer, etc., Co. v. Stanley*, 95 Wis. 56; 69 N. W. 820; *Seymour v. Cushway*, 100 Wis. 580; 69 Am. St. Rep. 957; 76 N. W. 769; *Milwaukee, etc., Co. v. Schoknecht*, 108 Wis. 457; 84 N. W. 838.

² *Gaither v. Slack*, 89 Md. 727; 43 Atl. 915; *Bay View Land Co. v. Myers*, 62 Minn. 265; 64 N. W. 816; and see *Jorden v. Money*, 5 H. L. Cas. 185.

³ *Harrington v. Rutherford*, 38 Fla. 321; 21 So. 283; *Haenni v. Bleisch*, 146 Ill. 262; 34 N. E. 153.

⁴ *Chicago, etc., Co. v. Titterington*, 84 Tex. 218; 31 Am. St. Rep. 39; 19 S. W. 472.

⁵ *Anderson v. Land Co.*, 96 Va. 257; 31 S. E. 82.

⁶ *Orr v. Goodloe*, 93 Va. 263; 24 S. E. 1014.

the property sold,⁷ a verbal agreement to form a partnership to buy standing timber, unenforceable under the statute of frauds,⁸ a promise not to compete in business,⁹ or not to assign a note,¹⁰ refer solely to the future, and though broken cannot be fraud. In the absence of facts raising a constructive trust, a mere promise to reconvey realty,¹¹ or to hold in trust,¹² or to pay certain notes in consideration of a conveyance of realty,¹³ does not, though broken, constitute fraud.

§100. Promise coupled with statement of fact.

If a material fact is misrepresented, the addition of a promise to such misrepresentation does not prevent it from being fraud, if the other elements of fraud exist.¹ Thus a false statement as to present ability to perform a contract,² as that a driller has appliances which can control quicksand;³ or a false statement

⁷ Day v. Improvement Co., 153 Ill. 293; 38 N. E. 567; affirming 53 Ill. App. 165.

⁸ Seymour v. Cushway, 100 Wis. 580; 69 Am. St. Rep. 957; 76 N. W. 769; (citing Dunphy v. Ryan, 116 U. S. 491; Lantry v. Lantry, 51 Ill. 458; 2 Am. Rep. 310; Hoge v. Hoge, 1 Watts 163; 26 Am. Dec. 52).

⁹ Witt v. Cuenod, 9 N. M. 143; 50 Pac. 328; (citing Atlantic Delaine Co. v. James, 94 U. S. 207; Fenwick v. Grimes, 5 Cranch C. C. 439; Day v. Investment Co., 153 Ill. 293; 38 N. E. 567; Burt v. Bowles, 69 Ind. 1; Long v. Woodman, 58 Me. 49; Chicago, etc., Co. v. Titterington, 84 Tex. 218; 31 Am. St. Rep. 39; 19 S. W. 472; Moore v. Cross, 87 Tex. 557; 29 S. W. 1051; Mayer v. Swift, 73 Tex. 367; 11 S. W. 378; Tufts v. Weinfeld, 88 Wis. 647; 60 N. W. 992).

¹⁰ Murray v. Beckwith, 48 Ill. 391.

¹¹ Stacey v. Walter, 125 Ala. 291; 28 So. 89.

¹² Lovett v. Taylor, 54 N. J. Eq. 311; 34 Atl. 896.

¹³ Harrington v. Rutherford, 38 Fla. 321; 21 So. 283. (The grantee here reconveyed to another, leaving the notes unpaid, himself being insolvent.)

¹ Dobinson v. McDonald, 92 Cal. 33; 27 Pac. 1098; Russ, etc., Co. v. Water Co., 120 Cal. 521; 65 Am. St. Rep. 186; 52 Pac. 995; Dashiell v. Harshman, 113 Ia. 283; 85 N. W. 85; Wood v. Lambert, 85 Ia. 580; 52 N. W. 515; Sargent v. Ry. Co., 48 Kan. 672; 29 Pac. 1063; Daniel v. Robinson, 66 Mich. 296; 33 N. W. 497; Traber v. Hicks, 131 Mo. 180; 32 S. W. 1145; Davis v. Driscoll, 22 Tex. Civ. App. 14; 54 S. W. 43.

² Russ, etc., Co. v. Water Co., 120 Cal. 521; 65 Am. St. Rep. 186; 52 Pac. 995; Sargent v. Ry. Co., 48 Kan. 672; 29 Pac. 1063.

³ Davis v. Driscoll, 22 Tex. Civ. App. 14; 54 S. W. 43.

that a given contract has been made,⁴ as a representation that a mill and iron foundry has been contracted for⁵ or has not been made,⁶ or a statement that a deed does not contain anything affecting the interest of a given party and that if anything does affect such interest it would be made good⁷ is fraud. If such promise is carried into the contract and is made a term thereof, failure to perform is a breach, and is discussed hereafter.⁸

§101. Breach of contract amounting to constructive trust.

If the circumstances are such as to create an implied trust, a breach of a contract to carry out such trust is often called fraud in equity.¹ In such cases, however, the fraud is really the failure to carry out the trust, a duty existing independent of contract, and not the breach of the contract. Thus where property is conveyed by one to another in whom he reposes trust and confidence, as by son to mother,² mother to son,³ husband to wife,⁴ wife to husband,⁵ or to any person in whom actual trust and confidence is reposed,⁶ for the purpose of carrying out a trust, equity will enforce a contract to carry out such trust. This question is affected by the Statute of Frauds.⁷

⁴ Owens v. Land Co., 95 Va. 560; 28 S. E. 950.

⁵ Owens v. Land Co., 95 Va. 560; 28 S. E. 950. But a statement that arrangements have been made for locating a depot on a given tract of land is not fraud. Lambert v. Land Co. (Va.), 27 S. E. 462.

⁶ A was B's agent with exclusive right to sell a certain tract of land at a specified commission. B represented to A that he would not sell such tract, and thereby induced A to surrender such contract. B had in fact sold such tract already. This was held fraud. Dobinson v. McDonald, 92 Cal. 33; 27 Pac. 1098.

⁷ Dashiell v. Harshman, 113 Ia. 283; 85 N. W. 85.

⁸ See § 1358 *et seq.*

¹ Brison v. Brison, 75 Cal. 525;

7 Am. St. Rep. 189; 17 Pac. 689; same case, 90 Cal. 323; 27 Pac. 186; Newell v. Newell, 14 Kan. 202; Wood v. Rabe, 96 N. Y. 414; 48 Am. Rep. 640. See § 717 *et seq.*

² Wood v. Rabe, 96 N. Y. 414; 48 Am. Rep. 640. *Contra*, Haenni v. Bleisch, 146 Ill. 262; 34 N. E. 153 (between father and daughter).

³ Nordholt v. Nordholt, 87 Cal. 552; 22 Am. St. Rep. 268; 26 Pac. 599.

⁴ Richardson v. Adams, 10 Yerg. (Penn.) 273.

⁵ Brison v. Brison, 75 Cal. 525; 7 Am. St. Rep. 189; 17 Pac. 689; same case, 90 Cal. 323; 27 Pac. 186.

⁶ Alaniz v. Casenave, 91 Cal. 41; 27 Pac. 521 (husband of niece).

⁷ See § 717 *et seq.*

§102. Promise made without intention of keeping it.

Where the promise is made without any intent on promisor's part to keep it, but to induce action on the part of promisee, it is held in many jurisdictions to be fraud,¹ on the theory that the intent of the party promising is a material fact.² Thus, where a wife induces her husband to convey property to her, meaning to abandon him when the conveyance is delivered,³ where A induces B to buy and pay for certain property by having C promise B to buy it from him at an advance;⁴ where a promise is made to furnish such proofs of pedigree as will make it possible to register horses sold,⁵ or to reorganize an insolvent corporation,⁶ or to reconvey property on demand,⁷ to make a specified use of the tract sold, thereby increasing

¹ *Ansley v. Bank*, 113 Ala. 467; 59 Am. St. Rep. 122; 21 So. 59; *Russ, etc., Co. v. Water Co.*, 120 Cal. 521; 65 Am. St. Rep. 186; 52 Pac. 995; *Lawrence v. Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29; 20 Pac. 382; *Ayres v. French*, 41 Conn. 142; *Dowd v. Tucker*, 41 Conn. 197; *Murray v. Tolman*, 162 Ill. 417; 44 N. E. 748; *Oakey v. Ritchie*, 69 Ia. 69; 28 N. W. 448; *Green v. Green*, 34 Kan. 740; 52 Am. Rep. 256; 10 Pac. 156; *Lancaster National Bank v. Mackey*, 5 Kan. App. 437; 49 Pac. 324; *Munzer v. Stern*, 105 Mich. 523; 55 Am. St. Rep. 468; 29 L. R. A. 859; 63 N. W. 513; *Wilson v. Eggleston*, 27 Mich. 257; *Gross v. McKee*, 53 Miss. 536; *Pollard v. McKenney*, — Neb. —; 96 N. W. 679; *Goodwin v. Horne*, 60 N. H. 485; *American Hosiery Co. v. Baker*, 18 Ohio C. C. 604; *Williams v. Kerr*, 152 Pa. St. 560; 25 Atl. 618; *Corn Exchange National Bank v. Solicitors, etc., Co.*, 188 Pa. St. 330; 68 Am. St. Rep. 872; 41 Atl. 536; *Chicago, etc., Ry. v. Titterington*, 84 Tex. 218; 31 Am. St. Rep. 39; 19 S. W. 472; *McFarland v. McGill*, 16 Tex. Civ. App.

298; 41 S. W. 402; *Touchstone v. Staggs* (Tex. Civ. App.), 39 S. W. 189; *Detroit Electrical Works v. Ry. Co.* (Tex. Civ. App.), 29 S. W. 412.

² *Old Colony Trust Co. v. Traction Co.*, 89 Fed. 794; *Langley v. Rodriguez*, 122 Cal. 580; 55 Pac. 406.

³ *Meldrum v. Meldrum*, 15 Colo. 478; 11 L. R. A. 65; 24 Pac. 1083; *Basye v. Basye*, 152 Ind. 172; 52 N. E. 797 (citing *Evans v. Edmonds*, 13 C. B. 777; *Brisson v. Brisson*, 75 Cal. 525; 7 Am. St. Rep. 189; 17 Pac. 689; *Stone v. Wood*, 85 Ill. 603; *Meldrum v. Meldrum*, 15 Colo. 478; 11 L. R. A. 65; 24 Pac. 1083; *Turner v. Turner*, 44 Mo. 535).

⁴ *De Lissa v. Coal Co.*, 59 Kan. 319; 52 Pac. 886; *Horton v. Lee*, 106 Wis. 439; 82 N. W. 360.

⁵ *McFarland v. McGill*, 16 Tex. Civ. App. 298; 41 S. W. 402.

⁶ *American Hosiery Co. v. Baker*, 18 Ohio C. C. 604; *Detroit Electrical Works v. Ry. Co.* (Tex. Civ. App.), 29 S. W. 412.

⁷ *Dowd v. Tucker*, 41 Conn. 197; *Kaut v. Gerdemann*, 109 Mo. 552; 19 S. W. 73; *Kithcart v. Larimore*, 34 Neb. 273; 51 N. W. 768. Fraud

the value of the rest of the original tract,⁸ or where A obtains from B an instrument unenforceable between the parties, by promising not to transfer it, but intending to transfer it to a *bona fide* holder and cut off B's defense,⁹ without intent to keep any of such promises, they were held to be fraud. So a promise by an agent as an inducement to a contract of sale that the principal would advance money to harvest the crop sold, the agent having no reasonable ground of expecting that the principal would make the advance is fraud.¹⁰ So a statement that the principal debtor would use the loan to buy property, when in fact he meant to use it to pay an antecedent debt, is fraud when a surety is thereby induced to sign a note.¹¹ So a representation by the agent of a railroad as to the time which a given trip would take is fraudulent where he knows that owing to an accident on a connecting road such trip cannot be thus made.¹² Some courts, however, hold that a promise

was committed by A (a husband) falsely stating to his wife that his brother B would convey to him stock in his business, thereby inducing her to deed her property to B, B intending to convey the property to A. *Ilgenfritz v. Ilgenfritz*, 116 Mo. 429; 22 S. W. 786.

⁸ *Williams v. Kerr*, 152 Pa. St. 560; 25 Atl. 618.

⁹ A was surety on a constable's bond. B, who claimed damage by reason of misconduct in office, obtained a note from A by representing to him that he did not intend to enforce it, but wished it to show the town that the matter was settled. It was held that this fraud avoided the note even if B had a claim against the town, and the town an action over against A. *Wilbur v. Prior*, 67 Vt. 508; 32 Atl. 474. Where a married woman was not liable as surety, but was liable as principal inducing a married woman who means to be surety only to sign as co-principal, representing

that no liability will be incurred thereon and then transferring to a *bona-fide* holder, whereby such surety is obliged to pay the note, fraud exists. *Jones v. Crawford*, 107 Ga. 318; 45 L. R. A. 105; 33 S. E. 51. So where A had the legal title and B the equitable, B was guilty of fraud in assigning his equitable interest and then getting A's heirs to convey to C, who conveyed to *bona-fide* purchasers. *Smith v. Glover*, 44 Minn. 260; 46 N. W. 406.

¹⁰ *Langley v. Rodriguez*, 122 Cal. 580; 55 Pac. 406. A statement by a creditor of an insolvent street railway as to the improvements which the creditors intended to put on the road, to induce another company to consolidate, is a statement of fact as of an existing intent. *Old Colony Trust Co. v. Traction Co.*, 89 Fed. 794.

¹¹ *Haworth v. Crosby*, 120 Ia. 612; 94 N. W. 1098.

¹² *Turner v. Ry.*, 15 Wash. 213; 55 Am. St. Rep. 883; 46 Pac. 243.

even when made without the intention of keeping it, cannot be fraud if the damage results solely from non-performance, as the essential feature relied on is the promise, without reference to the intent of the party making it.¹³ Thus a promise by a retail merchant to continue his business and to keep up his trade with a wholesale dealer is not fraudulent, even if he did not intend to keep the promise when he made it, as it is both future and indefinite.¹⁴ Even where a promise made without the intention of keeping it is not treated as fraud where the damage which is suffered results from non-performance, a different rule applies where the damage suffered is not the result of non-performance of the promise.¹⁵ Thus fraud was held to exist where a promise is made with no intention of keeping it, merely to induce promisee to come into the state so that the promisor may have him arrested,¹⁶ as the damage resulted from the arrest and not from the non-performance of the promise.

§103. Sales on credit.

An application of the doctrine that a promise made without the intention of keeping it may be fraud, is found in purchases of goods on credit. If one buys goods on credit, intending not to pay for them, this is held fraud,¹ distinct from any

¹³ *Farris v. Strong*, 24 Colo. 107; 48 Pac. 963; *Day v. Improvement Co.*, 153 Ill. 293; 38 N. E. 567; affirming 53 Ill. App. 165; *Haenni v. Blesch*, 146 Ill. 262; 34 N. E. 153; *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90; 20 N. E. 692; *Gage v. Lewis*, 68 Ill. 604; *Balue v. Taylor*, 136 Ind. 368; 36 N. E. 269; *Fouty v. Fouty*, 34 Ind. 433; *Bethell v. Bethell*, 92 Ind. 318; *Ayres v. Blewins*, 28 Ind. App. 101; 62 N. E. 305; *Long v. Woodman*, 58 Me. 49; *Dawe v. Morris*, 149 Mass. 188; 14 Am. St. Rep. 404; 4 L. R. A. 158; 21 N. E. 313 (*Seemle*; though there was no direct averment or proof of intent not to perform); A.

Landreth Co. v. Schevenel, 102 Tenn. 486; 52 S. W. 148.

¹⁴ *A. Landreth Co. v. Schevenel*, 102 Tenn. 486; 52 S. W. 148 (citing *Richter v. Irwin*, 28 Ind. 26; *Feret v. Hill*, 15 C. B. 207; distinguishing *Gross v. McKee*, 53 Miss. 536).

¹⁵ *Sweet v. Kimball*, 166 Mass. 332; 55 Am. St. Rep. 406; 44 N. E. 243.

¹⁶ *Sweet v. Kimball*, 166 Mass. 332; 55 Am. St. Rep. 406; 44 N. E. 243.

¹ *Donaldson v. Faris*, 93 U. S. 631; *Fechheimer v. Baum*, 37 Fed. 167; 2 L. R. A. 153; *Maxwell v. Shoe Co.*, 114 Ala. 304; 21 So. 1009; *Hudson v. Grocery Co.*, 105 Ala.

false representations as to solvency,² though the fraudulent intent is still clearer where there are false statements as to solvency,³ or where vendee conceals the fact that his property is mortgaged,⁴ or where property is concealed from creditors, though vendee is not insolvent.⁵ A like principle applies where deposits are received⁶ or money is borrowed⁷ by an insolvent bank or trust company, rescission being allowed if the money has not been mingled with the general funds of such institution.

In order to constitute fraud this intention must exist when the goods are purchased,⁸ and it must be an intent never to

200; 16 So. 693; Johnson Co. v. Triplett, 66 Ark. 233; 50 S. W. 455; Taub v. Commission Co., 10 Colo. App. 190; 51 Pac. 168; Thompson v. Rose, 16 Conn. 71; 41 Am. Dec. 121; Freeman v. Topkis, 1 Marv. (Del.) 174; 40 Atl. 948; People v. Healy, 128 Ill. 9; 15 Am. St. Rep. 90; 20 N. E. 692; Peninsular Stove Co. v. Ellis, 20 Ind. App. 491; 51 N. E. 105; P. B. Cox Shoe Mfg. Co. v. Adams, 105 Ia. 402; 75 N. W. 316; Reager v. Kendall (Ky.), 39 S. W. 257; Watson v. Silsby, 166 Mass. 57; 43 N. E. 1117; Wiggin v. Day, 9 Gray (Mass.) 97; Edson v. Hudson, 83 Mich. 450; 47 N. W. 347; Bidault v. Wales, 19 Mo. 36; 59 Am. Dec. 327; Moore v. Hinsdale, 77 Mo. App. 217; Reid v. Lloyd, 67 Mo. App. 513; McCready v. Phillips, 56 Neb. 446; 76 N. W. 885; Whitten v. Fitzwater, 129 N. Y. 626; 29 N. E. 298; Nichols v. Michael, 23 N. Y. 264; 80 Am. Dec. 259; Talcott v. Henderson, 31 O. S. 162; 27 Am. Rep. 501; Wilmot v. Lyon, 49 O. S. 296; 34 N. E. 720; Swift v. Rounds, 19 R. I. 527; 61 Am. St. Rep. 791; 33 L. R. A. 561; 35 Atl. 45; Belding v. Franklin, 8 Lea (Tenn.) 67; 41 Am. Rep. 630; Wertheimer, etc., Shoe Co. v. Faris (Tenn. Ch. App.), 46 S. W. 336; Whitaker v. Brown, (Tex. Civ. App.), 49 S. W. 1104;

B. F. Avery & Sons v. Dickson (Tex. Civ. App.), 49 S. W. 662; Williams v. Kohn (Tex. Civ. App.), 28 S. W. 920; Redington v. Roberts, 25 Vt. 686; Lee v. Simmons, 65 Wis. 523; 27 N. W. 174. The remedy generally sought in these cases is to rescind the contract of sale informally by replevying the property. This rule is said not to exist in Pennsylvania. Smith v. Smith, 21 Pa. St. 367; 60 Am. Dec. 51. But compare Bughman v. Bank, 159 Pa. St. 94; 28 Atl. 209; Perdue v. Taylor, 146 Pa. St. 163; 23 Atl. 317.

² Johnson Co. v. Triplett, 66 Ark. 233; 50 S. W. 455; Peninsular Stove Co. v. Ellis, 20 Ind. App. 491; 51 N. E. 105; Reager v. Kendall (Ky.), 39 S. W. 257.

³ Williams v. Kohn (Tex. Civ. App.), 28 S. W. 920.

⁴ Edson v. Hudson, 83 Mich. 450; 47 N. W. 347.

⁵ Hudson v. Grocery Co., 105 Ala. 200; 16 So. 693.

⁶ Higgins v. Hayden, 53 Neb. 61; 73 N. W. 280; Grant v. Walsh, 145 N. Y. 502; 45 Am. St. Rep. 626; 40 N. E. 209.

⁷ Corn Exchange National Bank v. Solicitors, etc., Co., 188 Pa. St. 330; 68 Am. St. Rep. 872; 41 Atl. 536.

⁸ Armstrong v. Lewis, 38 Ill. App.

pay for the goods, and not merely an intent not to pay for them at the time specified in the contract.⁹

If at the time that the goods are bought vendee's circumstances are such that he has no reasonable expectation of paying for them, and he buys on credit without disclosing his circumstances, this is held by some courts to be fraud, even if he had no intent of not paying for them, assuming such combination to be possible.¹⁰

Other authorities hold that there can be no fraud in such cases unless there is a definite intention not to pay for the goods purchased, or a false statement as to solvency.¹¹ A compromise by which vendee returned part of the goods sold, and vendor waived his right to replevin the rest for fraud in the contract of sale, where vendee meant to dispose of the goods and put the proceeds beyond the reach of vendor, so as to prevent his recovering the price, may be avoided for fraud.¹² The mere fact that vendee knows that he is insolvent and does not disclose such fact is not fraud, where he has a reasonable expectation of paying for the goods purchased;¹³ still less where

164; *Starr v. Stevenson*, 91 Ia. 684; 60 N. W. 217.

⁹ *Armstrong v. Lewis*, 38 Ill. App. 164; *Strickland v. Willis* (Tex. Civ. App.), 43 S. W. 602.

¹⁰ *McKensie v. Rothschild*, 119 Ala. 419; 24 So. 716; *Standard Horseshoe Co. v. O'Brien*, 88 Md. 335; 41 Atl. 898; *Reid v. Lloyd*, 52 Mo. App. 278; *Whittin v. Fitzwater*, 129 N. Y. 626; 29 N. E. 298; *Wilmet v. Lyons*, 49 O. S. 296; 34 N. E. 720; affirming on other grounds 11 Ohio C. C. 238; *Bughman v. Bank*, 159 Pa. St. 94; 28 Atl. 209. This rule has been applied even where vendee was not insolvent but was in such failing circumstances that he could not reasonably expect to pay for the goods purchased. *Hudson v. Grocery Co.*, 105 Ala. 200; 16 So. 693.

¹¹ *Gavin v. Armistead*, 57 Ark.

574; 38 Am. St. Rep. 262; 22 S. W. 431; *Burchinell v. Hirsch*, 5 Colo. App. 500; 39 Pac. 352; *People's Savings Bank v. James*, 178 Mass. 322; 59 N. E. 807; *Knitting Co. v. Blanchard*, — N. H. —; 43 Atl. 637.

¹² *Munzer v. Stern*, 105 Mich. 523; 55 Am. St. Rep. 468; 29 L. R. A. 859; 63 N. W. 513.

¹³ *Morrill v. Blackman*, 42 Conn. 324; *Freeman v. Topkis*, 1 Marv. (Del.) 174; 40 Atl. 948; *People v. Healy*, 128 Ill. 9, 17; 15 Am. St. Rep. 90; 20 N. E. 692; *Hacker v. Munroe*, 56 Ill. App. 532; *Thompson v. Peck*, 115 Ind. 512; 1 L. R. A. 20; 18 N. E. 16; *West v. Graff*, 23 Ind. App. 410; 55 N. E. 506; *Franklin, etc., Co. v. Collier*, 89 Ia. 69; 56 N. W. 279; *Edelhoff v. Mfg. Co.*, 86 Md. 595; 39 Atl. 314; *Reeder, etc., Co. v. Prylinski*, 102 Mich.

vendee does not in fact know that he is insolvent.¹⁴ The same rule applies to a purchase of realty without the intention of paying for it.¹⁵

§104. Value.

Ordinarily when both parties stand on equal footing and the material facts are equally accessible to both, a statement as to the value of property must be known to be a mere matter of opinion and therefore not fraud.¹ Thus, where both parties

468; 60 N. W. 969; *Zucker v. Karpeles*, 88 Mich. 413; 50 N. W. 373; *Sweet, etc., v. Sullivan*, 77 Mo. App. 128; *Sinnott v. Bank*, 164 N. Y. 386; 58 N. E. 286; *Rothmiller v. Stein*, 143 N. Y. 581, 594; 26 L. R. A. 148; 38 N. E. 718; *Morris v. Talcott*, 96 N. Y. 100; *Talcott v. Henderson*, 31 O. S. 162; 27 Am. Rep. 501; *Pike v. Bank*, 2 Ohio Dec. 283; 1 Ohio N. P. 323; affirming 2 Ohio Dec. 3; 1 Ohio N. P. 205; *Hallacher v. Henlein* (Tenn. Ch. App.), 39 S. W. 869; *Rome, etc., Co. v. Walling* (Tenn. Ch. App.), 58 S. W. 1094; *Walsh v. Hardware Co.* (Tex. Civ. App.), 50 S. W. 630; *Adler v. Thorp*, 102 Wis. 70; 78 N. W. 184.

¹⁴ *Johnston v. Brent*, 93 Ala. 160; 9 So. 581; *Diggs v. Denny*, 86 Md. 116; 37 Atl. 1037.

¹⁵ *Coppage v. Murphy* (Ky.), 68 S. W. 416.

¹ *Gordon v. Butler*, 105 U. S. 553; *Lion v. McClory*, 106 Cal. 623; 40 Pac. 12; *Rendell v. Scott*, 70 Cal. 514; 11 Pac. 779; *Mayo v. Wahlgreen*, 9 Colo. App. 506; 50 Pac. 40; *People v. Tynon*, 2 Colo. App. 131; 29 Pac. 809; *Gustafson v. Rustemeyer*, 70 Conn. 125; 66 Am. St. Rep. 92; 39 L. R. A. 644; 39 Atl. 104; *Moore v. Reeck*, 163 Ill. 17; 44 N. E. 868; *Strubhar v. Shorthose*, 78 Ill. App. 394; *Great*

Western Telegraph Co. v. Bush, 35 Ill. App. 213; *Consolidated, etc., R. Co. v. O'Neill*, 25 Ill. App. 313; *Harness v. Horne*, 20 Ind. App. 134; 50 N. E. 395; *Bossingham v. Syck*, 118 Ia. 192; 91 N. W. 1047; *Seng v. Keller* (Ky.) 37 S. W. 581; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330; 7 L. R. A. 81; 12 S. W. 668; *Chambers v. Education Society*, 1 B. Mon. (Ky.) 222; *Lynch v. Murphy*, 171 Mass. 307; 50 N. E. 623; *Homer v. Perkins*, 124 Mass. 431; 26 Am. Rep. 677; *Morse v. Shaw*, 124 Mass. 59; *Parker v. Moulton*, 114 Mass. 99; 19 Am. Rep. 315; *Johnson v. Seymour*, 79 Mich. 156; 44 N. W. 344; *Columbia Electric Co. v. Dixon*, 46 Minn. 463; 49 N. W. 244; *Cornwall v. Real Estate Co.*, 150 Mo. 377; 51 S. W. 736; *Cottrill v. Krum*, 103 Mo. 397; 18 Am. St. Rep. 549; 13 S. W. 753; *Canon v. Bank*, — Neb. —; 91 N. W. 585; *McKnight v. Thompson*, 39 Neb. 752; 58 N. W. 453; *Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379; *Heald v. Yumisko*, 7 N. D. 422; 75 N. W. 806; *Handy v. Waldron*, 18 R. I. 567; 49 Am. St. Rep. 794; 29 Atl. 143; *Long v. Gilbert* (Tenn. Ch. App.), 59 S. W. 414; *Maney v. Porter*, 3 Humph. (Tenn.) 347; *Adams v. Pardue* (Tex. Civ. App.), 36 S. W. 1015; *Whitney v. Rich-*

have equal means for ascertaining the material facts, a statement as to the value of realty,² or that a patent is valid³ or valuable⁴ or useful,⁵ or that bonds⁶ or stocks⁷ are valuable are mere matters of opinion. Connected with this principle is the rule that general and vague words of commendation uttered by a buyer to a seller with reference to the property offered for sale cannot constitute fraud.⁸

ards, 17 Utah 226; 53 Pac. 1122; Shanks v. Whitney, 66 Vt. 405; 29 Atl. 367; Cold Storage Co. v. Dexter, 99 Wis. 214; 40 L. R. A. 837; 74 N. W. 976; Mosher v. Post, 89 Wis. 602; 62 N. W. 516.

² Bradfield v. Land Co., 93 Ala. 527; 8 So. 383; Lion v. McClory, 106 Cal. 623; 40 Pac. 12; Mayo v. Wahlgreen, 9 Colo. App. 506; 50 Pac. 40; People v. Tynon, 2 Colo. App. 131; 29 Pac. 809; Richardson v. Horn, 8 Houst. (Del.) 26; 31 Atl. 896; Tuck v. Downing, 76 Ill. 71; Banta v. Palmer, 47 Ill. 99; Brady v. Cole, 164 Ill. 116; 45 N. E. 438; Seng v. Keller (Ky.), 37 S. W. 581; Nash v. Trust Co., 159 Mass. 437; 34 N. E. 625; compare same case 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40 N. E. 1039; Rubber Co. v. Adams, 23 Pick. (Mass.) 256; Walker v. Casgrain, 101 Mich. 604; 60 N. W. 291; Nosttrum v. Halliday, 39 Neb. 828; 58 N. W. 429; Hallinger v. Zimmerman, 58 N. J. Eq. 217; 42 Atl. 726; affirmed, 59 N. J. Eq. 644; 44 Atl. 1100; Heald v. Yumisko, 7 N. D. 422; 75 N. W. 806; Shanks v. Whitney, 66 Vt. 405; 29 Atl. 367; Lake v. Tyree, 90 Va. 719; 19 S. E. 787; Trust Co. v. Coal Co., 19 Wash. 493; 53 Pac. 951.

³ Huber v. Guggenheim, 89 Fed. 598.

⁴ Bain v. Withey, 107 Ala. 223;

18 So. 217; Anderson, etc., Works v. Meyers, 15 Ind. App. 385; 44 N. E. 193; Curran v. Hauser, 6 Ohio N. P. 281.

⁵ Dillman v. Nadlehofer, 119 Ill. 567; 7 N. E. 88; Neidefer v. Chastain, 71 Ind. 363; 36 Am. Rep. 198; Wade v. Ringo, 122 Mo. 322; 25 S. W. 901.

⁶ Deming v. Darling, 148 Mass. 504; 2 L. R. A. 743; 20 N. E. 107 (that a bond was an "A No. 1 bond" and that the railroad on which was a mortgage securing the bond was "good security").

⁷ Van Vechten v. Smith, 59 Ia. 173; 13 N. W. 94; Columbia Electric Co. v. Dixon, 46 Minn. 463; 49 N. W. 244.

⁸ Southern Development Co. v. Silva, 125 U. S. 247; Williams v. McFadden, 23 Fla. 143; 11 Am. St. Rep. 345; 1 So. 618; Dowden v. Wilson, 108 Ill. 257; Eastern Granite Co. v. Heim, 89 Ia. 698; 57 N. W. 437; Deming v. Darling, 148 Mass. 504; 2 L. R. A. 743; 20 N. E. 107; Parker v. Moulton, 114 Mass. 99; 19 Am. Rep. 312; Columbia Electric Co. v. Dixon, 46 Minn. 463; 49 N. W. 244; Ellis v. Andrews, 56 N. Y. 83; 15 Am. Rep. 379; Rockafellow v. Baker, 41 Pa. St. 319; 80 Am. Dec. 624; Mosher v. Post, 89 Wis. 602; 62 N. W. 516.

§105. Price.

A statement as to the price paid for either the property in question or for similar property,¹ as where price marks on goods are falsely stated to be the cost price;² or where a vendor gave his vendee a receipt showing that a greater amount was paid for realty than was paid, to enable vendee to sell such realty at a higher price to a third person;³ or as to the price offered therefor⁴ or as to the income therefrom,⁵ such as the

¹ *Zang v. Adams*, 23 Colo. 408; 58 Am. St. Rep. 249; 48 Pac. 509; *Mayo v. Wahlgreen*, 9 Colo. App. 506; 50 Pac. 40; *Potter v. Potter*, 65 Ill. App. 74; *Miller v. Buchanan*, 10 Ind. App. 474; 38 N. E. 56; affirming on rehearing 10 Ind. App. 474; 37 N. E. 187; *Dorr v. Cory*, 108 Ia. 725; 78 N. W. 682; *Teachout v. Van Hoesen*, 76 Ia. 113; 1 L. R. A. 664; 40 N. W. 96; *Morehead v. Eades*, 3 Bush (Ky.) 121; *Coolidge v. Goddard*, 77 Me. 578; 1 Atl. 831; *Hoxie v. Small*, 86 Me. 23; 29 Atl. 920; *Caswell v. Hunton*, 87 Me. 277; 32 Atl. 899; *Boles v. Merrill*, 173 Mass. 491; 73 Am. St. Rep. 308; 53 N. E. 894; *Kilgore v. Bruce*, 166 Mass. 136; 44 N. E. 108; *French v. Ryan*, 104 Mich. 625; 62 N. W. 1016; *Moon v. McKinstry*, 107 Mich. 668; 65 N. W. 546; *Woolen Co. v. Smalley*, 111 Mich. 321; 69 N. W. 722; *Conlan v. Roemer*, 52 N. J. L. 53; 18 Atl. 858; *Townsend v. Felthousen*, 156 N. Y. 618; 51 N. E. 279; *Smith v. Countryman*, 30 N. Y. 655; *Fairchild v. McMahon*, 139 N. Y. 290; 36 Am. St. Rep. 701; 34 N. E. 779; *Smith v. Patterson*, 30 O. S. 70; *Stallings v. Hulum*, 79 Tex. 421; 15 S. W. 677. Statements of a valuation placed on property by appraisers and bids made for shares are fraud where the valuation and bids were made in fraud. *Bartol v. Walton, etc., Co.*, 92 Fed. 13.

² *Miller v. Buchanan*, 10 Ind. App. 474; 38 N. E. 56; affirming on rehearing 10 Ind. App. 474; 37 N. E. 187; *Warren v. Miller*, — Ia. —; 99 N. W. 127; *Elerick v. Reid*, 54 Kan. 579; 38 Pac. 814.

³ *Stoney Creek Woolen Co. v. Smalley*, 111 Mich. 321; 69 N. W. 722; *Yeoman v. Lasley*, 40 O. S. 190.

⁴ *Moline Plow Co. v. Carson*, 72 Fed. 387; 18 C. C. A. 606; *Boles v. Merrill*, 173 Mass. 491; 73 Am. St. Rep. 308; 53 N. E. 894. As a statement of the amount offered for a patent right: *Strickland v. Graybill*, 97 Va. 602; 34 S. E. 475 (citing *Hull v. Fields*, 76 Va. 594, 606); or of the price at which similar property is offered, *Smith, etc., v. Smith*, 166 Pa. St. 563; 31 Atl. 343; or where a purchaser represents that his offer is the best available, concealing a better offer from parties to whom he resells at once. *Bennett v. McMillin*, 179 Pa. St. 146; 57 Am. St. Rep. 591; cited at top of page in 179 Pa. St. 146, and in 36 Atl. 188 as *Zahn v. McMillin*.

⁵ *Old Colony Trust Co. v. Light, etc., Co.*, 89 Fed. 794; *Cruess v. Fessler*, 39 Cal. 336; *Evans v. Duke*, (Cal.), 69 Pac. 688; reversed in banc on the ground of laches, 140 Cal. 22; 73 Pac. 732; *Beard v. Bliley*, 3 Colo. App. 479; 34 Pac. 271; *O'Donnell, etc., Brewing Co. v. Farrar*, 163 Ill. 471; 45 N. E. 283;

rental of realty,⁶ or profits from realty,⁷ or a statement of the cost of manufacturing a patented article⁸ may be fraud. Thus a false statement by vendor to vendee as to the amount of commissions to be paid out of the purchase price, has been held a ground for abatement of the price.⁹ Thus, a statement that a given brand of whiskey has a regular sale in open market at a specified price, is a statement of fact.¹⁰

In many cases, however, a statement by vendor of the price paid by him for the article offered for sale is held not fraud where it is understood by both parties to be the customary praise of one's own property,¹¹ and a like view is taken of statements as to the price offered for the article in question by a third person.¹² Thus a false statement by an agent as to the price demanded by his principal for certain territory

Allen v. Hart, 72 Ill. 104; Lee v. Tarplin, 183 Mass. 52; 66 N. E. 431; Cheney v. Gleason, 125 Mass. 166; Graves v. Kennedy, 119 Mich. 621; 78 N. W. 667; Miller v. Voorheis, 115 Mich. 356; 73 N. W. 383; Kost v. Bender, 25 Mich. 515; Handy v. Waldron, 18 R. I. 567; 49 Am. St. Rep. 794; 29 Atl. 143; Tacoma v. Water Co., 17 Wash. 458; 50 Pac. 55; reversing on rehearing 16 Wash. 288; 47 Pac. 738.

⁶ Briggs v. Dunne, 168 Ill. 226; 48 N. E. 48; Lee v. Tarplin, 183 Mass. 52; 66 N. E. 431; Hecht v. Metzler, 14 Utah 408; 60 Am. St. Rep. 906; 48 Pac. 37.

⁷ Evans v. Duke (Cal.), 69 Pac. 688; reversed in banc on the ground of laches, 140 Cal. 22; 73 Pac. 732.

⁸ Braley v. Powers, 92 Me. 203; 42 Atl. 362.

⁹ Henry v. Mayer, — Ariz. —; 53 Pac. 590.

¹⁰ Stoll v. Welborn, — N. J. Eq. —; 56 Atl. 894.

¹¹ Mackenzie v. Seeberger, 76 Fed. 108; 22 C. C. A. 83; Alexander v. Emmett, 169 Ill. 523; 48 N. E. 427; affirming 68 Ill. App. 261; Hawk v.

Brownell, 120 Ill. 161; 11 N. E. 416; Tuck v. Downing, 76 Ill. 71; Sowers v. Parker, 59 Kan. 12; 51 Pac. 888; Burns v. Mahannah, 39 Kan. 87; 17 Pac. 319; Graffenstein v. Epstein, 23 Kan. 443; 33 Am. Rep. 171; Holbrook v. Connor, 60 Me. 578; 11 Am. Rep. 212; Bishop v. Small, 63 Me. 12; Bourn v. Davis, 76 Me. 223; Gasset v. Glazier, 165 Mass. 473; 43 N. E. 193; Poland v. Brownell, 131 Mass. 138; 41 Am. Rep. 215; Parker v. Moulton, 114 Mass. 99; 19 Am. Rep. 315; Cooper v. Lovering, 106 Mass. 77; Mooney v. Miller, 112 Mass. 217; Hemmer v. Cooper, 8 All. (Mass.) 334. An analysis of these cases discloses that in many of them this proposition is not necessary to the decision, as the parties either knew of the facts before closing the sale or ratified it afterwards. Other cases, however, it must be admitted, lay down and apply this rule in such a way as to give exactly the opposite result from that reached in the cases cited in the first note of this section.

¹² Cole v. Smith, 26 Colo. 506; 58 Pac. 1086.

for a patent right and that he can get a better price from such principal than anyone else, whereby he gets a greater price than the principal required, was held not to be fraud.¹³

III. MATERIALITY.

§106. Materiality.

To constitute fraud the representation must be material.¹ What representations are material is a question of law;² and it is usually held that these are all representations which substantially affect the extent of the liability assumed, the value and qualities of the subject, or otherwise tend to induce the party to whom they are made, to enter into the contract.³ Many examples of material representations have already been given and need not be repeated.⁴ Other examples are, statements to an insurance company, which is adjusting a loss, that there are no books which show the cost of the property destroyed;⁵ that an insurance company has evidence that assured died by his own hand while of sound mind,⁶ pointing out different land from that conveyed in the deed,⁷ or misstating its loca-

¹³ *Insurance Company v. McIntire*, 99 Ia. 50; 68 N. W. 565.

¹ *Farnsworth v. Duffner*, 142 U. S. 43; *Marshall v. Hubbard*, 117 U. S. 415; *Colton v. Stanford*, 82 Cal. 351; 16 Am. St. Rep. 137; 23 Pac. 16; *Jones v. Bradley*, 8 Colo. App. 178; 45 Pac. 229; *Young v. Young*, 113 Ill. 430; *John V. Farwell Co. v. Linn*, 59 Ill. App. 245; *Lantz v. Ryman*, 102 Ia. 348; 71 N. W. 212; *Armstrong v. Breen*, 101 Ia. 9; 69 N. W. 1125; *Stevens v. Allen*, 51 Kan. 144; 32 Pac. 922; *Shackelford v. Hendley*, 1 A. K. Mar. (Ky.) 496; 10 Am. Dec. 753; *Palmer v. Bell*, 85 Me. 352; 27 Atl. 250; *Gerner v. Yates*, 61 Neb. 100; 84 N. W. 596; *Brown v. Dobson*, 198 Pa. St. 487; 48 Atl. 415; *Williams v. Kerr*, 152 Pa. St. 560; 25 Atl. 618.

² *Caswell v. Hunton*, 87 Me. 277;

32 Atl. 899; *Greenleaf v. Gerald*, 94 Me. 91; 80 Am. St. Rep. 377; 50 L. R. A. 542; 46 Atl. 799.

³ *Colton v. Stanford*, 82 Cal. 351; 16 Am. St. Rep. 137; 23 Pac. 16; *Lantz v. Ryman*, 102 Ia. 348; 71 N. W. 212; *McNamara v. Gargett*, 68 Mich. 454; 13 Am. St. Rep. 355; 36 N. W. 218; *Gerner v. Yates*, 61 Neb. 100; 84 N. W. 596; *Brown v. Dobson*, 198 Pa. St. 487; 48 Atl. 415.

⁴ See §§ 94, 96, 99, 101, 102, 104.

⁵ *Stockton, etc., Works v. Ins. Co.*, 98 Cal. 557; 33 Pac. 633.

⁶ *Michigan, etc., Ins. Co. v. Nauge*, 130 Ind. 79; 29 N. E. 393; see *McLean v. Assurance Society*, 100 Ind. 127; 50 Am. Rep. 779.

⁷ *Nelson v. Carlson*, 54 Minn. 90; 55 N. W. 821; *Nearen v. Blakewell*, 110 Mo. 645; 19 S. W. 988.

tion, as being on a corner,⁸ or misrepresenting the title to mortgaged realty,⁹ or to realty offered for sale,¹⁰ or as to area,¹¹ or as to rent paid;¹² a statement that vendor has a party ready to make a loan on the property,¹³ that renewing security for a loan does not increase liability, when, in fact, other security is released, casting a greater burden on the property conveyed,¹⁴ as to the amount due on a judgment offered for sale;¹⁵ a representation that a ward's counsel had advised settlement with the sureties on her guardian's bond and had said that she would probably realize little or nothing by further litigation, whereby she is induced to release the sureties;¹⁶ a representation as to the length of time (three years) that a vendor had resided on certain realty where under the statute after three years' residence the purchaser could receive a patent from the state on payment of the price;¹⁷ that a patent covers the entire article when it really covers only the design;¹⁸ a false representation that vendee on credit is solvent when in fact he is not;¹⁹ a statement as to the conditions on which others have subscribed to stock offered for sale,²⁰ or to the fund in question;²¹ or a statement to a subscriber to a book of "Men of Progress of the State of Maine" of the number of men both from his town and state, whose biographies would be inserted therein;²² and a statement that certain

⁸ *Hook v. Bowman*, 42 Neb. 80; 47 Am. St. Rep. 691; 60 N. W. 389.

⁹ *Baker v. Maxwell*, 99 Ala. 558; 14 So. 468. (Even if the mortgagor is solvent, as the mortgagor has a right to invoke either remedy.)

¹⁰ *Herman v. Hall*, 140 Mo. 270; 41 S. W. 733; *Spoer v. Tilson*, 97 Va. 279; 33 S. E. 609.

¹¹ *Lancaster v. Richardson*, (Tex. Civ. App.); 45 S. W. 409; *Carney v. Herbert*, 44 W. Va. 30; 28 S. E. 712.

¹² *Lee v. Tarplin*, 183 Mass. 52; 66 N. E. 431; *Hecht v. Metzler*, 14 Utah 408; 60 Am. St. Rep. 906; 48 Pac. 37.

¹³ *Shanks v. Whitney*, 66 Vt. 405; 29 Atl. 367.

¹⁴ *Interstate, etc., Association v.*

Tabor, 21 Tex. Civ. App. 112; 51 S. W. 300.

¹⁵ *Hyer v. Smith*, 48 W. Va. 550; 37 S. E. 632.

¹⁶ *Commonwealth to use of Shaffer v. Julius*, 173 Pa. St. 322; 34 Atl. 21.

¹⁷ *Settle v. Stephens*, 18 Tex. Civ. App. 695; 45 S. W. 969.

¹⁸ *Swinney v. Patterson*, 25 Nev. 411; 62 Pac. 1.

¹⁹ *In re Gany*, 103 Fed. 930; *Gallopis Furniture Co. v. Symmes*, 10 Ohio C. D. 514.

²⁰ *Zabel v. Telephone Co.*, 127 Mich. 402; 86 N. W. 949.

²¹ *Highland University v. Long*, 7 Kan. App. 173; 53 Pac. 766.

²² *Greenleaf v. Gerald*, 94 Me. 91;

members of a board had agreed to a certain contract, made to induce other members of such board to make such contract,²³ are all material.

On the other hand, statements which cannot be understood as influencing the conduct of the adversary party cannot be deemed material.²⁴ Thus a false statement as to the motive of the buyer²⁵ or seller²⁶ as to the information with reference to the conduct of an estate possessed by a creditor;²⁷ a false representation by a retiring member of a firm of insurance agents that he has no copy of the expiration list of policies, the contract of dissolution allowing him to keep his goodwill and solicit renewals;²⁸ a statement as to the amount of a debt where the parties agree on a certain sum therefor, "without regard to any question as to what is the real claim;"²⁹ a bank statement which inflates resources and liabilities equally, or which deducts interest or re-discounts from undivided profits, instead of stating each separately in full;³⁰ a statement by a patentee that not a reference had been found against him, the fact being that references had been made but were not then standing;³¹ that certain land is not "river land" where the title to such land has been cleared and it is as valuable as other land;³² and a representation made to a purchaser of a wharf who required twelve feet of water that it was seventeen feet, the depth being somewhat less but the city having guaranteed at least six-

80 Am. St. Rep. 377; 50 L. R. A. 542; 46 Atl. 799 (where the number is exceeded).

²³ Mills v. Collins, 67 Ia. 164; 25 N. W. 109.

²⁴ Colton v. Stanford, 82 Cal. 351; 16 Am. St. Rep. 137; 23 Pac. 16; Ransford v. Willetts, 43 Ill. App. 436; Lantz v. Ryman, 102 Ia. 348; 71 N. W. 212; Byrd v. Rautman, 85 Md. 414; 36 Atl. 1099; Brown v. Dobson, 198 Pa. St. 487; 48 Atl. 415.

²⁵ Byrd v. Rautman, 85 Md. 414; 36 Atl. 1099.

²⁶ Marriner v. Dennison, 78 Cal. 202; 20 Pac. 386.

²⁷ Jones v. Bradley, 8 Colo. App. 178; 45 Pac. 229 (made to the executrix by the creditor).

²⁸ Lantz v. Ryman, 102 Ia. 348; 71 N. W. 212.

²⁹ Brown v. Dobson, 198 Pa. St. 487; 48 Atl. 415.

³⁰ Gerner v. Yates, 61 Neb. 100; 84 N. W. 596.

³¹ Arnold v. Hosiery Co., 148 N. Y. 392; 42 N. E. 980.

³² Armstrong v. Breen, 101 Ia. 9; 69 N. W. 1125.

teen feet,³³ have all been held not to be fraud, even if knowingly false, as immaterial.

IV. FALSITY.

§107. Falsity.

To constitute fraud, the representation must be false when made.¹ This is so obvious that the question is rarely considered specifically. Its chief importance is in cases where the representation is substantially true though literally false, where it is held that fraud does not exist.² Thus a representation that a house is located on the best residence street in town, which is true, although that part of the street is not as good as other parts;³ that a secret process is to be used, even though it has been patented and the patent has expired, if it is unknown to the public;⁴ that A has authorized B to secure C's signature, though false, if made in A's presence as A is estopped to deny such authority;⁵ or that a lease has been extended, if such extension has been agreed on, and is afterward made;⁶ or that certain bicycles were completed and set aside for the vendee, when in fact the frames were set aside and the parts ready to assemble on receiving instructions from vendee as to tires and sprocket wheels,⁷ are not fraud, as they are substantially true. So it is not fraud to capitalize at five million dollars though the property owned was bought for one hundred thousand dollars; when it was sold in

³³ *Ranstead v. Allen*, 85 Md. 482; 37 Atl. 15.

¹ *Southern Development Co. v. Silva*, 125 U. S. 247; *Benton v. Ward*, 59 Fed. 411; *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90; 20 N. E. 692; *F. C. Austin Mfg. Co. v. Decker*, 109 Ia. 277; 80 N. W. 312; *Potts v. Chapin*, 133 Mass. 276; *Hoeft v. Kock*, 119 Mich. 458; 78 N. W. 556; *Frishmuth v. Barker*, 159 Pa. St. 549; 28 Atl. 368; *Hamburger v. Lusky* (Tenn. Ch. App.); 56 S. W. 24.

² *Benton v. Ward*, 59 Fed. 411; *Beard v. Bliley*, 3 Colo. App. 479; 34 Pac. 271; *F. C. Austin Mfg. Co.*

v. Decker, 109 Ia. 277; 80 N. W. 312; *World Mfg. Co. v. Cycle Co.*, 123 Mich. 620; 82 N. W. 528; *Hollinger v. Zimmerman*, 59 N. J. Eq. 644; 44 Atl. 1100; affirming 58 N. J. Eq. 217; 42 Atl. 726.

³ *Hollinger v. Zimmerman*, 59 N. J. Eq. 644; 44 Atl. 1100; affirming 58 N. J. Eq. 217; 42 Atl. 726.

⁴ *Benton v. Ward*, 59 Fed. 411.

⁵ *F. C. Austin Mfg. Co. v. Decker*, 109 Ia. 277; 80 N. W. 312.

⁶ *Beard v. Bliley*, 3 Colo. App. 479; 34 Pac. 271.

⁷ *World Mfg. Co. v. Cycle Co.*, 123 Mich. 620; 82 N. W. 528.

ignorance of large deposits of coal from which a profit exceeding five million dollars might reasonably be expected.⁸ If the statement is true, no fraud exists, even though the party making the statement believes that it is false.⁹ Accordingly a statement intended by the party making it to be false but which works an estoppel has been held by some courts not to amount to fraud.¹⁰ Thus since subscribers on condition who hold themselves out to subsequent subscribers as having subscribed unconditionally are estopped to deny it, such representation cannot be fraud.¹¹ So while employing "puffers" to bid at an auction is of itself a fraud on the bidder,¹² still no fraud exists if the puffer would be liable personally on his bid, even if third parties who have hired him have agreed to take over the land bid in by him.¹³ Some authorities, however, differ from this view on the ground that the defrauded party may rescind on discovering the falsity and should not be compelled to take the chances of litigation over the falsity of such statements at a future time. Thus where A, an illiterate woman, was induced by the false representations of an agent to insure her husband's life without his knowledge, which under the rules of the insurance company avoided the insurance, she was allowed to rescind and recover the premiums paid in, although the company would have been bound by the representations of its agent.¹⁴ On the other hand, a statement literally true may constitute fraud if substantially false.¹⁵ Thus

⁸ *Trust Co. v. Coal Co.*, 19 Wash. 493; 53 Pac. 951.

⁹ *F. C. Austin Mfg. Co. v. Decker*, 109 Ia. 277; 80 N. W. 312.

¹⁰ *Hart v. Waldo*, 117 Ga. 590; 43 S. E. 998.

¹¹ *Wilson v. Hundly*, 96 Va. 96; 70 Am. St. Rep. 837; 30 S. E. 492.

¹² *Bexwell v. Christie*, Cowp. 395; *Howard v. Castle*, 6 T. R. 642.

¹³ *McMillan v. Harris*, 110 Ga. 72; 78 Am. St. Rep. 93; 48 L. R. A. 345; 35 S. E. 334.

¹⁴ *Delouche v. Ins. Co.*, 69 N. H. 587; 45 Atl. 414; (citing *Concord Bank v. Gregg*, 14 N. H. 331; *Pres-*

by v. Parker, 56 N. H. 409; *McDonald v. Ins. Co.*, 68 N. H. 4; 38 Atl. 500; *Insurance Co. v. Fletcher*, 117 U. S. 519).

¹⁵ *Coles v. Kennedy*, 81 Ia. 360; 25 Am. St. Rep. 503; 46 N. W. 1088; *Lee v. Lemert*, 26 Kan. 111; *Van Houten v. Morse*, 162 Mass. 414; 44 Am. St. Rep. 373; 26 L. R. A. 430; 38 N. E. 705; *Foley v. Holtry*, 43 Neb. 133; 61 N. W. 120; *Lomerson v. Johnston*, 47 N. J. Eq. 312; 24 Am. St. Rep. 410; 20 Atl. 675; *George v. Johnson*, 6 Humph. (Tenn.) 36; 44 Am. Dec. 288.

where A sold B stock in a corporation representing that the report of the secretary of the corporation showed a certain monthly profit, fraud existed though such a report had been made if it was false and A knew it.¹⁶ If certain material statements are false, the fact that they are coupled with some truthful statements does not prevent fraud from existing.¹⁷ Thus fraudulent statements that certain bonds were marketable and were adequate security for the money paid therefor are not proved true by the fact that interest was paid promptly on such bonds for several years.¹⁸ A statement made to be acted on at a future time may be fraudulent if false when acted on though true when made.¹⁹ Thus a representation to induce the purchase of a lot, that it is unencumbered, is fraudulent if false when the sale is consummated, though true when the statement is made.²⁰

V. KNOWLEDGE OF FALSITY.

§108. Knowledge of falsity.

It is an essential element of fraud as distinguished from misrepresentation,¹ that the party making such statement must do so knowing that it is false;² or that he must make a positive statement as of an existing fact without any reasonable ground for believing it to be true, in reckless ignorance of its

¹⁶ *Foley v. Holtry*, 43 Neb. 133; 61 N. W. 120.

¹⁷ *In re Gany*, 103 Fed. 930; *Cleveland, etc., Co. v. Plow Co.*, 13 Ind. App. 225; 41 N. E. 480; *Stackpole v. Hancock*, 40 Fla. 362; 45 L. R. A. 814; 24 So. 914.

¹⁸ *Currier v. Poor*, 155 N. Y. 344; 49 N. E. 937; reversing 84 Hun. 45.

¹⁹ *Piche v. Robbins*, 24 R. I. 325; 53 Atl. 92.

²⁰ *Piche v. Robbins*, 24 R. I. 325; 53 Atl. 92.

¹ See §§ 56, 57.

² *Dushane v. Benedict*, 120 U. S. 630; *Union Pac. Ry. Co. v. Barnes*, 64 Fed. 80; *Hutchinson v. Gorman*, — Ark. —; 73 S. W. 793; *Daley v. Quick*, 99 Cal. 179; 33 Pac. 859;

Cole v. Smith, 26 Colo. 506; 58 Pac. 1086; *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511; 43 Atl. 615; *Crocker v. Manley*, 164 Ill. 282; 56 Am. St. Rep. 196; 45 N. E. 577; *Hutchinson, etc., Co. v. Lyford*, 123 Ill. 300; 13 N. E. 844; *Metzer v. Sargeant*, 115 Ia. 527; 88 N. W. 1068; *Boddy v. Henry*, 113 Ia. 462; 53 L. R. A. 769; 85 N. W. 771; *Scroggin v. Wood*, 87 Ia. 497; 54 N. W. 437; *Farmers', etc., Association v. Scott*, 53 Kan. 534; 36 Pac. 978; *Kansas Refrigerator Co. v. Pert*, 3 Kan. App. 364; 42 Pac. 943; *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508; 61 Am. Dec. 195; *Nash v. Trust Co.*, 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40

truth or falsity.³ Some courts in treating of fraud as an actionable wrong — a tort — for which damages are claimed, hold that a statement in ignorance of its truth or falsity cannot be fraud;⁴ though this is contrary to the weight of authority,⁵ but where the statement is made by the adversary party to the contract, and possesses the other elements of fraud, rescission is always granted, either informally at law or formally in equity.⁶ If the party making such representations knows that they are false, it makes no difference how he obtained his knowledge.

N. E. 1039; same case, 159 Mass. 437; 34 N. E. 625; *Bowker v. De-long*, 141 Mass. 315; 4 N. E. 834; *Haven v. Neal*, 43 Minn. 315; 45 N. W. 612; *Walsh v. Morse*, 80 Mo. 568; *Dun v. White*, 63 Mo. 181; *Crowell v. Jackson*, 53 N. J. L. 656; 23 Atl. 426; *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651; 29 L. R. A. 360; 41 N. E. 414; *Taylor v. Leith*, 26 O. S. 428; *McCracken v. West*, 17 Ohio 16; *Lamberton v. Dunham*, 165 Pa. St. 129; 30 Atl. 716; *Wynne v. Allen*, 7 Baxt. (Tenn.) 312; 32 Am. Rep. 562.

³ *Cooper v. Schlesinger*, 111 U. S. 148; *Hindman v. Bank*, 112 Fed. 931; 57 L. R. A. 108; 50 C. C. A. 623; *Nevada Bank v. Bank*, 59 Fed. 338; *Jones v. Ross*, 98 Ala. 448; 13 So. 319; *Mayer v. Salazar*, 84 Cal. 646; 24 Pac. 597; *Alvarez v. Brannan*, 7 Cal. 503; 68 Am. Dec. 274; *Schofield, etc., Co. v. Schofield*, 71 Conn. 1; 40 Atl. 1046; *Browning v. Bank*, 13 App. D. C. 1; *Miller v. John*, 208 Ill. 173; 70 N. E. 27; *Furnas v. Friday*, 102 Ind. 129; 1 N. E. 296; *Prewitt v. Trimble*, 92 Ky. 176; 36 Am. St. Rep. 586; 17 S. W. 356; *Linscott v. Ins. Co.*, 88 Me. 497; 51 Am. St. Rep. 435; 34 Atl. 405; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727; 18 N. E. 168; *Milliken v. Thorndike*, 103 Mass. 382; *Beebe v. Knapp*, 28

Mich. 53; *Hedin v. Minneapolis, etc., Institute*, 62 Minn. 146; 54 Am. St. Rep. 628; 35 L. R. A. 417; 64 N. W. 158; *Bullitt v. Farrar*, 42 Minn. 8; 18 Am. St. Rep. 485; 6 L. R. A. 149; 43 N. W. 566; *Hamlin v. Abell*, 120 Mo. 188; 25 S. W. 516; *Florida v. Morrison*, 44 Mo. App. 529; *Paretti v. Rebenack*, 81 Mo. App. 494; *McCready v. Phillips*, 56 Neb. 446; 76 N. W. 885; *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651; 29 L. R. A. 360; 41 N. E. 414; *Parmlee v. Adolph*, 28 O. S. 10; *Darling v. Stuart*, 63 Vt. 570; 22 Atl. 634; *Montreal, etc., Co. v. Mihills*, 80 Wis. 540; 50 N. W. 507; *Barndt v. Frederick*, 78 Wis. 1; 11 L. R. A. 199; 47 N. W. 6.

⁴ *Derry v. Peek*, L. R. 14 App. 337; reversing 37 Ch. D. 541; *White v. Sage*, 19 Ont. App. 135; *Sylvester v. Henrich*, 93 Ia. 489; 61 N. W. 942.

⁵ See cases cited in note 3, this section.

⁶ *Wainscott v. Association*, 98 Cal. 253; 33 Pac. 88; *Borders v. Kattleman*, 142 Ill. 96; 31 N. E. 19; *Prewitt v. Trimble*, 92 Ky. 176; 36 Am. St. Rep. 586; 17 S. W. 356; *Riggs v. Thorpe*, 67 Minn. 217; 69 N. W. 891; *Braunschweiger v. Waits*, 179 Pa. St. 47; 36 Atl. 155; *Henderson v. R. R.*, 17 Tex. 560; 67 Am. Dec. 675; *Grosh*

Thus knowledge obtained by one as creditor and administrator is chargeable against him as vendor of a note.⁷

§109. Statement as of personal knowledge.

The personal knowledge of the person who makes a statement may be a material fact. Accordingly, a false, positive statement made as of the personal knowledge of the person making it is fraud, even where he is misled by statements of others into believing that the facts are as he states them, if he must know that he has not personal knowledge thereof.¹ "A man is guilty of wilful falsehood when he asserts as of his own knowledge a matter of which he knows he is ignorant."² Thus where

v. Land, etc., Co., 95 Va. 161; 27 S. E. 841; Wilson v. Carpenter, 91 Va. 183; 50 Am. St. Rep. 824; 21 S. E. 243; McKinnon v. Vollmar, 75 Wis. 82; 17 Am. St. Rep. 178; 6 L. R. A. 121; 43 N. W. 800.

⁷ Gordan v. Irvine, 105 Ga. 144; 31 S. E. 151.

¹ Cooper v. Schesinger, 111 U. S. 148; Muroe v. Pritchett, 16 Ala. 785; 50 Am. Dec. 203; Browning v. Bank, 13 App. D. C. 1; Ross v. Hobson, 131 Ind. 166; 26 N. E. 775; Furnas v. Friday, 102 Ind. 129; 1 N. E. 296; Mendenhall v. Stewart, 18 Ind. App. 262; 47 N. E. 943; Swayne v. Waldo, 73 Ia. 749; 5 Am. St. Rep. 712; 33 N. W. 78; Riley v. Bell, 120 Ia. 618; 95 N. W. 170; Prewitt v. Trimble, 92 Ky. 176; 36 Am. St. Rep. 586; 17 S. W. 356; Gould v. Ins. Co., 47 Me. 403; 74 Am. Dec. 494; Lewis v. Jewell, 151 Mass. 345; 21 Am. St. Rep. 454; 24 N. E. 52; Chatham Furnace Co. v. Moffatt, 147 Mass. 403; 9 Am. St. Rep. 727; 18 N. E. 168; Cole v. Cassidy, 138 Mass. 437; 52 Am. Rep. 284; Litchfield v. Hutchinson, 117 Mass. 195; Fisher v. Mellen, 103 Mass. 503; Knappen v. Freeman, 47 Minn. 491; 50 N. W. 533; Bullitt

v. Farrar, 42 Minn. 8; 18 Am. St. Rep. 485; 6 L. R. A. 149; 43 N. W. 566; Nauman v. Oberle, 90 Mo. 666; 3 S. W. 380; Ring v. Glass Co., 44 Mo. App. 111; Bauer v. Taylor,

Neb. ; 98 N. W. 29; modifying on rehearing, Neb. ; 96 N. W. 268; Olcott v. Bolton, 50 Neb. 779; 70 N. W. 366; Haddock v. Osmer, 153 N. Y. 604; 47 N. E. 923; Kountze v. Kennedy, 147 N. Y. 124; 49 Am. St. Rep. 651; 29 L. R. A. 360; 41 N. E. 414; Cawston v. Sturgis, 29 Or. 331; 43 Pac. 656; Hexter v. Bast, 125 Pa. St. 52; 11 Am. St. Rep. 874; 17 Atl. 252; Tyson v. Passmore, 2 Pa. St. 122; 44 Am. Dec. 181; Wright v. Mortgage Co. (Tex. Civ. App.), 42 S. W. 789; Wells v. McGeoch, 71 Wis. 196; 35 N. W. 769; as a statement that debtors "are good for money you let them have" Haddock v. Osmer, 153 N. Y. 604; 47 N. E. 923; so by statute in California, Benson v. Bunting, 127 Cal. 532; 78 Am. St. Rep. 81; 59 Pac. 991; Mayer v. Salazar, 84 Cal. 646; 24 Pac. 597.

² Gerner v. Yates, 61 Neb. 100, 107; 84 N. W. 596. "An unqualified statement that a fact exists, made for the purpose of inducing

A stated to B that a certain specific lot of ore was within the boundaries of the mine to be sold, when A believed that he was telling the truth, but knew that the truth of the statement depended on the unwarranted assumption that a certain line assumed by the surveyor to run north did in fact run north, fraud was held to exist as such line did not run north and therefore such lot of ore was outside the tract conveyed.³ So the statement by a bank that the capital of an insurance company has been paid in,⁴ or a statement by a creditor that a certain debt has not been paid made to induce the guarantor to pay it,⁵ may each be fraudulent if made positively though believed when made to be true. That the party making the representations can show that he was himself deceived by another,⁶ or was misled by a forged letter from which he obtained his information,⁷ is no defense, as he has expressly or impliedly represented that he had personal knowledge of the fact stated. Either damages,⁸ or rescission⁹ may be had.

§110. Statement of facts which it is one's duty to know.

Where a person makes representations as to matters which from his situation he should have known, or which it was his duty to know,¹ as where officers of a corporation make state-

another to act upon it, implies that the person who makes it, knows it to exist and speaks from his own knowledge. If the fact does not exist and the defendant states of his own knowledge that it does, and induces another to act upon his statement the law will impute to him a fraudulent purpose." *Hamlin v. Abell*, 120 Mo. 188, 203; 25 S. W. 516.

³ *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727; 18 N. E. 168.

⁴ *Hindman v. Bank*, 112 Fed. 931; 57 L. R. A. 108; 50 C. C. A. 623.

⁵ *Johnson v. Cate*, 75 Vt. 100; 53 Atl. 329.

⁶ *Browning v. Bank*, 13 App. D. C. 1.

⁷ *Mendenhall v. Stewart*, 18 Ind. App. 262; 47 N. E. 943.

⁸ *Lahay v. Bank*, 15 Colo. 339; 22 Am. St. Rep. 407; 25 Pac. 704; *Prewitt v. Trimble*, 92 Ky. 176; 36 Am. St. Rep. 586; 17 S. W. 356; *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; 17 Atl. 673.

⁹ *Cooper v. Schlesinger*, 111 U. S. 148; *Parmlee v. Adolph*, 28 O. S. 10; *Braunschweiler v. Waits*, 179 Pa. St. 47; 36 Atl. 155.

¹ *Swofford, etc., Co. v. Mills*, 86 Fed. 556; *Moline Plow Co. v. Carson*, 72 Fed. 387; 18 C. C. A. 606; *Foard v. McComb*, 12 Bush (Ky.)

ments concerning the affairs of the corporation,² or where a mortgagor states that he has given only one mortgage on his real estate,³ such representations will if false be treated as fraud. So one who knows facts from which a reasonable man could infer the falsity of the statement which he makes is held as guilty of fraud as if he had actual knowledge.⁴ Rescission in equity may be had in such cases.⁵ However, in tort some courts hold that no liability exists if there is no active, conscious and intentional fraud.⁶ Some jurisdictions treat fraud in such cases as merely a *prima facie* inference which may be rebutted by showing good faith.⁷

§111. Statement on authority disclosed.

Fraud is not committed by one who innocently makes a false statement if he makes it not as of his own knowledge, but on

723; *Kiefer v. Rogers*, 19 Minn. 14; *Davis v. Driscoll*, 22 Tex. Civ. App. 14; 54 S. W. 43; *Krause v. Busacker*, 105 Wis. 350; 81 N. W. 406; *Beetle v. Anderson*, 98 Wis. 5; 73 N. W. 560; *Montreal, etc., Co. v. Mihills*, 80 Wis. 540; 50 N. W. 507.

² *Shelton v. Healy*, 74 Conn. 265; 50 Atl. 742; *Hubbard v. Weare*, 79 Ia. 678; 44 N. W. 915; *Prewitt v. Trimble*, 92 Ky. 176; 36 Am. St. Rep. 586; 17 S. W. 356; *Silberman v. Monroe*, 104 Mich. 352; 62 N. W. 555; *Bank v. Hunt*, 76 Mo. 439; *Gerner v. Mosher*, 58 Neb. 135; 46 L. R. A. 244; 78 N. W. 384; *Olcott v. Bolton*, 50 Neb. 779; 70 N. W. 366; *Tate v. Bates*, 118 N. Car. 287; 54 Am. St. Rep. 719; 24 S. E. 482. In *Hubbard v. Weare*, 79 Ia. 678, 687; 44 N. W. 915, the court said: "Officers of corporations who hold out to individuals or to the public advantages which will accrue to persons who take shares in their corporation and invite them to take shares on the faith of their representations are bound to state every thing with strict and scrupulous ac-

curacy and not only to abstain from stating as facts that which is not so but to omit no fact within their knowledge, the existence of which might affect the advantages held out as inducements to take shares. Such officers will be presumed to have known that which it was their duty to know. Before making representations as to the condition of the company as inducements to take stock therein or extend credit thereto, it is their duty to use reasonable diligence to know that the representations are true, and they will be presumed to have used such diligence and to possess the knowledge which its exercise would bring to them." *Contra*, *Cahill v. Applegarth*, — Md. —; 56 Atl. 794.

³ *Kiefer v. Rogers*, 19 Minn. 14.

⁴ *Gordon v. Irvine*, 105 Ga. 144; 31 S. E. 151; *French v. Vining*, 102 Mass. 132; 3 Am. Rep. 440.

⁵ *Olcott v. Bolton*, 50 Neb. 779; 70 N. W. 366.

⁶ *Warfield v. Clark*, 118 Ia. 69; 91 N. W. 833.

⁷ *Griswold v. Gebbie*, 126 Pa. St.

authority which he then discloses.¹ If, however, he knows the statement to be false, his stating it on the authority of others does not prevent it from constituting fraud.²

Whatever may be its effect as a misrepresentation,³ a false statement made on reasonable ground of belief is not fraud if made innocently, at least if the party making does not make it as of his personal knowledge.⁴ Thus misstatement of ownership in land in good faith is not fraud,⁵ such as a representation as to the title to land made in honest reliance on the certificate of the town clerk and the advice of counsel;⁶ nor is it fraud to omit from a list of debts a claim in litigation on advice of counsel that such claim is unenforceable.⁷

Rescission has been refused for a false statement made innocently not of the knowledge of the party making it, but on infor-

353; 12 Am. St. Rep. 878; 17 Atl. 673.

¹ *Stevenson v. Marble*, 84 Fed. 23; *Union Pac. Ry. Co. v. Barnes*, 64 Fed. 80; *Stevens v. Allen*, 51 Kan. 144; 32 Pac. 922; *Hillyer v. Dickinson*, 154 Mass. 502; 28 N. E. 905; *Hume v. Brelsford*, 51 Mo. App. 651; *Moore v. Scott*, 47 Neb. 346; 66 N. W. 441; *Crist v. Dice*, 18 O. S. 536; *English v. Grinstead*, 12 Wash. 670; 42 Pac. 121.

² *Hanscom v. Drullard*, 79 Cal. 234; 21 Pac. 736; *Savage v. Stevens*, 126 Mass. 207; *Foley v. Holtry*, 43 Neb. 133; 61 N. W. 120.

³ See § 142 *et seq.*

⁴ *Wright v. Phipps*, 90 Fed. 556; *Patton v. Glatz*, 87 Fed. 283; *Stevenson v. Marble*, 84 Fed. 23; *Union Pac. Ry. Co. v. Barnes*, 64 Fed. 80; *Jones v. Ross*, 98 Ala. 448; 13 So. 319; *Toner v. Meussdorffer*, 123 Cal. 462; 56 Pac. 39; *Elwell v. Russell*, 71 Conn. 462; 42 Atl. 862; *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511; 43 Atl. 615; *Scroggin v. Wood*, 87 Ia. 497; 54 N. W. 437; *Farmers', etc., Association v. Scott*, 53 Kan. 534; 36 Pac. 978; *Kansas*

Refrigerator Co. v. Pert, 3 Kan. App. 364; 42 Pac. 943; *Nash v. Trust Co.*, 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40 N. E. 1039; same case, 159 Mass. 437; 34 N. E. 625; *People's National Bank v. Trust Co.*, — Mo. —; 78 S. W. 618; *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651; 29 L. R. A. 360; 41 N. E. 414; *Gatlin v. Harrell*, 108 N. Car. 485; 13 S. E. 190; *Wessels v. Weiss*, 156 Pa. St. 591; 27 Atl. 535; *Leiker v. Henson*, (Tenn. Ch. App.); 41 S. W. 862.

⁵ *Union Pac. Ry. Co. v. Barnes*, 64 Fed. 80; *Nash v. Trust Co.*, 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40 N. E. 1039; same case, 159 Mass. 437; 34 N. E. 625.

⁶ *Elwell v. Russell*, 71 Conn. 462; 42 Atl. 862.

⁷ *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651; 29 L. R. A. 360; 41 N. E. 414. This case carries the doctrine to extreme limits. Fair dealing would seem to require that the facts be communicated to the adversary party and he be free on his own judgment to deter-

mation which he discloses.⁸ Thus rescission is refused for a false statement as to earnings of another company, with which consolidation of the company whose stock is for sale, is expected, made in good faith and based on data furnished by such company accessible to both parties and believed to be true.⁹

VI. INTENT TO DECEIVE.

§112. Intent to deceive.

Intent to deceive is often said to be an element of actual fraud.¹ If this form of statement is used, it must be noted that, though it may seem to involve an intent to do wrong, it does not necessarily involve such intent.² If the statement has the elements of fraud hitherto discussed, it is sufficient if the party making it intends it to be believed, and action in reliance thereon to be taken.³ Thus if he knows that the statement is false, but believes that it will come true hereafter he is guilty of fraud.⁴ So, fraud exists where one intentionally misrepresents his financial condition in buying goods on credit, though he believes he will be able to pay for them.⁵

Where the party making the statement does not know that it is false, but is bound to know the fact in question, fraud exists

mine whether the claim is valid or not.

⁸ *Crist v. Dice*, 18 O. S. 536.

⁹ *Stevenson v. Marble*, 84 Fed. 23.

¹ *Lord v. Goddard*, 13 How. (U. S.) 198; *Nevada Nickel Syndicate v. Nickel Co.*, 96 Fed. 133; *Toner v. Meussdorffer*, 123 Cal. 462; 56 Pac. 39; *Clement, etc., Co. v. Swanson*, 110 Ia. 106; 81 N. W. 233; *Stevens v. Allen*, 51 Kan. 144; 32 Pac. 922; *Nash v. Trust Co.*, 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40 N. E. 1039; *Humphrey v. Merriam*, 32 Minn. 197; *Kelly v. Gould*, 141 N. Y. 596; 36 N. E. 320; *Wells v. Cook*, 16 O. S. 67; 88 Am. Dec. 436; *Thorpe v. Smith*, 18 Wash. 277; 51 Pac. 381.

² *Claffin v. Ins. Co.*, 110 U. S. 81;

Sukeforth v. Lord, 87 Cal. 399; 25 Pac. 497; *Heidenbluth v. Rudolph*, 152 Ill. 316; 38 N. E. 930; *Baldwin v. Marsh*, 6 Ind. App. 533; 33 N. E. 973.

³ *Sukeforth v. Lord*, 87 Cal. 399; 25 Pac. 497; *Mooney v. Davis*, 75 Mich. 188; 13 Am. St. Rep. 425; 42 N. W. 802; *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432.

⁴ *Peek v. Gurney*, L. R. 6 H. L. 377; *Pohill v. Walter*, 3 B. & Ad. 114; *Reid v. Cowduroy*, 79 Ia. 169; 18 Am. St. Rep. 359; 44 N. W. 351; *Grosh v. Improvement Co.*, 95 Va. 161; 27 S. E. 841.

⁵ *Morris v. Posner*, 111 Ia. 335; 82 N. W. 755; *Gallipolis Furniture Co. v. Symmes*, 19 Ohio C. C. 659; 10 Ohio C. D. 514.

even if he does not intend to deceive.⁶ However, a false statement made casually and at a time previous to the contract and in no way connected with it, is not intended to deceive, so as to make such subsequent contract voidable.⁷ If a false statement of a material fact is made knowingly to the adversary party to the contract, it is almost impossible to escape the inference that intent to induce action existed so as to constitute fraudulent intent.⁸ Since constructive fraud, so-called, often consists of mere non-disclosure,⁹ intent to deceive, as the term is ordinarily used, is not a necessary element thereof, though often present.

§113. Statement not made to party deceived.

Where the statement is not made directly to the person who acts thereon, a question of greater difficulty arises. As a general proposition it may be said that unless the person making the false statement intends to induce action on the part of the person who in fact acts thereon, fraud does not exist.¹ Generally, if A makes a false statement to C, B's agent, to induce B to act thereon, this is fraud if it would be fraud had A made the statement to B in person.² Thus a corporation may maintain an action for fraudulent representations made to its promoters to

⁶ *McCready v. Phillips*, 56 Neb. 446; 76 N. W. 885; *Giddings v. Baker*, 80 Tex. 308; 16 S. W. 33; *Seale v. Baker*, 70 Tex. 283; 8 Am. St. Rep. 592; 7 S. W. 742. In such cases fraud does "not depend on a specific intent to deceive." *Giddings v. Baker*, 80 Tex. 308; 16 S. W. 33.

⁷ *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712; 17 Atl. 93.

⁸ *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572; 12 N. E. 247; *Baldwin v. Marsh*, 6 Ind. App. 533; 33 N. E. 973; *Atchison County Bank v. Byers*, 139 Mo. 627; 41 S. W. 325.

⁹ See § 178 *et seq.*

¹ *Marshall v. Hubbard*, 117 U. S. 415; *Coe v. R. R.*, 52 Fed. 531; *Lebanon Steam Laundry Co. v.*

Dyckman (Ky.), 57 S. W. 227; *Hunnewell v. Duxbury*, 154 Mass. 286; 13 L. R. A. 733; 28 N. E. 267; *Hoeft v. Kock*, 119 Mich. 458; 78 N. W. 556; *Rawlings v. Bean*, 80 Mo. 614; *Wells v. Cook*, 16 O. S. 67; 88 Am. Dec. 436; *McCracken v. West*, 17 Ohio 16; *Butterfield v. Barber*, 20 R. I. 99; 37 Atl. 532; *Gainesville National Bank v. Bamberger*, 77 Tex. 48; 19 Am. St. Rep. 738; 13 S. W. 959; *Thorp v. Smith*, 18 Wash. 277; 51 Pac. 381; *Tacoma v. Water Co.*, 16 Wash. 288; 47 Pac. 738.

² *Schofield, etc., Co. v. Schofield*, 77 Conn. 1; 40 Atl. 1046; *Hubbard v. Weare* 79 Ia. 678; 44 N. W. 915.

induce them to organize the corporation.³ This rule is not always applicable. If C knows the truth and A and C are not conspiring to defraud B, B is charged with C's knowledge.⁴ Thus where C asked A to insert in a written contract of sale a higher price than the real one, representing that B wished it, A is not liable to B though C makes use of such contract to mislead B into believing that such price was paid.⁵ If they are so conspiring B may avoid the contract.⁶ If A makes a fraudulent statement to B and B innocently repeats it to C, A's liability to C depends on whether A intended or should have contemplated A's communicating such offer to C. If so intended, A is liable.⁷ If A did not so intend, as where A defrauds B in some transaction and B conveys his rights to C repeating A's representations, A is not liable to C.⁸ So in cases where a corporation has been required to file sworn statements of its condition as a condition precedent to incorporation or to doing business in a foreign state, it is held that such statements are filed solely for that purpose and not being intended to induce action on the part of those dealing with the corporation are not fraud.⁹ If A makes a false

³ Iowa, etc., Co. v. Heater Co., 32 Fed. 735; Schofield, etc., Co. v. Schofield, 71 Conn. 1; 40 Atl. 1046. But in Lebanon Steam Laundry Co. v. Dyckman (Ky.), 57 S. W. 227, representations to future stock holders whereby they are induced to buy property which they subsequently transfer to a corporation or organized thereafter were held not to amount to fraud upon the corporation.

⁴ Thorp v. Smith, 18 Wash. 277; 51 Pac. 381.

⁵ Thorp v. Smith, 18 Wash. 277; 51 Pac. 381.

⁶ Cunningham v. Holcomb, 1 Tex. Civ. App. 331; 21 S. W. 125.

⁷ Chubbuck v. Cleveland, 37 Minn. 466; 5 Am. St. Rep. 864; 35 N. W. 362; Allison v. Tyson, 5 Humph. (Tenn.) 449.

⁸ Smith v. Roseboom, 13 Ind. App. 284; 41 N. E. 552; Wells v. Cook, 16 O. S. 67; 88 Am. Dec. 436; Butterfield v. Barber, 20 R. I. 99; 37 Atl. 532.

⁹ Lieberman v. Bank, 2 Penne (Del.) 416; 48 L. R. A. 514; 45 Atl. 901; Hunnewell v. Duxbury, 154 Mass. 286; 13 L. R. A. 733; 28 N. E. 267; Hoeft v. Kock, 119 Mich. 458; 78 N. W. 556; (a certificate of the amount of capital stock issued). But compare Silberman v. Munroe, 104 Mich. 352; 62 N. W. 555; and the cases cited in the following section. Where the statute requires a report, the intention of the legislature in requiring such report determines whether fraud can be committed thereby.

statement to X in B's presence, intending that B should hear and act upon such statement, A is guilty of fraud toward B.¹⁰

§114. Statement made to deceive public.

A statement made to the public, intended to influence the action of anyone who may be deceived thereby, may amount to fraud.¹ Thus fraud may be committed by issuing a statement or prospectus of the affairs of a corporation, designed to influence the public generally though such report may be required by law,² and such liability exists by force of Common Law principles independent of statute.³ Thus depositors,⁴ a purchaser of stock,⁵ or a surety on the bond of a cashier,⁶ can avail themselves of fraud in such cases. So a statement made in an advertisement of a sale⁷ may be fraud.

¹⁰ *Brown v. Brown*, 62 Kan. 666; 64 Pac. 599.

¹ *Hindman v. Bank*, 112 Fed. 931; 57 L. R. A. 108; *Prewitt v. Trimble*, 92 Ky. 176; 36 Am. St. Rep. 586; 17 S. W. 356; *Silberman v. Munroe*, 104 Mich. 352; 62 N. W. 555; *Bartholomew v. Bentley*, 15 Ohio 659; 45 Am. Dec. 596.

² *Peek v. Gurney*, L. R. 6 H. L. 377; *Hindman v. Bank*, 112 Fed. 931; 57 L. R. A. 108; *Trimble v. Reid*, 97 Ky. 713; 31 S. W. 861; *Prewitt v. Trimble*, 92 Ky. 176; 36 Am. St. Rep. 586; 17 S. W. 356; *Graves v. Bank*, 10 Bush. 23; 19 Am. Rep. 50; *Silberman v. Munroe*, 104 Mich. 352; 62 N. W. 555; *Hamilton-Brown Shoe Co. v. Milliken*, 62 Neb. 116; 86 N. W. 913; *Gerner v. Yates*, 61 Neb. 100; 84 N. W. 596; *Gerner v. Mosher*, 58 Neb. 135; 46 L. R. A. 244; 78 N. W. 384; *Stuart v. Bank*, 57 Neb. 569; 78 N. W. 298; *Westervelt v. Demarest*, 46 N. J. L. 37; 50 Am. Rep. 400; *Tate v. Bates*, 118 N.

Car. 287; 54 Am. St. Rep. 719; 24 S. E. 482; *Seale v. Baker*, 70 Tex. 283; 8 Am. St. Rep. 592; 7 S. W. 742.

³ *Stuart v. Bank*, 57 Neb. 569; 78 N. W. 298.

⁴ *Westervelt v. Demarest*, 46 N. J. L. 37; 50 Am. Rep. 400; *Tate v. Bates*, 118 N. Car. 287; 54 Am. St. Rep. 719; 24 S. E. 482; *Seale v. Baker*, 70 Tex. 283; 8 Am. St. Rep. 592; 7 S. W. 742.

⁵ *Warfield v. Clark*, 118 Ia. 69; 91 N. W. 833; *Prewitt v. Trimble*, 92 Ky. 176; 36 Am. St. Rep. 586; 17 S. W. 356. One who issues a prospectus of a corporation which is intended to influence purchases in the market as well as subscriptions for shares is liable to one who is thereby induced to purchase shares. *Andrews v. Mockford* (1896), 1 Q. B. 372; 65 L. J. Q. B. N. S. 302.

⁶ *Graves v. Bank*, 10 Bush (Ky.) 23; 19 Am. Rep. 50.

⁷ *Hadley v. Importing Co.*, 13 O. S. 502; 82 Am. Dec. 454.

§115. Statements to commercial agencies.

Fraud may be committed by making false statements to a commercial agency for communication to those applying for information,¹ or by referring others to an agency for a report, where, though such person made no false statement of his financial condition to the agency, he knows that the agency rates him too high.² But an erroneous report of an agency cannot be considered the fraud of one who neither made the representations on which such report is based, nor gave such agency as his reference.³ The omission of a corporation to change its statement made to a financial agency is not fraud as to one who without the knowledge of such corporation relies on the statement of such agency.⁴

§116. Effect of action other than that intended.

If the intent to deceive exists, but the action of the party deceived is different from that contemplated, fraud is nevertheless

¹ *In re Epstein*, 109 Fed. 874; *Fechheimer v. Baum*, 37 Fed. 167; 2 L. R. A. 153; *Nicholls v. McShane*, — Colo. App. —; 64 Pac. 375; *Soper Lumber Co. v. Harmount Co.*, 73 Conn. 547; 48 Atl. 425; *Moyer v. Lederer*, 50 Ill. App. 94; *P. Cox Shoe Mfg. Co. v. Adams*, 105 Ia. 402; 75 N. W. 316; *Frisbee v. Chickering*, 115 Mich. 185; 73 N. W. 112; *Genesee County Savings Bank v. Barge Co.*, 52 Mich. 164; 17 N. W. 790; *Moon-ey v. Davis*, 75 Mich. 118; 13 Am. St. Rep. 425; 42 N. W. 802; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419; 47 N. W. 330; *Charles P. Kellogg Co. v. Holm*, 82 Minn. 416; 85 N. W. 159; *Stevens v. Ludlum*, 46 Minn. 160; 24 Am. St. Rep. 210; 13 L. R. A. 270; 48 N. W. 771; *John V. Farwell Co. v. Boyce*, 17 Mont. 83; 42 Pac. 98; *Poska v. Stearns*, 56 Neb. 541; 71 Am. St. Rep. 688; 42 L. R. A. 427; 76 N. W. 1078; *Tindle v. Birkett*, 171 N. Y. 520; 89 Am. St.

Rep. 822; 64 N. E. 210; *Eaton, etc., Co. v. Avery*, 83 N. Y. 31; 38 Am. Rep. 389; *Wilmot v. Lyon*, 49 O. S. 296; 34 N. E. 720; affirming, 11 Ohio C. C. 238; 7 Ohio C. D. 394; *Sharpless v. Gummey*, 166 Pa. St. 199; 30 Atl. 1127; *B. F. Avery & Sons v. Dickson* (Tex. Civ. App.), 49 S. W. 662; *Belleville Pump, etc., Works v. Samuelson*, 16 Utah 234; 52 Pac. 282.

² *P. Cox Shoe Mfg. Co. v. Adams*, 105 Ia. 402; 75 N. W. 316; *Hiller v. Ellis*, 72 Miss. 701; 41 L. R. A. 707; 18 So. 95.

³ *P. Cox Shoe Mfg. Co. v. Adams*, 105 Ia. 402; 75 N. W. 316; *Sprague, etc., Co. v. Kempe*, 74 Minn. 465; 77 N. W. 412; *Hiller v. Ellis*, 72 Miss. 701; 41 L. R. A. 707; 18 So. 95; *Bennett v. Rubber Co.*, 54 Neb. 553; 74 N. W. 821.

⁴ *Sprague, etc., Co. v. Kempe*, 74 Minn. 465; 77 N. W. 412.

held to exist if the other elements thereof exist.¹ Thus where the directors wished to deceive the stockholders into thinking the corporation better than it was, a stockholder who in reliance thereon refused an offer for his stock of eighty dollars cash and accepted the alternative offer of fifty dollars cash and fifty dollars more if ten per cent dividends were paid thereon during the ensuing year, can hold such directors for fraud, though they did not contemplate such action.²

VII. RELIANCE.

§117. Reliance on false statement.

To constitute fraud, the party alleging fraud must have believed such representations to be true, and so believing must have acted in reliance thereon.¹ The representation must,

¹ *Heidenbluth v. Rudolph*, 152 Ill. 316; 38 N. E. 930; *Rothmiller v. Stein*, 143 N. Y. 581; 26 L. R. A. 148; 38 N. E. 718.

² *Rothmiller v. Stein*, 143 N. Y. 581; 26 L. R. A. 148; 38 N. E. 718; *But in Merchants' National Bank v. Thoms*, 1 Ohio Dec. 226, it was held that a circular intended to obtain depositors cannot be fraud where relied on by a pledgee of stock who makes advances thereon.

¹ *Smith v. Richards*, 13 Pet. (U. S.) 26; *Hawkins v. Mtge. Co.*, 84 Feb. 526; 28 C. C. A. 484; *Supreme Council v. Casualty Co.*, 63 Fed. 48; *Hartford Fire Ins. Co. v. Kirkpatrick*, 111 Ala. 456; 20 So. 651; *Estep v. Armstrong*, 69 Cal. 536; 11 Pac. 132; *Bank v. Hammond*, 25 Colo. 367; 55 Pac. 1090; *Bennett v. Gibbons*, 55 Conn. 450; 12 Atl. 99; *Hale Elevator Co. v. Hale*, 201 Ill. 131; 66 N. E. 249; *affirming*, 98 Ill. App. 430; *Crocker v. Manley*, 164 Ill. 282; 56 Am. St. Rep. 196; 45 N. E. 577; *Dady v. Condit*, 163 Ill. 511; 45 N. E. 224; *Mucisk v. Gatz-*

meyer, 47 Ill. App. 329; *Craig v. Hamilton*, 118 Ind. 565; 21 N. E. 315; *Newman v. Sylvester*, 42 Ind. 106; *Kain v. Rinker*, 1 Ind. App. 86; 27 N. E. 328; *Provident Loan Trust Company v. McIntosh*, — Kan. —; 75 Pac. 498; *Wood v. Staudenmayer*, 56 Kan. 399; 43 Pac. 760; *Flanders v. Cobb*, 88 Me. 488; 51 Am. St. Rep. 410; 34 Atl. 277; *Burns v. Dockray*, 156 Mass. 135; 30 N. E. 551; *Crehore v. Crehore*, 97 Mass. 330; 93 Am. Dec. 98; *Spencer v. Johnston*, 58 Neb. 44; 78 N. W. 482; *Davidson v. Crosby*, 49 Neb. 60; 68 N. W. 338; *American, etc., Association v. Bear*, 48 Neb. 455; 67 N. W. 500; *Pearce v. Buell*, 22 Or. 29; 29 Pac. 78; *Chamberlain v. Coal Co.*, 92 Tenn. 13; 20 S. W. 345; *Schwartz v. Mit-tenthall (Tex. Civ. App.)*, 50 S. W. 182; *Calhoun v. Quinn (Tex. Civ. App.)*, 21 S. W. 705; *Pennypacker v. Laidley*, 33 W. Va. 624; 11 S. E. 39; *Bush v. Maxwell*, 79 Wis. 114; 48 N. W. 250.

therefore, be one in which reliance is possible.² If, in fact, action is taken in reliance solely upon the representations, fraud exists although the party to whom such representations were made testifies, "I could not believe him, for I did not know."³

If the party who claims to have been misled acted when he did not know that such false statement had been made,⁴ as where he acts before the representation has been made,⁵ or if knowing that the statements have been made he does not rely on them, but by contract he makes his liability contingent on the truth of such statements,⁶ or if he disbelieves the statements,⁷ or relies solely on some collateral inducement, such as a guaranty,⁸ or knows

² Commercial National Bank v. Pirie, 82 Fed. 799; 27 C. C. A. 171; Antle v. Sexton, 137 Ill. 410; 27 N. E. 691; affirming 32 Ill. App. 437; Moore v. Recek, 163 Ill. 17; 44 N. E. 868; John V. Farwell Co. v. Linn, 59 Ill. App. 245; Dillman v. Nadlehoffer, 119 Ill. 567; 7 N. E. 88; Lake v. Tyree, 90 Va. 719; 19 S. E. 787. An alleged guaranty by a national bank of the payment of goods bought by A was offered to the vendor. It was held that even if this implied execution by the directors, and a representation that the bank was sound, it could not be made the basis of a charge of fraud as the vendor must know that no obligation was thereby imposed on the bank. Commercial National Bank v. Pirie, 82 Fed. 799; 27 C. C. A. 171. But a false statement by one selling mining stock that a million and a half dollars' worth of ore is in sight is not so extravagant that it could not, in law, have been relied on. Barndt v. Frederick, 78 Wis. 1; 11 L. R. A. 199; 47 N. W. 6.

³ Lund v. Davis, 47 Minn. 290; 50 N. W. 79.

⁴ Burnett v. Hensley, 118 Ia. 575; 92 N. W. 678.

⁵ Porter v. Collins, 90 Ala. 510; 8

So. 80; Manhattan Brass Co. v. Reger, 168 Pa. St. 644; 32 Atl. 64; Bank v. Rhea County (Tenn. Ch. App.), 59 S. W. 442. Thus a representation made after a contract for a lease is made but before the lease is given is not fraud. Oakford v. Hackley, 92 Fed. 38. A false statement made by A to a commercial agency before he buys of B, but not communicated by the agency to B till after the sale is made is not fraud. Manhattan Brass Co. v. Reger, 168 Pa. St. 644; 32 Atl. 64.

⁶ St. Vrain Stone Co. v. Ry. Co., 18 Colo. 211; 32 Pac. 827; Lienthal v. Brewing Co., 154 Mass. 185; 26 Am. St. Rep. 234; 12 L. R. A. 821; 28 N. E. 151.

⁷ Bowman v. Carithers, 40 Ind. 90; City National Bank v. Hickox, 4 Johns (N. M.) 212; 16 Pac. 912; (Where he bought the land not believing vendor's representations, but because he could exchange diamonds therefor at a large profit.)

⁸ Haldom v. Ayer, 110 Ill. 448. It was held that fraud did not exist where A represented to B that X, the maker of a note which B held, was solvent, and thereby induced him to accept such note in payment; A took it, not relying on B's representations but expecting to hold B

that they are either false, or else mere matters of opinion, inferred from facts known to him,⁹ or if he acts solely in reliance on other information,¹⁰ or on the judgment of others,¹¹ or disregards the false statement made to him,¹² he cannot be said to be defrauded. Thus where vendee knows all the material facts, a false statement as to the title to land,¹³ or power to convey it,¹⁴ or the taxes thereon,¹⁵ or the area thereof,¹⁶ or value,¹⁷ or quality,¹⁸ or that it was a continuous tract,¹⁹ or a false statement as to the condition of a business made to one who is famil-

as indorser, but omitted to notify B of the non-payment of the note. *Flanders v. Cobb*, 88 Me. 488; 51 Am. St. Rep. 410; 34 Atl. 277.

⁹ *Nevada Nickel Syndicate v. Nickel Co.*, 96 Fed. 133; *Hofman v. Keane*, 54 Fed. 986; *Richardson v. Walton*, 49 Fed. 888; *Lincoln v. Ragsdale*, 9 Ind. App. 555; 37 N. E. 25; *Simpson v. Kane*, 98 Ia. 271; 67 N. W. 247; *Merchants', etc., Bank v. Cleland (Ky.)*, 67 S. W. 386; *Anderson v. Black (Ky.)* 32 S. W. 468; *Ferrill v. Coombs (Ky.)* 18 S. W. 226; *Lewis v. Clark*, 86 Md. 327; 37 Atl. 1035; *Michaud v. Eisenmenger*, 46 Minn. 405; 49 N. W. 202; *Marshall v. Gilman*, 52 Minn. 88; 53 N. W. 811; *Graham v. Burch*, 53 Minn. 17; 55 N. W. 64; *Davis v. Ins. Co.*, 81 Mo. App. 264; *Murphy v. Bank*, 57 Neb. 519; 77 N. W. 1102; *Conly v. Coffin*, 115 N. C. 563; 20 S. E. 207; *Warner Elevator Co. v. Guthrie*, 7 Ohio N. P. 200; *Davis v. Hawkins*, 163 Pa. St. 228; 29 Atl. 746; *Baum v. Raley*, 53 S. Car. 32; 30 S. E. 713; *Wright v. Mtge. Co. (Tex. Civ. App.)*, 42 S. W. 1026; *Allen v. Brooks*, 88 Wis. 265; 60 N. W. 253.

¹⁰ *Colton v. Stanford*, 82 Cal. 351; 16 Am. St. Rep. 137; 23 Pac. 16; *Fargo, etc., Co. v. Fargo, etc., Co.*, 4 N. D. 219; 37 L. R. A. 593; 59 N. W. 1066; *Boyd v. Shiffer*, 156 Pa. St. 100; 27 Atl. 60.

¹¹ *Achilles v. Achilles*, 137 Ill. 589; 28 N. E. 45; *Boyd v. Shiffer*, 156 Pa. St. 100; 27 Atl. 60.

¹² Where goods were sold C. O. D. and payments were made thereon credit obtained by defendant cannot be said to have been obtained by reason of false representations made before the sale. *Roscoe v. Sawyer*, 71 Vt. 367; 45 Atl. 218.

¹³ *Warner Elevator Co. v. Guthrie*, 7 Ohio N. P. 200; *Baum v. Raley*, 53 S. Car. 32; 30 S. E. 713; *Allen v. Brooks*, 88 Wis., 265; 60 N. W. 253.

¹⁴ *Davis v. Hawkins*, 163 Pa. St. 228; 29 Atl. 746. (Where vendee knew that an agent who said that he had power of attorney to convey, had only verbal authority.)

¹⁵ *Wright v. Mtge. Co. (Tex. Civ. App.)*, 42 S. W. 1026.

¹⁶ *Hofman v. Keane*, 54 Fed. 986; *Michaud v. Eisenmenger*, 46 Minn. 405; 49 N. W. 202; *Marshall v. Gilman*, 52 Minn. 88; 53 N. W. 811; *Mires v. Summervill*, 85 Mo. App. 183; *May v. San Antonio, etc., Co.*, 83 Tex. 502; 18 S. W. 959.

¹⁷ *Conly v. Coffin*, 115 N. C. 563; 20 S. E. 207. See § 103.

¹⁸ *Brown v. Smith*, 109 Fed. 26. So as to the sale of a water right. *San Jose Ranch Co. v. Water Co.*, 132 Cal. 582; 64 Pac. 1097.

¹⁹ *Ferrill v. Coombs (Ky.)*, 18 S. W. 226.

iar therewith²⁰ cannot be fraud. So one who knows that the only supply of water is from a cistern cannot avoid a lease for fraud when the water becomes impure for want of rain, though the landlord represented the water supply as excellent.²¹

One to whom false statements are made and who believes them in spite of information to the contrary received from others, may in law be justified in relying thereon and may hold the party making such statements liable for fraud.²² Thus where A represented to a woman that he was unmarried, and though others informed her that he was married, she believed A, she can hold A for such fraud,²³ and so where A sells B stock representing that he is only a stockholder and not a promoter, though B has heard rumors that A had a greater interest than he admitted.²⁴ So knowledge of the falsity of one representation is not notice of the falsity of another.²⁵ So notice of the facts to one not an authorized agent of the adversary party does not prevent a positive false statement as to the title to realty from amounting to fraud, such notice not being communicated to such adversary party.²⁶ So a declaration by A at the outset of negotiations of his ignorance of a certain fact does not prevent a subsequent positive false statement as to such fact from amounting to fraud.²⁷ Whether a fraudulent representation as to title to land can be said to be relied on where a deed is taken with covenants of warranty is a question on which the courts are divided. A majority hold that such representations are not merged in the warranty, but may be fraud;²⁸ a minority holding that they are merged.²⁹

²⁰ Richardson v. Walton, 49 Fed. 888; Anderson v. Black (Ky.) 32 S. W. 468.

²¹ Lewis v. Clark, 86 Md. 327; 37 Atl. 1035.

²² Moncrief v. Wilkinson, 93 Ala. 373; 9 So. 159; Morrill v. Palmer, 68 Vt. 1; 33 L. R. A. 411; 33 Atl. 829; Virginia Land Co. v. Haupt, 90 Va. 533; 44 Am. St. Rep. 939; 19 S. E. 168.

²³ Morrill v. Palmer, 68 Vt. 1; 33 L. R. A. 411; 33 Atl. 829.

²⁴ Virginia Land Co. v. Haupt, 90

Va. 533; 44 Am. St. Rep. 939; 19 S. E. 168.

²⁵ Pursel v. Teller, 10 Colo. App. 488; 51 Pac. 436.

²⁶ Pennoyer v. Willis, 26 Or. 1; 46 Am. St. Rep. 594; 36 Pac. 568.

²⁷ Irvine v. Grady, 85 Tex. 120; 19 S. W. 1028. (As to the number of cattle sold.)

²⁸ Kimball v. Saguin, 86 Ia. 186; 53 N. W. 116; Breeding v. Flannery (Ky.), 14 S. W. 907.

²⁹ Andrus v. Refining Co., 130 U. S. 643; Wright v. Phipps, 90 Fed.

A provision in a contract that it is subject to an investigation by the purchaser of the land purchased does not prevent false representations from amounting to fraud.³⁰

§118. Necessity of sole reliance on false statement.

If the false representation was material and influenced the party to whom it was made, it may constitute fraud although the party acted as he did from several motives of which this was but one;¹ as where vendee buys, relying on the false statements of the vendor, but influenced in part by information from other sources.²

Some courts hold that the party deceived must show that he would not have acted as he did but for the false representation to establish fraud.³ So where one acts on the report of a commercial agency which is based in part on false statements of vendee and in part on independent investigation, some courts hold that this cannot be fraud.⁴ This view is unsound in principle and if carried to its logical limit would practically destroy the doctrine of fraud, since in almost every case the defrauded party relies in part on some knowledge outside of the false statements,⁵ and some jurisdictions which have entertained it seem

556; *Whitney v. Allaire*, 1 N. Y. 313.

³⁰ *Clark v. Harmer*, 9 App. D. C. 1.

¹ *Sioux National Bank v. Bank*, 56 Fed. 139; *Rice v. Gilbreath*, 119 Ala. 424; 24 So. 421; *Schofield, etc., Co. v. Schofield*, 71 Conn. 1; 40 Atl. 1046; *Sprague v. Taylor*, 58 Conn. 542; 20 Atl. 612; *Ruff v. Jarrett*, 94 Ill. 475; *Cook v. Gill*, 83 Md. 177; 34 Atl. 248; *Roberts v. French*, 153 Mass. 60; 25 Am. St. Rep. 611; 26 N. E. 416; *Safford v. Grout*, 120 Mass. 20; *Matthews v. Bliss*, 22 Pick. (Mass.) 48; *Marshall v. Gilman*, 52 Minn. 88; 53 N. W. 811; *Becraft v. Grist*, 52 Mo. App. 586; *Saunders v. McClintock*, 46 Mo. App. 216; *Fishback v. Miller*, 15 Nev.

428; *Handy v. Waldron*, 19 R. I. 618; 35 Atl. 884; same case, 18 R. I. 567; 49 Am. St. Rep. 794; 29 Atl. 143; *James v. Hodsdon*, 47 Vt. 127.

² *Marshall v. Gilman*, 52 Minn. 88; 53 N. W. 811; *Becraft v. Grist*, 52 Mo. App. 586.

³ *Huber v. Guggenheim*, 89 Fed. 598.

⁴ *Wachsmuth v. Martini*, 154 Ill. 515; 39 N. E. 129; *Hiller v. Ellis*, 72 Miss. 701; 41 L. R. A. 707; 18 So. 95; *Berkson v. Heldman*, 58 Neb. 595; 79 N. W. 162; *Poska v. Stearns*, 56 Neb. 541; 71 Am. St. Rep. 688; 42 L. R. A. 427; 76 N. W. 1078.

⁵ The reason given is that the defrauded party "might have been entirely influenced by that part of the

to have abandoned it.⁶ Of the cases cited, some can be explained on other grounds, as where the report of the agency advised the party asking for it that the statement in question was incorrect,⁷ or where the report was not based on the statement.⁸ A change made by the agency correcting an error in addition is not such an independent report as to prevent the false statement thus forwarded from being fraud.⁹

§119. Duty of making further investigation.

If the person to whom the false statements are made could, by such further investigation for himself as a prudent man would make, discover their falsity, he is negligent to some extent if he omits to investigate. Whether the party making such false statements can avoid liability by showing that it was negligence to believe them, is a different question. The weight of modern authority is that this is no defense: indeed, the greater reliance, the clearer case of fraud, as long as the representations were not false on their face or known to be false.¹ Thus fraud may exist although the party deceived might by investigation have discov-

report for which there is no pretense that (the party making the false statements) was responsible." *Poska v. Stearns*, 56 Neb. 541; 71 Am. St. Rep. 688; 42 L. R. A. 427; 76 N. W. 1078.

⁶ *Gerner v. Yates*, 61 Neb. 100; 84 N. W. 596.

⁷ *Cohn v. Broadhead*, 51 Neb. 834; 71 N. W. 747.

⁸ *Wachsmuth v. Martini*, 154 Ill. 515; 39 N. E. 129.

⁹ *Belleville Pump, etc., Works v. Samuelson*, 16 Utah 234; 52 Pac. 282.

¹ *Strand v. Griffith*, 97 Fed. 854; *Merrill v. Improvement Co.*, 60 Fed. 17; *Leicester Piano Co. v. Improvement Co.*, 55 Fed. 190; *Hutchinson v. Gorman*, — Ark. —; 73 S. W. 793; *Zang v. Adams*, 23 Colo. 408; 58 Am. St. Rep. 249; 48 Pac. 509; *Lahay v. Bank*, 15 Colo. 339; 22

Am. St. Rep. 407; 25 Pac. 704; *Benjamin v. Mattler*, 3 Colo. App. 227; 32 Pac. 837; *Wilson v. Nichols*, 72 Conn. 173; 43 Atl. 1052; *Gustafson v. Rustemeyer*, 70 Conn. 125; 66 Am. St. Rep. 92; 39 Atl. 104; *Lingington v. Strong*, 107 Ill. 295; *Mayberry v. Rogers*, 81 Ill. App. 581; *Kramer v. Williamson*, 135 Ind. 655; 35 N. E. 388; *Ross v. Hobson*, 131 Ind. 166; 26 N. E. 775; *Ledbetter v. Davis*, 121 Ind. 119; 22 N. E. 744; *Dodge v. Pope*, 93 Ind. 480; *Pryse v. McGuire*, 81 Ky. 608; *Trimble v. Ward*, 97 Ky. 748; 31 S. W. 864; *Brady v. Finn*, 162 Mass. 260; 38 N. E. 506; *David v. Park*, 103 Mass. 501; *Morman v. Harrington*, 118 Mich. 623; 77 N. W. 242; *Bank v. Seymour*, 75 Minn. 100; 77 N. W. 543; *Alfred Shrimpton & Sons v. Philbrick*, 53 Minn. 366; 55 N. W. 551; *Erickson v. Fisher*, 51 Minn.

ered the falsity of statements as to the quality,² location,³ or area of land,⁴ even if he sees the boundaries,⁵ or of statements as to solvency, condition of business and the like,⁶ even where he is given the right to examine the books,⁷ or though he relies on the report of vendee to a commercial agency and does not inquire of vendee in person.⁸

Even though the falsity of the facts stated appears on public records, open to inspection, such as records of conveyances,⁹ or

300; 53 N. W. 638; Redding v. Wright, 49 Minn. 322; 51 N. W. 1056; Evans v. Forstall, 58 Miss. 30; Wilder v. De Cou, 18 Minn. 421; Perry v. Rogers, 62 Neb. 898; 87 N. W. 1063; Gerner v. Mosher, 58 Neb. 135; 46 L. R. A. 144; 78 N. W. 384; Hooch v. Bowman, 42 Neb. 80; 47 Am. St. Rep. 691; 60 N. W. 389; Swinney v. Patterson, 25 Nev. 411; 62 Pac. 1; Stoll v. Wellborn, — N. J. Eq. —; 56 Atl. 894; Mead v. Bunn, 32 N. Y. 275; Blacknall v. Rowland, 116 N. C. 389; 21 S. E. 296; same case, 108 N. C. 554; 13 S. E. 191; Fargo, etc., Co. v. Fargo, etc., Co., 4 N. D. 219; 37 L. R. A. 593; 59 N. W. 1066; Rasmussen v. Reedy, 14 S. D. 15; 84 N. W. 205; Davenport v. Buchanan, 6 S. D. 376; 61 N. W. 47; Dakota National Bank v. Taylor, 5 S. D. 99; 58 N. W. 297; Labbe v. Corbett, 69 Tex. 503; 6 S. W. 808; Schram v. Strouse (Tex. Civ. App.), 28 S. W. 262; Grosh v. Land Co., 95 Va. 161; 27 S. E. 841; Warder, etc., Co. v. Whitish, 77 Wis. 430; 46 N. W. 540. It is said to be an extraordinary defense. Watson v. Atwood, 25 Conn. 313; Young v. Hopkins, 6 T. B. Mon. (Ky.) 19.

² As that plaster rock is on the land. Mormon v. Harrington, 118 Mich. 623; 77 N. W. 242.

³ As by examining a plat of record. Hooch v. Bowman, 42 Neb. 80;

47 Am. St. Rep. 691; 60 N. W. 389.

⁴ Lovejoy v. Isbell, 73 Conn. 368; 47 Atl. 682; Boddy v. Henry, 113 Ia. 462; 53 L. R. A. 769; 85 N. W. 771.

⁵ Roberts v. French, 153 Mass. 60; 25 Am. St. Rep. 611; 26 N. E. 416. Especially if the tract is irregular in shape and its area a matter of difficult calculation. Cawston v. Sturgis, 29 Or. 331; 43 Pac. 656.

⁶ Merrill v. Improvement Co., 60 Fed. 17; Leicester Piano Co. v. Improvement Co., 55 Fed. 190; Ross v. Hobson, 131 Ind. 166; 26 N. E. 775; Trimble v. Ward, 97 Ky. 748; 31 S. W. 864; Redding v. Wright, 49 Minn. 322; 51 N. W. 1056; Blacknall v. Rowland, 116 N. C. 389; 21 S. E. 296; same case, 108 N. C. 554; 13 S. E. 191; Fargo, etc., Co. v. Fargo, etc., Co., 4 N. D. 219, 593; 37 L. R. A. 593; 59 N. W. 1066; Dakota National Bank v. Taylor, 5 S. D. 99; 58 N. W. 297.

⁷ Zang v. Adams 23 Colo. 408; 58 Am. St. Rep. 249; 48 Pac. 509; Blacknall v. Rowland, 116 N. C. 389; 21 S. E. 296; same case, 108 N. C. 554; 13 S. E. 191; Gerner v. Mosher, 58 Neb. 135; 46 L. R. A. 244; 78 N. W. 384.

⁸ Schram v. Strouse (Tex. Civ. App.), 28 S. W. 262.

⁹ Wilson v. Higbee, 62 Fed. 723; Baker v. Maxwell, 99 Ala. 558; 14 So. 468; Graham v. Thompson, 55

incumbrances,¹⁰ or taxes,¹¹ or tax-titles,¹² or though it appears on an abstract of title,¹³ or records of the patent office,¹⁴ fraud exists if such false statements were in fact relied on. Where A makes certain representations to B and refers him to other sources of information and advises him to consult them, it is a question of fact whether B should consult such sources.¹⁵

§120. Investigation held necessary.—Comparison of doctrines.

There are, however, many cases, some of them decided recently, in which the courts hold that where the facts are equally accessible to both parties, public policy demands that the law should require persons to whom representations are made to use all reasonable means for determining their truth, and that failure to investigate may amount to inexcusable negligence and may preclude the negligent party from obtaining relief.¹

Ark. 296; 29 Am. St. Rep. 40; 18 S. W. 58; Benjamin v. Mattler, 3 Colo. App. 227; 32 Pac. 837; Wheeler v. Baars, 33 Fla. 696; 15 So. 584; Backer v. Pyne, 130 Ind. 288; 30 Am. St. Rep. 231; 30 N. E. 21; Riley v. Bell, 120 Ia. 618; 95 N. W. 170; Faust v. Hosford, 119 Ia. 97; 93 N. W. 58; Campbell v. Whittingham, 5 J. J. Mar. (Ky.) 96; 20 Am. Dec. 241; Carlton v. Hulett, 49 Minn. 308; 51 N. W. 1053; Daly v. Bernstein, 6 N. M. 380; 28 Pac. 764; Hunt v. Barker, 22 R. I. 18; 46 Atl. 46.

¹⁰ Carpenter v. Wright, 52 Kan. 221; 34 Pac. 798.

¹¹ Wright v. Mtge. Co. (Tex. Civ. App.), 42 S. W. 789.

¹² Matlack v. Shaffer, 51 Kan. 208; 37 Am. St. Rep. 270; 32 Pac. 890.

¹³ Cornell v. Crane, 113 Mich. 460; 71 N. W. 878.

¹⁴ Swinney v. Patterson, 25 Nev. 411; 62 Pac. 1.

¹⁵ Whiting v. Price, 172 Mass. 240; 70 Am. St. Rep. 262; 51 N. E. 1084.

¹ Andrus v. Refining Co., 130 U. S. 643; Farrar v. Churchill, 135 U. S. 609; Slaughter v. Gerson, 13 Wall (U. S.) 379; The Mattano, 52 Fed. 876; Bianconi v. Smith, (Ariz.); 28 Pac. 880; Matlock v. Reppy, 47 Ark. 148; 14 S. W. 546; Fitzhugh v. Davis, 46 Ark. 337; Hamilton v. Ford, 46 Ark. 245; Toner v. Meussdorffer, 123 Cal. 462; 56 Pac. 39; Champion v. Woods, 79 Cal. 17; 12 Am. St. Rep. 126; 21 Pac. 534; San José Commissioners v. Younger, 29 Cal. 172; Chicago, etc., Co. v. Summerour, 101 Ga. 820; 29 S. E. 291; Brown v. Bledsoe, 1 Ida. 746; Jones v. Foster, 175 Ill. 459; 51 N. E. 862; Moore v. Recek, 163 Ill. 17; 44 N. E. 868; Schwacker v. Riddle, 99 Ill. 343; Douglass v. Littler, 58 Ill. 342; Wright v. Gully, 28 Ind. 475; Brown v. Zachary, 102 Ia. 433; 71 N. W. 413; McGibbons v. Wilder, 78 Ia. 531; 43 N. W. 520; Clarke v. Tanner, 100 Ky. 275; 38 S. W. 11; Pratt v. Philbrook, 33 Me. 17; Weaver v. Shriver, 79 Md. 530; 30 Atl. 189; Spitze v. Ry. Co., 75 Md. 162; 32 Am. St. Rep. 378; 23 Atl.

A comparison and analysis of the two apparently conflicting lines of cases shows that there is little conflict in the actual decisions though there is absolute conflict in the *dicta*. In many of the cases the real holding was that the parties had not equal means of knowledge.² Discussion of what would have been the result had they had equal means of information is therefore in the nature of an *obiter*. In others, the statement was rather in the nature of an opinion, for instance, as to the value of property,³ or of the legal effect of transactions known to both parties, as where a husband claimed that all property acquired under circumstances known to his wife was his sole property,⁴ or where A claimed that B's mortgage had been foreclosed, though the receipt which B had was a notice of facts which showed that no valid decree could have been taken;⁵ where the means of knowledge possessed by the party defrauded is important only as showing that the statement was an opinion, and not a fact.⁶

307; *Salem India Rubber Co. v. Adams*, 23 Pick. (Mass.) 256; *Brown v. Leach*, 107 Mass. 364; *McEacheran v. Western, etc., Co.*, 97 Mich. 479; 56 N. W. 860; *Minneapolis, etc., Ry. Co. v. Chisholm*, 55 Minn. 374; 57 N. W. 63; *Lewis v. Land Co.*, 124 Mo. 672; 28 S. W. 324; *Wade v. Ringo*, 122 Mo. 322; 25 S. W. 901; *Leavitt v. Fletcher*, 60 N. H. 182; *Long v. Warren*, 68 N. Y. 426; *Finlayson v. Finlayson*, 17 Or. 347; 11 Am. St. Rep. 836; 21 Pac. 57; *Grael v. Wolf*, 185 Pa. St. 83; 39 Atl. 819; *Short v. Pierce*, 11 Utah, 29; 39 Pac. 474; *Lake v. Tyree*, 90 Va. 719; 19 S. E. 787; *Griffith v. Strand*, 19 Wash. 686; 54 Pac. 613; *Washington, etc., Co. v. Newlands*, 11 Wash. 212; 39 Pac. 366; *Farr v. Peterson*, 91 Wis. 182; 64 N. W. 863; *Mamlock v. Fairbanks*, 46 Wis. 415; 32 Am. Rep. 716; 1 N. W. 167. "When the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made

to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor." *Shappirio v. Goldberg*, 192 U. S. 232; citing, *Farnsworth v. Duffner*, 142 U. S. 43; *Farrar v. Churchill* 135 U. S. 609; *Southern Development Co. v. Silva*, 125 U. S. 247; *Slaughter v. Gerson*, 13 Wall. (U. S.) 379.

² See § 120.

³ *Moore v. Recek*, 163 Ill. 17; 44 N. E. 868; *Wightman v. Tucker*, 50 Ill. App. 75; *Van Velsor v. Seeburger*, 35 Ill. App. 598; *Brown v. Zachary*, 102 Ia. 433; 71 N. W. 413; *Lake v. Tyree*, 90 Va. 719; 19 S. E. 787; *Farr v. Peterson*, 91 Wis. 182; 64 N. W. 863.

⁴ *Champion v. Woods*, 79 Cal. 17; 12 Am. St. Rep. 126; 21 Pac. 534.

⁵ *Jones v. Foster*, 175 Ill. 459; 51 N. E. 862.

⁶ *Tindall v. Harkinson*, 19 Ga.

Many of the cases are really decided on other grounds, such as absence of knowledge of falsity, ratification, and the like. In other cases the very transaction brought such facts to the notice of the party alleging fraud as advised him of the falsity of the representations,⁷ such as the quality of the soil, the timber or the existence of springs,⁸ or the nature of a channel to be dredged.⁹ After eliminating all these cases, however, a number are left where representations which otherwise would be fraud, are held not to be so because the party deceived had the means of determining the facts but negligently omitted to use them.¹⁰ This rule has been applied to false statements as to price paid for stock,¹¹ as to the amount of sales and profits of a business made to one familiar with the business, who has examined it carefully and who refused an opportunity to examine the books,¹² as to land titles,¹³ or that there has been no trouble over a right of way,¹⁴ in each of which cases relief against fraud was refused on the ground of negligence of the defrauded party. Almost all the decisions, as distinguished from the reasons given in the opinions of the courts, may be harmonized by stating the rule in this form. A person is charged with notice of facts actually brought to his attention in the transaction, though he may fail to grasp their full import and all the consequences that flow from them. On mere opinions he has in ordinary cases no right to rely, but he must investigate for himself. But if facts are stated positively, he is not bound to make further investigation though he must avail himself of the knowledge actually brought to his notice with whatever is implied therefrom.¹⁵ Where fraud is invoked to avoid contract liability the weight of authority is that while the defrauded party must make use of his senses

448; *Moore v. Recek*, 163 Ill. 17; 44 N. E. 868; *Rockafellow v. Baker*, 41 Pa. 319; 80 Am. Dec. 624.

⁷ *McGar v. Williams*, 26 Ala. 469; 62 Am. Dec. 739; *Kaiser v. Nummendor*, — Wis. —; 97 N. W. 932.

⁸ *Stone v. Moore*, 75 Ga. 565.

⁹ *Rowland Lumber Co. v. Ross*, 100 Va. 275; 40 S. E. 922.

¹⁰ *Osborne v. Ry.*, — Neb. —; 98 N. W. 685.

¹¹ *Weaver v. Shriver*, 79 Md. 530; 30 Atl. 189.

¹² *Grauel v. Wolfe*, 185 Pa. St. 83; 39 Atl. 819.

¹³ *Bianconi v. Smith*, (Ariz.); 28 Pac. 880.

¹⁴ *Palmer v. Bell*, 85 Me. 352; 27 Atl. 250.

¹⁵ *Perry v. Rogers*, 62 Neb. 898; 87 N. W. 1063.

and his reason, and must take cognizance of what is actually brought to his notice, he need not make further investigation. The greater number of cases in which investigation has been held necessary are those in which the fraud has been used as the basis of the action of deceit.

§121. Right to rely where means of knowledge not equal.

Even the courts which adhere most rigidly to the rule that if the means of knowledge are equal, the party deceived is bound to use such means, recognize a class of cases which they refuse to define exactly, preferring to say that each separate case rests on its own facts and circumstances,¹ in which the means of knowledge are not equal, and in which the defrauded party is therefore excused from investigating. Thus where investigation is difficult,² as where the false statement is as to rock or minerals underlying land,³ as where a statement is made as to the result of submarine soundings and as to the thickness of rock to be removed,⁴ or where the bottom of pits filled with water was said to show ore,⁵ or where statements are made as to underground supply pipes,⁶ or where the property in question is at some distance so that further research is necessary to ascertain the falsity of the statement,⁷ or where a vendor of a stock of goods so located that the vendee cannot inspect them represents that it is a

¹ "The circumstances of each case should be considered to determine whether the plaintiff has been guilty of such inexcusable negligence as should preclude him, under a general rule of public policy, from having a remedy against one who has fraudulently abused his confidence." *Holst v. Stewart*, 161 Mass. 516; 42 Am. St. Rep. 442; 37 N. E. 755.

² *Mayberry v. Rogers*, 81 Ill. App. 581; *Ross v. Hobson*, 131 Ind. 166; 26 N. E. 775; *Morman v. Harrington*, 118 Mich. 623; 77 N. W. 242; *McKnight v. Thompson*, 39 Neb. 752; 58 N. W. 453; *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523.

³ *Morman v. Harrington*, 118 Mich. 623; 77 N. W. 242.

⁴ *Hingston v. Smith Co.*, 114 Fed. 294; 52 C. C. A. 206.

⁵ *Green v. Turner*, 86 Fed. 837; 30 C. C. A. 427.

⁶ *Tacoma v. Water Co.*, 17 Wash. 458; 50 Pac. 55; reversing, 16 Wash. 288; 47 Pac. 738.

⁷ *Smith v. Richards*, 13 Pet. (U. S.) 26; *Witherwax v. Riddle*, 121 Ill. 140; 13 N. E. 545; *Robinson v. Reinhart*, 137 Ind. 674; 36 N. E. 519; *King v. Trust Co.*, 76 Ia. 11; 39 N. W. 919; *Mountain v. Day*, — Minn. —; 97 N. W. 883; *Mullen v. Kinsey*, 50 Neb. 466; 70 N. W. 18; *Cressler v. Rees*,

first class stock of goods of the best quality,⁸ or where the party making the statement induces the other to refrain from examination,⁹ as by pretending to read information from an authentic source;¹⁰ or where the party making the statement has means of knowledge not possessed by the other,¹¹ as where one makes statements concerning the condition of his own business,¹² or as to the condition of an animal which could not be discovered by ordinary examination,¹³ the courts are practically unanimous in holding that fraud may exist.

§122. Right to rely where parties are in confidential relations.

Where the parties are not on an equality, as where there are relations of trust and confidence,¹ or where trust and confidence are actually reposed, although no technical relations of trust and confidence exist,² or where one party while *compos mentis* is

27 Neb. 515; 20 Am. St. Rep. 691; 43 N. W. 363. "A statement as to the character or even the value of property where the same is at a distance, or so located that the person to whom they are made may reasonably rely thereon, for the purpose of inducing him to enter into a contract or incur expense or part with anything of value, is the statement of a fact, not a mere expression of opinion." Benolkin v. Guthrie, 111 Wis. 554; 87 N. W. 466 (citing Henderson v. Henshall, 54 Fed. 320; Witherwax v. Riddle, 121 Ill. 140; 13 N. E. 545; Harris v. McMurray, 23 Ind. 9; McKnight v. Thompson, 39 Neb. 752; 58 N. W. 453).

⁸ Benolkin v. Guthrie, 111 Wis. 554; 87 N. W. 466.

⁹ Henderson v. Henshall, 54 Fed. 320; Hanscom v. Drullard, 79 Cal. 234; 21 Pac. 736; Holst v. Stewart, 161 Mass. 516; 42 Am. St. Rep. 442; 37 N. E. 755; Swimm v. Bush, 23 Mich. 99; Burr v. Willson, 22 Minn. 206; Stochl v. Carey, 48 Neb. 786; 67 N. W. 783; Hill v. Brower, 76 N. C. 124.

¹⁰ Holst v. Stewart, 161 Mass. 516; 42 Am. St. Rep. 442; 37 N. E. 755 (reading a schedule of trains from a time-table to show the accessibility of suburban property).

¹¹ Nysewander v. Lowman, 124 Ind. 584; 24 N. E. 355; Andrews v. Jackson, 168 Mass. 266; 60 Am. St. Rep. 390; 47 N. E. 412; Cottrill v. Krum, 100 Mo. 397; 18 Am. St. Rep. 549; 13 S. W. 753.

¹² Bloomer v. Gray, 10 Ind. App. 326; 37 N. E. 819; Cottrill v. Krum, 100 Mo. 397; 18 Am. St. Rep. 549; 13 S. W. 753.

¹³ Whitworth v. Thomas, 83 Ala. 308; 3 Am. St. Rep. 725; 3 So. 781.

¹ Farwell v. Telegraph Co., 161 Ill. 522; 44 N. E. 891; Teachout v. Van Hoesen, 76 Ia. 113; 14 Am. St. Rep. 206; 1 L. R. A. 664; 140 N. W. 96; Cheney v. Gleason, 125 Mass. 166; Wells v. McGeoch, 71 Wis. 196; 35 N. W. 769.

² Endsley v. Johns, 120 Ill. 469; 60 Am. Rep. 572; 12 N. E. 247; Elerick v. Reid, 54 Kan. 579; 38 Pac. 814.

mentally deficient,³ or understands English imperfectly,⁴ the person reposing trust and confidence has a right to rely upon the positive statements of the other without further investigation. This, however, is a doctrine of constructive fraud,⁵ and might be invoked in cases where no actual fraud could be shown to exist.

§123. Effect of independent investigation.

If the person to whom the false statements are made does not rely on them, but investigates for himself and acts in reliance on his own knowledge, no fraud exists if the falsity of such representations was or could be discovered thereby and if no artifice was resorted to to prevent him from discovering the truth.¹

Thus where the party to whom false representations are made as to the value of land,² the condition of a mine,³ an hotel,⁴

³ *Goodrich v. Smith*, 87 Mich. 1; 49 N. W. 469; *Garrow v. Brown*, Winst. Eq. (N. C.) 46; 86 Am. Dec. 450; *De Frees v. Carr*, 8 Utah 488; 33 Pac. 217.

⁴ *Holst v. Stewart*, 161 Mass. 516; 42 Am. St. Rep. 442; 37 N. E. 755.

⁵ See ch. xi.

¹ *Farnsworth v. Duffner*, 142 U. S. 43; *Farrar v. Churchill*, 135 U. S. 609; *Southern Development Co. v. Silva*, 125 U. S. 247; *Stratton's Independence v. Dines*, 126 Fed. 968; *In re Epstein*, 109 Fed. 874; *Brewer v. Arantz*, 124 Ala. 127; 26 So. 922; *Lee v. McClelland*, 120 Cal. 147; 52 Pac. 300; *Colton v. Stanford*, 82 Cal. 351; 16 Am. St. Rep. 137; 23 Pac. 16; *Security Investment Co. v. Garrett*, 3 App. D. C. 69; *Lewis v. Mtge. Co.*, 94 Ga. 572; 21 S. E. 224; *Crocker v. Manley*, 164 Ill. 282; 56 Am. St. Rep. 196; 45 N. E. 577; *Day v. Milligan*, 72 Ill. App. 324; *Craig v. Hamilton*, 118 Ind. 565; 21 N. E. 315; *Denny v. Woods*, 2 Ind. App. 301; 28 N. E. 443; *Armstrong v. Breen*, 101 Ia.

9; 69 N. W. 1125; *Lucas v. Crippen*, 76 Ia. 507; 41 N. W. 205; *Newton v. Terry*, (Ky.) 22 S. W. 159; *Buxton v. Jones*, 120 Mich. 522; 79 N. W. 980; *Fifth National Bank v. Pierce*, 117 Mich. 376; 75 N. W. 1058; *Hiller v. Ellis*, 72 Miss. 701; 41 L. R. A. 707; 18 So. 95; *Warren v. Ritchie*, 128 Mo. 311; 30 S. W. 1023; *Brockhaus v. Schilling*, 52 Mo. App. 73; *Arnold v. Hosiery Co.*, 148 N. Y. 392; 42 N. E. 980; *Whalen v. Tipton*, 31 Or. 566; 50 Pac. 1016; *Driver v. White* (Tenn. Ch. App.), 51 S. W. 994; *Security, etc., Co. v. Haney* (Tex. Civ. App.); 27 S. W. 215; *Calhoun v. Quinn* (Tex. Civ. App.); 21 S. W. 705; *Farr v. Peterson*, 91 Wis. 182; 64 N. W. 863.

² *Lewis v. Mtge. Co.*, 94 Ga. 572; 21 S. E. 224; *Security, etc., Co. v. Haney* (Tex. Civ. App.); 27 S. W. 215; *Farr v. Peterson*, 91 Wis. 182; 64 N. W. 863.

³ *Crocker v. Manley*, 164 Ill. 282; 56 Am. St. Rep. 196; 45 N. E. 577.

⁴ *Day v. Milligan*, 72 Ill. App. 324.

a mill,⁵ the stock of goods in a saloon,⁶ the quality of personal property,⁷ or the solvency of a person,⁸ relies not on such statement but on the result of his independent inquiries, no fraud can be said to exist.

§124. Effect of partial and unsuccessful investigation.

If a partial investigation is made which from its nature cannot and does not disclose the falsity of the statements made, and the original statement is relied on, as not being contradicted by such investigation, the weight of modern authority is that fraud can exist.¹ Thus a statement that a lot is on a certain unopened street,² or that the dimensions of the tract are of a certain length,³ or that the tract is of a certain area,⁴ or that a certain

⁵ *Newton v. Terry* (Ky.), 22 S. W. 159.

⁶ *Brockhaus v. Schilling*, 52 Mo. App. 73 (vendor stated how long the stock would last; and vendee had an experienced saloonkeeper inspect the stock for him).

⁷ *Brewer v. Arantz*, 124 Ala. 127; 26 So. 922.

⁸ *Fifth National Bank v. Pierce*, 117 Mich. 376; 75 N. W. 1058; *Hiller v. Ellis*, 72 Miss. 701; 41 L. R. A. 707; 18 So. 95.

¹ *Stewart v. Rancho Co.*, 128 U. S. 383; *Kelley v. Owens* (Cal.), 30 Pac. 596; same case, 31 Pac. 14; *Hennessy v. Damourette*, 15 Colo. App. 354; 62 Pac. 229; *Watson v. Brown*, 113 Ia. 308; 85 N. W. 28; *Speed v. Hollingsworth*, 54 Kan. 436; 38 Pac. 496; *Burns v. Dockray*, 156 Mass. 135; 30 N. E. 551; *Roberts v. French*, 153 Mass. 60; 25 Am. St. Rep. 611; 26 N. E. 416; *Foley v. Holtry*, 43 Neb. 133; 61 N. W. 120; *Schumaker v. Mather*, 133 N. Y. 590; 30 N. E. 755; *Boyd v. Shiffer*, 156 Pa. St. 100; 27 Atl. 60; *Herring v. Mason*, 17 Tex. Civ. App. 559; 43 S. W. 797; *Farmer v. Ran-*

del (Tex. Civ. App.); 28 S. W. 384; *Land Co. v. Haupt*, 90 Va. 533; 44 Am. St. Rep. 939; 19 S. E. 168; *Tacoma v. Light, etc., Co.*, 17 Wash. 458; 50 Pac. 55; reversing on rehearing, 16 Wash. 288; 47 Pac. 738; *Porter v. Beattie*, 88 Wis. 22; 59 N. W. 499; *Castenholz v. Heller*, 82 Wis. 30; 51 N. W. 432. "While it is always wise for the purchaser to be on the alert against deception, the law still permits him to confide in the statements of the seller; and it makes no difference in the rule if the purchaser makes some investigation for himself where the truth or falsity of the representations are not readily discoverable by him." *Beetle v. Anderson*, 98 Wis. 5, 8; 73 N. W. 560; *Porter v. Beattie*, 88 Wis. 22; 59 N. W. 499.

² *Hook v. Bowman*, 42 Neb. 80; 47 Am. St. Rep. 691; 60 N. W. 389.

³ *Roberts v. French*, 153 Mass. 60; 25 Am. St. Rep. 611; 10 L. R. A. 656; 26 N. E. 416.

⁴ *Speed v. Hollingsworth*, 54 Kan. 436; 38 Pac. 496; *Porter v. Beattie*, 88 Wis. 22; 59 N. W. 499. *Contra*, where the alleged discrepancy was

fence is the boundary,⁵ or that a certain well never went dry,⁶ or that a machine could perform certain work,⁷ may be fraud, though actual view of the premises in question was had, but did not reveal the falsity of the statement. An inquiry as to vendee's solvency made of persons who obtain their knowledge solely from vendee,⁸ is not such independent investigation as to prevent a false statement as to solvency from being fraud. So misrepresentation and the use of unfamiliar technical words may be fraud leading the purchaser to believe that he is to get an "artist-proof edition" even if he sees samples;⁹ or a false statement by A that a judgment against B has been assigned to him, though B examines the record and no assignment appears there.¹⁰

§125. Effect of investigation defeated by fraud.

If the party who makes the false representations prevents such investigation as would disclose the falsity of such statements by means of further deceit, a partial examination, or a total omission to make an examination, does not prevent fraud from existing.¹ Thus A's making false statements to B as to the quantity of timber on certain land, and A's agent showing B a part of the land on which the timber was much better than on the rest and assured B that this was a fair average;² or point-

apparently so gross that the view of the premises which grantee had must have disclosed it. It was claimed that grantor said that only a small corner, about an acre, was cut off by a railroad, while a great deal more was in fact so cut off. *Armstrong v. Breen*, 101 Ia. 9; 69 N. W. 1125.

⁵ *Castenholz v. Heller*, 82 Wis. 30; 51 N. W. 432. Or that a certain road is the boundary. *Rasmussen v. Reedy*, 14 S. D. 15; 84 N. W. 205.

⁶ *Herring v. Mason*, 17 Tex. Civ. App. 559; 43 S. W. 797 (the well not being dry when inspected).

⁷ *Watson v. Brown*, 113 Ia. 308;

85 N. W. 28; (the party inspecting it not being familiar with machinery.)

⁸ *Kelley v. Owens* (Cal.), 30 Pac. 596; *Boyd v. Shiffer*, 156 Pa. St. 100; 27 Atl. 60.

⁹ *Barrie v. Miller*, 104 Ga. 312; 69 Am. St. Rep. 171; 30 S. E. 840.

¹⁰ *Goring v. Fitzgerald*, 105 Ia. 507; 75 N. W. 358.

¹ *Wainscott v. Occidental Association*, 98 Cal. 253; 33 Pac. 88; *Brotherton v. Reynolds*, 164 Pa. St. 134; 30 Atl. 234.

² *Brotherton v. Reynolds*, 164 Pa. St. 134; 30 Atl. 234.

ing out improvements on adjoining land as being on the land conveyed,³ or employing unfair means to make the examination incomplete,⁴ such as a pretense of haste,⁵ or by artifice in testing a patented article,⁶ or bribing an agent appointed by B for such examination to make a false report,⁷ will constitute fraud though some examination was made.

VIII. ^{*}DAMAGE.

§126. Damage a necessary element of fraud.

To constitute fraud the party deceived must act in reliance upon such false representations to his damage.¹ Illustrations of action which does not result in damage and in which case therefore fraud does not exist, are employing false representations to induce one to do a legal duty,² as to secure his own debt,³ or to pay his own debt,⁴ inducing one to sell his property

³ Carmichael v. Vandebur, 50 Ia. 651.

⁴ Wainscott v. Occidental Association, 98 Cal. 253; 33 Pac. 88.

⁵ Brady v. Finn, 162 Mass., 260; 38 N. E. 506.

⁶ Gardner v. Trenary, 65 Ia. 646; 22 N. W. 912.

⁷ Alger v. Keith, 105 Fed. 105; 44 C. C. A. 371.

¹ Marshall v. Hubbard, 117 U. S. 415; Holton v. Noble, 83 Cal. 7; 23 Pac. 58; Freeman v. McDaniel, 23 Ga. 354; Jones v. Foster, 175 Ill. 459; 51 N. E. 862; Hetzler v. Morrell, 82 Ia. 562; 48 N. W. 938; Short v. Cure, 100 Mich. 418; 59 N. W. 173; Alden v. Wright, 47 Minn. 225; 49 N. W. 767; McCready v. Phillips, 44 Neb. 790; 63 N. W. 7; Lorenzen v. Investment Co., 44 Neb. 99; 62 N. W. 231; Hanson v. Edgerly, 29 N. H. 343; Jex v. Strauss, 122 N. Y. 293; 25 N. E. 478; Deobold v. Oppermann, 111 N. Y. 531; 7 Am. St. Rep. 760; 2 L. R. A. 644; 19 N. E. 94; Taylor v. Guest, 58 N. Y. 262; Nelson v. Grondahl, — N. D. —; 96

N. W. 299; Sioux Banking Co. v. Kendall, 6 S. D. 543; 62 N. W. 377; First National Bank v. North, 2 S. D. 480; 51 N. W. 96; Whitson v. Gray, 3 Head (Tenn.) 441; Moore v. Cross, 87 Tex. 557; 29 S. W. 1051; Hopkins v. Grocery Co. (Tex. Civ. App.); 66 S. W. 63; Read v. Chambers (Tex. Civ. App.); 45 S. W. 742; Nye v. Merriam, 35 Vt. 438; Potter v. Lumber Co., 105 Wis. 25; 80 N. W. 88; 81 N. W. 118.

² Skowhegan First National Bank v. Maxfield, 83 Me. 576; 22 Atl. 479; Randall v. Hazelton, 12 All. (Mass.) 412; Deobold v. Oppermann, 111 N. Y. 531; 7 Am. St. Rep. 760; 2 L. R. A. 644; 19 N. E. 94.

³ Skowhegan First Nat. Bank v. Maxfield, 83 Me. 576; 22 Atl. 479; (stating to the principal debtor on a draft which had been paid by parties secondarily liable thereon that it was unpaid and thus getting a mortgage to secure his debt to such parties.

⁴ Brown v. Blunt, 72 Me. 415.

for its full value,⁵ or inducing all the stockholders to surrender to the corporation an equal percentage of their holdings,⁶ misrepresenting the estate conveyed as a fee when it is possibly a life estate, but all the remaindermen are bound by the judgment of the court that it is a fee,⁷ or inducing one who has a right to renounce a contract for any reason he sees fit, to renounce it.⁸ So a life insurance company cannot defend in an action by an examiner for examination fees on the ground that applicants were induced to apply by the representation of a director that such applications would be for the benefit of such director and the examiner.⁹ So where even if the facts as represented were true, no advantage could result therefrom to the party to whom they were made, and he has the same legal rights whether they are false or true, fraud does not exist.¹⁰ Thus allegations that A, the owner of the fee in a tract of land and X conspired to defraud B, and that X represented that he had leased the tract for a term of years, had paid a year's rent, and that on completion thereon by X of buildings to cost seventy-five thousand dollars, A was to pay X twenty-five thousand dollars, no part of which was to go to pay for the buildings or to pay contractors, and that by reason of such representations B was induced to make a contract with X for the erection of buildings to cost about sixty-eight thousand dollars, and that under such contract B had done certain work of a certain value which had not been paid, does not state a case of fraud.¹¹

§127. Fraud in contract invalid in any event.

If the contract entered into is unenforceable in any event, as where it is illegal,¹ neither party can complain because he was

⁵ *Potter v. Lumber Co.*, 105 Wis. 25; 80 N. W. 88; 81 N. W. 118.

⁶ *Potter v. Lumber Co.*, 105 Wis. 25; 80 N. W. 88; 81 N. W. 118.

⁷ *Simmang v. Harris* (Tex. Civ. App.); 27 S. W. 786.

⁸ *Hetzler v. Morrell*, 82 Ia. 562; 48 N. W. 938; (the other parties to the contract cannot recover dam-

ages from the party causing such renunciation).

⁹ *Carrington v. Life Association*, 59 Neb. 116; 80 N. W. 491.

¹⁰ *McClure v. Campbell*, 148 Mo. 96; 49 S. W. 881.

¹¹ *McClure v. Campbell*, 148 Mo. 96; 49 S. W. 881.

¹ *Graham v. Marks*, 98 Ga. 67; 25 S. E. 931.

induced to enter into it by fraud. So fraudulently inducing a conveyance of an entire tract by one occupying only a small part thereof gives no right of action in equity to the real owner of such tract to have such deed cancelled as it has no effect on his rights.² So an oral promise, though made without the intention of performing, if made prior to the execution of an inconsistent written contract on the same subject, cannot be enforced because of the parol evidence rule,³ and is not fraud.⁴

§128. Meaning of "damage" in contract law.

The cases already given are for the most part actions at law for deceit. It seems clear on principle that one who wishes to recover damages must show damages. Whether the same rule applies where rescission is sought in equity or is effected informally at law by an action to recover the property parted with is not so clear. In some cases rescission is refused where no actual damage exists,¹ as inducing purchase of coal land by false statements as to the output where the land is as valuable as represented.²

This rule cannot be sustained on sound principle. To hold that one must accept a legal right different from that promised him because it is as valuable in money is to ignore a fundamental principle of contract law. Accordingly, many courts hold that false representation made knowingly with intent to deceive, causing deception and thereby inducing one to make a contract that he would not otherwise have made, are grounds for rescission though no actual damage follows.³ Where one does

² *Hannibal, etc., Ry. v. Nortoni*, 154 Mo. 142; 55 S. W. 220. So inducing A, who owns one-half of a stock certificate to sell the entire certificate by false representations is no ground for an action by B, the owner of the other half, since the sale is void as to B. *Moynahan v. Prentiss*, 10 Colo. App. 295; 51 Pac. 94.

³ See ch. lvi.

⁴ *Perkins v. Bakrow*, 45 Mo. App. 248. (An oral promise to locate an

opera-house on a certain tract, made to induce a written subscription which showed within what limits it was to be located.)

¹ *Whitesides v. Taylor*, 105 Ill. 496; *American, etc., Association v. Bear*, 48 Neb. 455; 67 N. W. 500; *Chamberlain v. Coal Co.*, 92 Tenn. 13; 20 S. W. 345.

² *Chamberlain v. Coal Co.*, 92 Tenn. 13; 20 S. W. 345.

³ *Baker v. Maxwell*, 99 Ala. 558; 14 So. 468; *MacLaren v. Cochran*,

not, by reason of fraud, obtain a legal right which he is promised, as where a different tract of land is pointed out from that conveyed,⁴ or where a remedy such as foreclosure is lost by such fraud, though the mortgagor is solvent,⁵ rescission may be had without showing any pecuniary loss. Equity will not give specific performance of a contract to one who has been guilty of false representations.⁶

Informal rescission for fraud has been allowed at law though no injury is shown to have resulted therefrom.⁷ Thus where A induced B to buy certain stock food by falsely stating that B's brother had recommended its purchase, and B gave his note therefor, B was allowed to avoid liability to A on the note by disaffirming the contract and refusing to accept the food.⁸ So in the meaning of this rule damage exists where there is a false statement as to the amount of a mortgage on the property conveyed, though the grantee did not assume it and the mortgagor is personally liable on the mortgage debt,⁹ or where there is a false statement as to who is surety on a bond, though the party defrauded may have so acted as to release all sureties on such bond,¹⁰ or where a person is induced to make a new mortgage when other security for such debt is released, throwing a greater burden on the land,¹¹ or where a woman is deceived by a representation of A that he is unmarried, by which she is induced to marry him.¹²

44 Minn. 255; 46 N. W. 408; Harlow v. La Brun, 151 N. Y. 278; 45 N. E. 859; Williams v. Kerr, 152 Pa. St. 560; 25 Atl. 618.

⁴ Nelson v. Carlson, 54 Minn. 90; 55 N. W. 821.

⁵ Baker v. Maxwell, 99 Ala. 558; 14 So. 468.

⁶ Kelly v. R. R., 74 Cal. 557; 5 Am. St. Rep. 470; 16 Pac. 386.

⁷ Higbee v. Trumbauer, 112 Ia. 74; 83 N. W. 812.

⁸ Higbee v. Trumbauer, 112 Ia. 74; 83 N. W. 812.

⁹ Short v. Cure, 100 Mich. 418; 59 N. W. 173.

¹⁰ Mutual, etc., Association v. McGee (Tex. Civ. App.); 43 S. W. 1030.

¹¹ Interstate, etc., Association v. Tabor, 21 Tex. Civ. App. 112; 51 S. W. 300.

¹² Morrill v. Palmer, 68 Vt. 1; 33 L. R. A. 411; 33 Atl. 829.

IX. PARTY MAKING FALSE STATEMENT.

§129. By whom false representation can be made.

To constitute fraud, the false representation must be made by the party held liable therefor or his agent. A false statement made by a third person cannot be treated as the fraud of a party to the contract who is ultimately benefited thereby if he did not know that such false statement had been made, and was relied on by the adversary party, if the party who made the false representation is not the agent of such party to the contract. The party innocent of the fraud is not liable for damages nor can the contract be rescinded,¹ unless it is void under the doctrines of mistake. Accordingly if a person desiring insurance makes a truthful statement to the agent of the insurance company, and such agent, without the knowledge of the insured, forwards a false statement of facts to the company on which a policy issued, such false statement is not the fraud of the insured.² Thus a vendee cannot be held guilty of fraud on account of false statements sent out by mercantile agencies, unless it can be shown that he made the statement to the agency.³ Thus where A

¹The *Seguranca* 70 Fed. 258; *Schultz v. McLean* (Cal.), 25 Pac. 427; *Strong v. Smith*, 62 Conn. 39; 25 Atl. 395; *Whitesides v. Taylor*, 105 Ill. 496; *Hayner v. McIlwain*, 53 Ill. App. 652; *Jones v. Swift*, 94 Ind. 516; *Belau v. Bryan*, 89 Ia. 348; 56 N. W. 512; *Roach v. Karr*, 18 Kan. 529; 26 Am. Rep. 788; *Fightmaster v. Levi* (Ky.) 17 S. W. 195; *Nash v. Minnesota, etc., Co.*, 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40 N. E. 1039; *Madison County Bank v. Graham*, 74 Mo. App. 251; *Kingsland v. Pryor*, 33 O. S. 19; *Trevitt v. Converse*, 31 O. S. 60; *Atkinson v. Reed* (Tex. Civ. App.); 49 S. W. 260; *American National Bank v. Cruger* (Tex. Civ. App.); 44 S. W. 1057; *Kuhn v. Foster*, 16 Tex. Civ. App. 465; 41 S. W. 716.

²*Triple Link, etc., Association v. Williams*, 121 Ala. 138; 77 Am. St. Rep. 34; 26 So. 19; *German Ins. Co. v. Hayden*, 21 Colo. 127; 52 Am. St. Rep. 206; 40 Pac. 453; *Royal Neighbors v. Roman*, 177 Ill. 27; 69 Am. St. Rep. 201; 52 N. E. 264; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330; 54 Am. St. Rep. 506; 38 N. E. 417; *Otte v. Ins. Co.*, 88 Minn. 423; 97 Am. St. Rep. 532; 93 N. W. 608; *Sternaman v. Ins. Co.*, 170 N. Y. 13; 88 Am. St. Rep. 625; 57 L. R. A. 318; 62 N. E. 763; *Leonard v. Assurance Co.*, 24 R. I. 7; 96 Am. St. Rep. 698; 51 Atl. 1049.

³*Hiller v. Ellis*, 72 Miss. 701; 41 L. R. A. 707; 18 So. 95; *Cream City Hat Co. v. Tollinger*, 62 Neb. 98; 86 N. W. 921; *Dorman v. Weakley* (Tenn. Ch. App.), 39 S. W. 890.

agreed with B to convey realty to such person as B should designate, and B designates C, B's fraud does not affect C's rights,⁴ nor where A by fraud induces B to act as surety for him to C, can A's fraud be a defense to B against C,⁵ nor where A by fraud induces B to join with him in contracting with C,⁶ nor where A by fraud induces B to sell goods to C.⁷ Thus where A sold goods to B by fraudulent representations and C acquires A's interests in ignorance of the fraud and made a new contract with B, A's fraud cannot be imputed to C.⁸ But a grantee who assumes certain claims on the land may interpose the defense of his grantor's fraud on grantee, when sued by the holder of such claims, no transfer of them having been made since grantee acquired the land.⁹ If a stockholder in a corporation is induced to take stock by fraudulent representations of the officers of the corporation he cannot avoid his double liability to creditors of the corporation whose claims have arisen after he acquired his stock.¹⁰ But where he repudiates his subscription promptly he has been allowed to defend against an action to recover his subscription for the benefit of the creditors of the corporation.¹¹

§130. Fraud of agent acting for his principal.

But if the party making the fraudulent representations is the agent of the party benefited thereby,¹ or the agent of both parties,² or if a party ratifies the contract induced by such fraudulent representations, of one acting as his agent without author-

⁴ *Belau v. Bryan*, 89 Ia. 348; 56 N. W. 512.

⁵ *Jones v. Swift*, 94 Ind. 516; *Martin v. Campbell*, 120 Mass. 126; *Kingsland v. Pryor*, 33 O. S. 19.

⁶ *Anderson v. Warne*, 71 Ill. 20; 22 Am. Rep. 83.

⁷ *Nash v. Minnesota, etc., Co.*, 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40 N. E. 1039.

⁸ *Griffith v. Strand*, 19 Wash. 686; 54 Pac. 613.

⁹ *Saunders v. McClintock*, 46 Mo. App. 216.

¹⁰ *Bissell v. Heath*, 98 Mich. 472; 57 N. W. 585. (He had received

dividends on his stock for several years.).

¹¹ *Savage v. Bartlett*, 78 Md. 561; 28 Atl. 414.

¹ *Nichols v. Colgan*, 130 Ind. 341; 30 N. E. 301; *Coryell v. Hotchkiss* (Mich.), 91 N. W. 162; *Indianapolis, etc., Ry. Co. v. Tyng*, 63 N. Y. 653; *Erie, etc., Works v. Barber*, 106 Pa. St. 125; 51 Am. Rep. 508; *Bank v. Cruger*, 91 Tex. 446; 44 S. W. 278; *Beetle v. Anderson*, 98 Wis. 5; 73 N. W. 560.

² *Andrew v. Whitwer* (Neb.), 90 N. W. 924.

ity,³ or knowingly aids in the commission of the fraud,⁴ or refers the party defrauded to the person making the false statement for information,⁵ he is liable as though he had made the representation in person.

The principal may be liable for fraud though the agent is innocent, as where he authorizes the agent to make a statement but suppresses information which results in a false statement by the agent, contrary to the information possessed by the principal.⁶ Questions as to whom a fraudulent representation can be made are discussed elsewhere.⁷

X. REMEDIES FOR FRAUD.

§131. Election of remedies for fraud.

Fraud in the inducement affects the validity of the offer and acceptance which form the contract. It is also a tort. The injured party has a choice of the following remedies: (1) an action of deceit in tort; (2) in proper cases an informal rescission of the contract at law and a recovery of what he has parted with thereunder; (3) in proper cases a formal decree of rescission or cancellation in equity and a recovery of what he has parted with thereunder; (4) a defense against the enforcement of his executory promise induced by fraud. The election of one of these remedies is a waiver of others, resting upon inconsistent theories of the transaction.¹ Thus where the fraud is committed by the adversary party to the contract, the injured

³ *Riser v. Walton*, 78 Cal. 490; 21 Pac. 362; *Atlantic Cotton Mills v. Mills*, 147 Mass. 268; 9 Am. St. Rep. 698; 17 N. E. 496; *Fairchild v. McMahon*, 139 N. Y. 290; 36 Am. St. Rep. 701; 34 N. E. 779; *Barnard v. Iron Co.*, 85 Tenn. 139; 2 S. W. 21; *Gunther v. Ullrich*, 82 Wis. 222; 33 Am. St. Rep. 32; 52 N. W. 88.

⁴ *Ely v. Stannard*, 46 Conn. 124; *Wolfe v. Pugh*, 101 Ind. 293; *Stoney Creek Woolen Co. v. Smalley*, 111 Mich. 321; 69 N. W. 722. So where a wife seeks to take advantage of her husband's fraud. *Hofecker v.*

Pfeil, 193 Pa. St. 288; 44 Atl. 421.

⁵ *Witherwax v. Riddle*, 121 Ill. 140; 13 N. E. 545.

⁶ *Schram v. Straus* (Tex. Civ. App.); 28 S. W. 262.

⁷ See § 112.

¹ *Gustafsen v. Rustemeyer*, 70 Conn. 125; 66 Am. St. Rep. 92; 39 L. R. A. 644; 39 Atl. 104; *Building & Loan Association v. Cameron*, 48 Neb. 124; 66 N. W. 1109; *Pryor v. Foster*, 130 N. Y. 171; 29 N. E. 123; *Vail v. Reynolds*, 118 N. Y. 297; 23 N. E. 301; *Strong v. Strong*, 102 N. Y. 69; 5 N. E. 799.

party may elect between his right to avoid the contract, and his right to affirm it and to sue in tort in the action of deceit,² and the election of either remedy,³ as suing for the purchase price after discovery,⁴ or suing on the contract after discovery of the fraud,⁵ bars the other. If, however, after rescission by the defrauded party, the party guilty of fraud refuses to return the property received by him, he may be considered as having converted it to his own use and be held for its value.⁶

Where the fraud is committed by a third person, rescission does not bar a right of action if the defrauded party is not placed in *statu quo* thereby.⁷ Commencing an action for deceit does not waive the right to rescind in equity.⁸

It is the defrauded party and not the party making the false statements that has this right of election.⁹ Hence the offer of the party guilty of fraud to place the other in the same position that he would have had if the representation had been true does

² Moline Plow Co. v. Carson, 72 Fed. 387; 18 C. C. A. 606; Bing-hampton Trust Co. v. Auten, 68 Ark. 299; 82 Am. St. Rep. 295; 57 S. W. 1105; Bank v. Frank, 63 Ark. 16; 58 Am. St. Rep. 65; 37 S. W. 400; Norris v. Honestone Co., 22 Colo. 162; 43 Pac. 1024; Gustafson v. Rustemeyer, 70 Conn. 125; 66 Am. St. Rep. 92; 39 L. R. A. 644; 39 Atl. 104; Endsley v. Johns, 120 Ill. 469; 60 Am. Rep. 572; 12 N. E. 247; Stanhope v. Swafford, 80 Ia. 45; 45 N. W. 403; Sweet v. Kimball, 166 Mass. 332; 55 Am. St. Rep. 406; 44 N. E. 243; Hedin v. Minneapolis, etc., Institute, 62 Minn. 146; 54 Am. St. Rep. 628; 35 L. R. A. 417; 64 N. W. 158; Pollock v. Smith, 49 Neb. 864; 69 N. W. 312; Yeomans v. Bell, 151 N. Y. 230; 45 N. E. 552; Pryor v. Foster, 130 N. Y. 171; 29 N. E. 123; Scott v. Walton, 32 Or. 460; 52 Pac. 180; Hexter v. Bast, 125 Pa. St. 52; 11 Am. St. Rep. 874; 17 Atl. 252; Mining Co. v. McIlvein, 97 Tenn. 225;

36 S. W. 1094; Ford v. Oliphant (Tex. Civ. App.), 32 S. W. 437; Wilson v. Hundley, 96 Va. 96; 70 Am. St. Rep. 837; 30 S. E. 492; Griffith v. Strand, 19 Wash. 686; 54 Pac. 613.

³ Bank v. Frank, 63 Ark. 16; 58 Am. St. Rep. 65; 37 S. W. 400; Pollock v. Smith, 49 Neb. 864; 69 N. W. 312; Yeomans v. Bell, 151 N. Y. 230; 45 N. E. 552; Mining Co. v. McIlvein, 97 Tenn. 225; 36 S. W. 1094.

⁴ Bank v. Frank, 63 Ark. 16; 58 Am. St. Rep. 65; 37 S. W. 400.

⁵ Edwards v. Roberts, 7 S. & M. (Miss.) 544; Ayres v. Mitchell, 3 S. & M. (Miss.) 683.

⁶ Stewart v. Hollingsworth, 129 Cal. 177; 61 Pac. 936.

⁷ Nash v. Trust Co., 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40 N. E. 1039.

⁸ Ludington v. Patton, 111 Wis. 208; 86 N. W. 571.

⁹ Gunther v. Ullrich, 82 Wis. 222; 33 Am. St. Rep. 32; 52 N. W. 88.

not bar the right of the defrauded party to rescind and recover what he has parted with,¹⁰ nor does the offer to rescind bar him from retaining the property conveyed to him and suing in damages.¹¹ If before rescission the defrauded party is placed in the condition that he would have been in had the representation been true, no damage exists and hence there is no fraud.¹²

Separate fraudulent purchases give rise to distinct causes of action; and an election of a remedy on one cause of action does not bar the election of a different remedy on another cause.¹³ The defrauded party cannot treat the fraudulent representations as terms of the contract. They are merely grounds for avoiding liability thereunder.¹⁴

If the defrauded party does not elect to rescind he may be held liable on the contract subject to a right to reduce the amount of recovery by the amount of damage caused him by the fraud.¹⁵

§132. Action of deceit.

The action of deceit lies against the person who makes the fraudulent representations.¹ This action is entirely distinct from any rights connected with contract. It may be brought against one who is guilty of false representations even if he is

¹⁰ *Delouche v. Ins. Co.*, 69 N. H., 587; 45 Atl. 414.

¹¹ *Gunther v. Ullrich*, 82 Wis. 222; 33 Am. St. Rep. 32; 52 N. W. 88

¹² *Barber v. Kilbourn*, 16 Wis. 485.

¹³ *Reid v. Ferris*, 112 Mich. 693; 67 Am. St. Rep. 437; 71 N. W. 484. (Hence replevin may be brought for one fraud and trover for another.) *Lee v. Kendall*, 56 Hun (N. Y.) 610.

¹⁴ *Norris v. Honestone Co.*, 22 Colo. 162; 43 Pac. 1024. "A fraudulent misrepresentation although sufficient to sustain an action for damages cannot be converted into a contract to be enforced as such. Neither will it furnish the measure by which a written contract may be

reformed." *Glass v. Hulbert*, 102 Mass. 24, 38; 3 Am. Rep. 418.

¹⁵ *Upton v. Levy*, 39 Neb. 331; 58 N. W. 95; *Rogers v. Baker*, 66 N. J. L. 56; 48 Atl. 1003; *Linerode v. Rasmussen*, 63 O. S. 545; 59 N. E. 220.

¹ *Stewart v. Rancho Co.*, 128 U. S. 383; *Sigafus v. Porter*, 84 Fed. 430; 28 C. C. A. 443; *Wilson v. Higbee*, 62 Fed. 723; *Grand Rapids, etc., Co. v. Lock Co.*, 45 Fed. 671; *Oakes v. Miller*, 11 Colo. App. 374; 55 Pac. 193; *Vivian v. Allen*, 9 Colo. App. 147; 47 Pac. 844; *West Florida Land Co. v. Studebaker*, 37 Fla. 28; 19 So. 176; *Antle v. Sexton*, 137 Ill. 410; 27 N. E. 691; affirming 32 Ill. App. 437; *Ogden v. Duffy*, 59 Ill.

not a party to the contract;² and even if he has derived no personal benefit from making such representations.³ If A as B's agent makes a false representation to C, he is liable personally, though since he acts as agent, he is not liable on the contract.⁴ It lies even though the party defrauded has not fully performed the contract,⁵ as where he has not paid for the property in full.⁶ It may be brought though the property obtained by fraud has been transferred to a *bona fide* purchaser against whom no action can lie.⁷

In such action the law endeavors to give to the defrauded party the damages which result directly or naturally from such fraud.⁸ In sales made by fraud on the vendee, the damages are the difference between the property as represented and as it actually is;⁹ if by fraud on vendor, the difference between the real

App. 120; Stanhope v. Swafford, 80 Ia. 45; 45 N. W. 403; Davis v. Jenkins, 46 Kan. 19; 26 Pac. 459; Burnham v. Lutz, 8 Kan. App. 361; 55 Pac. 519; Hughes v. Robertson, 1 T. B. Mon. (Ky.) 215; 15 Am. Dec. 104; Exchange Bank v. Gaitskill, (Ky.) 37 S. W. 160; Sweet v. Kimball, 166 Mass. 332; 55 Am. St. Rep. 406; 44 N. E. 243; Haven v. Neal, 43 Minn. 315; 45 N. W. 612; Cottrill v. Krum, 100 Mo. 397; 18 Am. St. Rep. 549; 13 S. W. 753; Schwenk v. Naylor, 102 N. Y. 683; 7 N. E. 788; Hexter v. Bast, 125 Pa. St. 52; 11 Am. St. Rep. 874; 17 Atl. 252; Cabaness v. Holland, 19 Tex. Civ. App. 383; 47 S. W. 379; Shanks v. Whitney, 66 Vt. 405; 29 Atl. 367.

² Lahay v. Bank, 15 Colo. 339; 22 Am. St. Rep. 497; 25 Pac. 704; Hamilton-Brown Shoe Co. v. Sanger, (Tex. Civ. App.); 23 S. W. 525.

³ Hindman v. Bank, 112 Fed. 931; 57 L. R. A. 108; 50 C. C. A. 623; Endsley v. Johns, 120 Ill. 469, 479; 60 Am. Rep. 572; 12 N. E. 247; Cox v. Armstrong, (Ky.) 20 S. W. 290.

⁴ Hedin v. Minneapolis, etc., Institute, 62 Minn. 146; 54 Am. St.

Rep. 628; 35 L. R. A. 417; 64 N. W. 158; Hamlin v. Abell, 120 Mo. 188; 25 S. W. 516.

⁵ Weaver v. Shriver, 79 Md. 530; 30 Atl. 189.

⁶ West Florida Land Co. v. Studebaker, 37 Fla. 28; 19 So. 176.

⁷ Valentine v. Richardt, 126 N. Y. 272; 27 N. E. 255.

⁸ Smith v. Bolles, 132 U. S. 125; Ahrens v. Adler, 33 Cal. 608; Lahay v. Bank, 15 Colo. 339; 22 Am. St. Rep. 407; 25 Pac. 704; Stevens v. Bradley, 89 Ia. 174; 56 N. W. 429; Exchange Bank v. Gaitskill, (Ky.) 37 S. W. 160; Allen v. Truesdell, 135 Mass. 75; Brown v. Woods, 3 Coldw. (Tenn.) 182; Hamilton Brown Shoe Co. v. Sanger (Tex. Civ. App.); 23 S. W. 525; Gunther v. Ullrich, 82 Wis. 222; 33 Am. St. Rep. 32; 52 N. W. 88.

⁹ Antle v. Sexton, 137 Ill. 410; 27 N. E. 691; affirming 32 Ill. App. 437; Nysewander v. Lowman, 124 Ind. 584; 24 N. E. 355; Whiting v. Price, 172 Mass. 240; 70 Am. St. Rep. 262; 51 N. E. 1084; Totten v. Burhans, 91 Mich. 495; 51 N. W. 1119; Townsend v. Felthousen, 156

value and the price paid.¹⁰ The party defrauded is thus given the full benefit of his contract, and is placed as nearly as possible in the condition in which he would have been had the representations been true. Since this action is not necessarily connected with contract, it is merely referred to in this connection, to illustrate the different remedies available in case of fraud.

§133. Effect on contract of fraud in the inducement.

As affecting the validity of the contract, fraud in the inducement renders the contract voidable, not void.¹

In some cases a contract procured by fraud upon a public corporation is void and not voidable. Thus where A, an agent of a corporation selling maps, promised to pay B, a member of a board of education, a sum of money to compensate him for time lost by him in attending a board meeting; and at such meeting maps were purchased from such corporation, B's vote being necessary to carry such resolution, the contract of purchase was held "void," even though no intention on A's part existed to influence B's action.² In cases of this sort, however, the contract is void because the public officers are incompetent to act. Fraud is material only as creating such incompetency.

§134. Informal rescission at law.

If executed in whole or in part the defrauded party may rescind informally and sue to recover what he has parted with

N. Y. 618; 51 N. E. 279; Hubbel v. Meigs, 50 N. Y. 480; Haight v. Haight, 19 N. Y. 465.

¹⁰ Vivian v. Allen, 9 Colo. App. 147; 47 Pac. 844; Potter v. Lumber Co., 105 Wis. 25; 80 N. W. 88; 81 N. W. 118.

¹ Zang v. Adams, 23 Colo. 408; 58 Am. St. Rep. 249; 48 Pac. 509; Union, etc., Co. v. Mallory, 157 Ill. 554; 48 Am. St. Rep. 341; 41 N. E. 888; Kearney, etc., Co. v. Ry. Co., 97 Ia. 719; 59 Am. St. Rep. 434; 66

N. W. 1059; Smith v. Hornback, 4 Litt. (Ky.) 232; 14 Am. Dec. 122; Och. v. Ry., 130 Mo. 27; 36 L. R. A. 442; 31 S. W. 962; Elmer v. Loper, 66 N. J. L. 50; 48 Atl. 550; Butler v. Prentiss, 158 N. Y. 49; 52 N. E. 652; Perry v. Bassett, 16 Tex. Civ. App. 288; 41 S. W. 523; Clothing Co. v. Hulbert, 98 Wis. 183; 73 N. W. 784.

² Honaker v. Board of Education, 42 W. Va. 170; 57 Am. St. Rep. 847; 32 L. R. A. 413; 24 S. E. 544.

under the contract,¹ or avoid liability as far as it is executory.² Where fraud induces a sale on credit, the defrauded party may sue at once for the price,³ or may replevin the goods.⁴ If services have been rendered under a special contract induced by fraud, the defrauded party may sue for the reasonable value of such services, less what he has received under the contract. He is not obliged to restore what he has received and sue for the entire amount due as reasonable compensation.⁵ An action of this sort is in quasi-contract.⁶ If a compromise or release is induced by fraud, it may be ignored and recovery may be had on the original cause of action.⁷

A formal decree of rescission is not necessary.⁸ Thus where a release was obtained from A by fraud, it was held that he need not sue in equity to avoid it, but must offer to return the value received therefor and in his suit on the original claim he must have the court declare the release void.⁹

§135. Formal rescission in equity.

Formal decrees of rescission and cancellation may be obtained in equity in cases where no plain, adequate and complete relief can be had at law.¹ Even though the fraud may be a good

¹ *King v. White*, 119 Ala. 429; 24 So. 710; *Roberts v. French*, 153 Mass. 60; 25 Am. St. Rep. 611; 26 N. E. 416; *Coon v. Anderson*, 101 Mich. 295; 59 N. W. 607; *Taylor v. Bank*, 9 S. D. 572; 70 N. W. 834; *Mayhew v. Mather*, 82 Wis. 355; 52 N. W. 436.

² *Martin v. Davis*, 96 Ia. 718; 65 N. W. 101.

³ *Jaffrey v. Wolf*, 4 Okla. 303; 47 Pac. 496.

⁴ *Farwell v. Hanchett*, 120 Ill. 573; 11 N. E. 875; *Brower v. Goodyer*, 88 Ind. 572; *Goebel v. Troll*, 71 Mo. App. 123; *Wilmot v. Lyon*, 49 O. S. 296; 34 N. E. 720; *Cincinnati Cooperage Co. v. Gaul*, 170 Pa. St. 545; 32 Atl. 1093.

⁵ *Mead v. Welch*, 67 N. H. 341; 39 Atl. 970.

⁶ See ch. xxxvii.

⁷ *McLean v. Assurance Society*, 100 Ind. 127; 50 Am. Rep. 779; *Michigan Mutual Life Ins. Co. v. Naugle*, 130 Ind. 79; 29 N. E. 393.

⁸ *Wilder v. Beede*, 119 Cal. 646; 51 Pac. 1083.

⁹ *Och v. Ry. Co.*, 130 Mo. 27; 36 L. R. A. 442; 31 S. W. 962; *Elmer v. Loper*, 66 N. J. L. 50; 48 Atl. 550.

¹ *Veazie v. Williams*, 8 How. (U. S.) 134; *Blackburn v. Wooding*, 56 Fed. 545; 6 C. C. A. 6; *Merritt v. Ehrman*, 116 Ala. 278; 22 So. 514; *Sherman v. Stove Co.*, 85 Mich. 169; 48 N. W. 537; *Ramsey v. Mfg. Co.*, 116 Mo. 313; 22 S. W. 719; *Harlow v. La Brum*, 151 N. Y. 278; 45 N. E. 859; *Yeoman v. Lasley*, 40 O. S. 190; *Sutton v. Morgan*, 158 Pa. St. 204; 38 Am. St. Rep. 841; 27 Atl.

defense in an action at law on the contract, the defrauded party will not be compelled to wait for litigation at law, but may have rescission in equity.² So the jurisdiction of equity to rescind an ante-nuptial contract for fraud is not ousted by a statute giving concurrent jurisdiction to the probate court.³ Thus executed conveyances,⁴ as a conveyance under seal of a share in an estate,⁵ even when held to be nullities at law, requiring no reconveyances,⁶ fraudulent sales of stock,⁷ written contracts, as a contract to purchase land,⁸ may be avoided by a formal decree in equity.

§136. Defense to executory contract.

If the contract is executory as to the liability of the defrauded party, he may avoid liability thereunder, and interpose the defense of fraud in an action brought against him on the contract at law.¹ This is, in one sense, informal rescission, since no decree in equity is necessary. It differs, however, from what is ordinarily termed informal rescission in that the injured party is not seeking to recover what he has parted with under the contract; but is seeking to avoid further liability thereunder.

894; *Woods v. North*, 6 Humph. (Tenn.) 309; 44 Am. Dec. 312; *Crislip v. Cain*, 19 W. Va. 438.

² *Nathan v. Nathan*, 166 Mass. 294; 44 N. E. 221; *Billings v. Mann*, 156 Mass. 203; 30 N. E. 1136; *John Hancock, etc., Ins. Co. v. Dick*, 114 Mich. 337; 43 L. R. A. 566; 72 N. W. 179.

³ *Nathan v. Nathan*, 166 Mass. 294; 44 N. E. 221.

⁴ *Blackburn v. Wooding*, 56 Fed. 545; 6 C. C. A. 6; *Little v. Dyer*, 35 Ill. App. 85.

⁵ *Copley v. Hyland*, 46 Minn. 205; 48 N. W. 777.

⁶ On the theory that equity will remove a cloud on the title and not drive the party to await prospective and deferred litigation, *Billings v. Mann*, 156 Mass. 203; 30 N. E. 1136.

⁷ *Sherman v. Stove Co.*, 85 Mich. 169; 48 N. W. 537; *Ramsey v. Mfg. Co.*, 116 Mo. 313; 22 S. W. 719.

⁸ *Ross v. Sumner*, 57 Neb. 588; 78 N. W. 264. Where the party seeking relief has been careless in relying on fraudulent statements that there was a demand for such land for building lots and a syndicate had been formed to secure it, equity will give relief, but at the costs of the plaintiff; *Sutton v. Morgan*, 158 Pa. St. 204; 38 Am. St. Rep. 841; 27 Atl. 894.

¹ *Zang v. Adams*, 23 Colo. 408; 58 Am. St. Rep. 249; 48 Pac. 509; *Mexican Amole Soap Co. v. Clarke*, 72 Ill. App. 655; *Welch v. Ins. Co.*, 108 Ia. 224; 50 L. R. A. 774; 78 N. W. 853; *Marston v. Ins. Co.*, 89 Me. 266; 56 Am. St. Rep. 412; 36 Atl. 389; *Milliken v. Thorndike*, 103 Mass. 382; *Loveridge v. Coles*, 72 Minn. 57; 74 N. W. 1109; *Cecil v. Spurger*, 32 Mo. 462; 82 Am. Dec. 140.

§137. Duty to place adversary party in statu quo.

In order to rescind, whether informally or by formal decree in equity, the party who commits the fraud must be placed *in statu quo* by the party seeking relief.¹ The defrauded person, if he has parted with the possession of what he has received under the contract, must regain possession and tender it back,² but if he does this, such sale and repurchase will not prevent rescission.³ The right of being placed *in statu quo* may be enforced by persons, such as execution creditors, who have acquired liens on the property which the vendor replevins as sold by fraud.⁴ The general rule that the party guilty of fraud must be placed *in statu quo* is subject to certain qualifications. If the property received by the person defrauded is worthless,⁵ or if its value is trifling,⁶ he need not offer to return it in order to rescind. The party seeking relief need not restore anything not received by him under the contract which he is seeking to avoid.⁷ He need not, of course, restore what he has received under some other contract which he is not seeking to avoid.⁸ If the fraud complained of consists in fraud between the agent

¹ Vandervelden v. Ry., 61 Fed. 54; Petty v. Ry., 109 Ga. 666; 35 S. E. 82; Western, etc., R. R. v. Burke, 97 Ga. 560; 25 S. E. 498; Mortimer v. McMullen, 202 Ill. 413; 67 N. E. 20; Rigdon v. Walcott, 141 Ill. 649; 31 N. E. 158; Balue v. Taylor, 136 Ind. 368; 36 N. E. 269; Starke v. Dicks, 2 Ind. App. 125; 28 N. E. 214; Swayne v. Waldo, 73 Ia. 749; 5 Am. St. Rep. 712; 33 N. W. 78; Snow v. Alley, 144 Mass. 546; 59 Am. Rep. 119; 11 N. E. 764; Loveridge v. Coles, 72 Minn. 57; 74 N. W. 1109; (obiter) Carlton v. Hulett, 49 Minn. 308; 51 N. W. 1053; Och v. Ry. Co., 130 Mo. 27; 36 L. R. A. 442; 31 S. W. 962; Tootle v. Bank, 34 Neb. 863; 52 N. W. 396; Kley v. Healy, 149 N. Y. 346; 44 N. E. 150; R. R. v. Steinfeld, 42 O. S. 449; Johnson v. Burnside, 3 S. D.

230; 52 N. W. 1057; Wells v. Houston, 23 Tex. Civ. App. 629; 57 S. W. 584.

² Hemphill v. Miller, 75 Ill. App. 488.

³ Yeoman v. Lasley, 40 O. S. 190.

⁴ Schofield v. Schiffer, 156 Pa. St. 65; 27 Atl. 69.

⁵ Larkin v. Mullen, 128 Cal. 449; 60 Pac. 1091; Cheney v. Powell, 88 Ga. 629; 15 S. E. 750; Higham v. Harris, 108 Ind. 246; 8 N. E. 255; Hess v. Young, 59 Ind. 379; Childs v. Merrill, 63 Vt. 463; 14 L. R. A. 264; 22 Atl. 626.

⁶ Pidcock v. Swift, 51 N. J. Eq. 405; 27 Atl. 470.

⁷ Hargadine-McKittrick Dry Goods Co. v. Dry Goods Co., 65 Kan. 572; 70 Pac. 582.

⁸ Petty v. Ry., 109 Ga. 666; 35 S. E. 82; (distinguishing Butler v. R. R., 88 Ga. 594; 15 S. E. 668.

of the defrauded party and the party guilty of fraud, the defrauded party need not restore what has been paid to such agent on his own account,⁹ but in such cases the defrauded party must, at least, notify the adversary party of his intention to rescind and give him an opportunity to take control of such property.¹⁰ If there is no fraudulent combination between the party guilty of fraud and the agent of the adversary party, the party seeking relief must tender what has been paid to such agent as commission.¹¹ So he need not tender to the party against whom he seeks relief an amount paid to him by a third party.¹² If the party guilty of fraud is placed *in statu quo* rescission for such fraud may be granted.¹³ In cases of informal rescission at law the party seeking relief must, as a condition precedent to maintaining his action, place the adversary party *in statu quo*, or make tender thereof.¹⁴ In a suit for formal rescission in equity it is not a condition precedent to bring the suit that the defrauding party be placed *in statu quo*. It is sufficient if the defrauded party is ready and willing so to place the adversary party.¹⁵ If the thing received by the defrauded party is surrendered at the trial of the action it is sufficient.¹⁶ The decree

⁹ Mortland v. Mortland, 151 Pa. St. 593; 25 Atl. 150.

¹⁰ Henniger v. Heald, 52 N. J. Eq. 431; 29 Atl. 190.

¹¹ Wood v. Nichols, 6 Wash. 96; 32 Pac. 1055; 35 Pac. 140.

¹² Whitmire v. Boyd, 53 S. C. 315; 31 S. E. 306.

¹³ Harvey v. Morris, 63 Mo. 475.

¹⁴ Mortimer v. McMullen, 202 Ill. 413; 67 N. E. 20; Rigdon v. Walcott, 141 Ill. 649; 31 N. E. 158.

¹⁵ Thackrah v. Haas, 119 U. S. 499; Higham v. Harris, 108 Ind. 246; 8 N. E. 255; Shull v. Shull, 100 Ind. 477; Gould v. Bank, 86 N. Y. 75; Thomas v. Beals, 154 Mass. 51; 27 N. E. 1004; Maloy v. Berkin, 11 Mont. 138; 27 Pac. 442; Ludington v. Patton, 111 Wis. 208; 86 N. W. 571; Paetz v. Stoppleman, 75 Wis.

510; 44 N. W. 834. "There was no necessity for an offer to return the consideration before the bill was brought. A bill in equity is not, like an action at law, brought on the footing of a rescission previously completed. . . The foundation of the bill is that the rescission is not complete and that it asks the aid of the court to make it so." Thomas v. Beals, 154 Mass. 51; 27 N. E. 1004; quoted in Ludington v. Patton, 111 Wis. 208; 86 N. W. 571. Becker v. Trickel, 80 Wis. 484, an action in equity in which it was held that an offer to restore is necessary before suing in equity is overruled in Ludington v. Patton, 111 Wis. 208; 86 N. W. 571.

¹⁶ Thurston v. Blanchard, 22 Pick. (Mass.) 18; 33 Am. Dec. 700.

of rescission must itself provide for restoration, however, if the defrauding party has not been placed *in statu quo* before commencement of the suit. The duty to place the party guilty of fraud *in statu quo* is waived by his refusal to receive it and to return what he has received, and formal tender is thus waived.¹⁷ If the defense of fraud is interposed in an action on an executory contract, it is not necessary as a condition precedent to making such defense to place the adversary party *in statu quo*.¹⁸

§138. Partial rescission impossible.

A partial rescission of an entire contract cannot be had. The contract must be valid or void *in toto*. This rule applies to informal rescission at law, or repudiation of liability under the contract.¹ Where A had exchanged land for stock, by reason of fraudulent representations as to facts affecting its value, he could not affirm the sale, and at the same time enforce a vendor's lien on the realty to the amount of the difference between the actual value of the stock and its value as represented.² If the contract is avoided, it carries with it all clauses, such as provisions for the forfeiture of money deposited.³ Still less can the guilty party demand that the innocent party should rescind only that part of an entire contract to which the fraud specifically related.⁴ The rule that partial rescission or repudiation is impossible applies equally to formal rescission in equity.⁵

This rule does not apply to fraud in some matter collateral to the contract, but not a term thereof. Thus, where A has by fraud been induced to pay an extra sum over and above his actual contract liability he may recover such sum without attack-

¹⁷ Johnson v. Burnside, 3 S. D. 230; 52 N. W. 1057.

¹⁸ Coburn v. Hardy, 63 Mo. 475; Heavner v. Morgan, 30 W. Va. 355; 8 Am. St. Rep. 55; 4 S. E. 406.

¹ Barrie v. Earle, 143 Mass. 1; 8 N. E. 639; Yeomans v. Bell, 151 N. Y. 230; 45 N. E. 552.

² Graham v. Moffett, 119 Mich. 303; 78 N. W. 132.

³ McDowell v. Caldwell, 116 Ia. 475; 89 N. W. 1111.

⁴ Butler v. Prentiss, 158 N. Y. 49; 52 N. E. 652.

⁵ McConnell v. Hughes, 83 Wis. 25; 53 N. W. 149; Hoffman v. King, 70 Wis. 372, 381; 36 N. W. 25; Hyslip v. French, 52 Wis. 513, 516; 9 N. W. 605.

ing the original contract.⁶ So if he has been induced to pay money under the contract, by fraudulent representations that the contract has been performed, he may recover such payment without avoiding the contract.⁷ The rule that partial rescission or repudiation is impossible applies only to entire contracts, and not to severable contracts. If the contract is divisible, a part of it may be affirmed and a part disaffirmed.⁸

§139. Ratification.

Since fraud in the inducement makes a contract voidable, not void, the party defrauded may make the contract valid by electing, with full knowledge of the facts, to treat it as valid.¹ Thus a promise to pay the purchase money,² making a partial payment

⁶ *Kelly v. Solari*, 9 M. & W. 54; *United States v. Barlow*, 132 U. S. 271; *Caldwell v. Maxfield*, 7 S. D. 361; 64 N. W. 166.

⁷ *Minor v. Baldridge*, 123 Cal. 187; 55 Pac. 783.

⁸ *Higham v. Harris*, 108 Ind. 246; 8 N. E. 255.

¹ *Shappirio v. Goldberg*, 192 U. S. 232; *McLean v. Clapp*, 141 U. S. 429; *Upton v. Tribilcock*, 91 U. S. 45; *Alger v. Anderson*, 92 Fed. 696; *Wright v. Phipps*, 90 Fed. 556; *Kingman v. Stoddard*, 85 Fed. 740; 29 C. C. A. 413; *Manning v. Pippen*, 95 Ala. 537; 11 So. 56; *Thweatt v. McLeod*, 56 Ala. 375; *Schmidt v. Mesmer*, 116 Cal. 267; 48 Pac. 54; *Nounnan v. Land Co.*, 81 Cal. 1; 6 L. R. A. 219; 22 Pac. 515; *Brown v. Brown*, 142 Ill. 409; 32 N. E. 500; *St. John v. Hendrickson*, 81 Ind. 350; *Dorr v. Alford*, 111 Ia. 278; 82 N. W. 789; *Kearney, etc., Co. v. Ry. Co.*, 97 Ia. 719; 59 Am. St. Rep. 434; 66 N. W. 1059; *W. W. Kimball Co. v. Raw*, 7 Kan. App. 17; 51 Pac. 789; *McCulloch v. Scott*, 13 B. Mon. (Ky.) 172; 56 Am. Dec. 561; *Stevens v. Pierce*, 151 Mass. 207; 23 N. E. 1006; *Western Electric Co. v.*

Hart, 103 Mich. 477; 61 N. W. 867; *Bedier v. Reaume*, 95 Mich. 518; 55 N. W. 366; *Crooks v. Nippolt*, 44 Minn. 239; 46 N. W. 349; *Thompson v. Libby*, 36 Minn. 287; 31 N. W. 52; *Thiemann v. Heinze*, 120 Mo. 630; 25 S. W. 533; *Ellis v. Newbrough*, 6 N. M. 181; 27 Pac. 490; *Pryor v. Foster*, 130 N. Y. 171; 29 N. E. 123; *Strong v. Strong*, 102 N. Y. 69, 73; 5 N. E. 799; *Schiffer v. Dietz*, 83 N. Y. 300; *People v. Stephens*, 71 N. Y. 527; *Vernol v. Vernol*, 63 N. Y. 45; *Saratoga, etc., Ry. Co. v. Fogg*, 24 Wend. 74; 35 Am. Dec. 598; *Vaughn v. Smith*, 34 Or. 54; 55 Pac. 99; *Precious Blood Society v. Elsythe*, 102 Tenn. 40; 50 S. W. 759; *Blue Springs Mining Co. v. McIlvien*, 97 Tenn. 225; 36 S. W. 1094; *Kerns v. Perry* (Tenn. Ch. App.); 48 S. W. 729; *Lear v. Lumber Co.* (Tenn. Ch. App.); 42 S. W. 808; *Rector, etc., v. Snyder*, 100 Va. 567; 42 S. E. 337; *Slotthower v. Land Co.* (Va.) 27 S. E. 466; *Wilson v. Hundley*, 96 Va. 96; 70 Am. St. Rep. 837; 30 S. E. 492.

² *Blue Springs Mining Co. v. McIlvien*, 97 Tenn. 225; 36 S. W. 1094.

thereon,³ the payment of interest thereon,⁴ an assignment of a mortgage,⁵ the obtaining of an extension of time,⁶ renewing a note,⁷ or making payments thereon,⁸ making a new contract,⁹ or receiving money under the contract,¹⁰ or leasing the property bought through fraud,¹¹ or remaining in possession and making improvements,¹² or taking security for performance,¹³ or treating as his own property received under the contract,¹⁴ or other performance of an executory contract,¹⁵ or bringing suit on the contract,¹⁶ are all acts which amount to a ratification if done after discovery of the fraud and with full knowledge thereof.

The conduct relied on as ratification must be such as unequivocally shows the intention of the defrauded party to be bound by his contract.

Acts which never take effect, as signing and acknowledging a deed of assignment of partnership property, but withdrawing assent before delivery,¹⁷ or acts done under duress, as giving a purchase-money note under duress,¹⁸ are not ratification.

Acts done before the discovery of the fraud cannot constitute ratification.¹⁹ However, acts done after the fraud is discovered,

³ *Dennis v. Jones*, 44 N. J. Eq. 513; 6 Am. St. Rep. 899; 14 Atl. 913.

⁴ *Harrington v. Paterson*, 124 Cal. 542; 57 Pac. 476.

⁵ *Bedier v. Reaume*, 95 Mich. 518; 55 N. W. 366.

⁶ *Ruhl v. Mott*, 120 Cal. 668; 53 Pac. 304; *Western Electric Co. v. Hart*, 103 Mich. 477; 61 N. W. 867.

⁷ *W. W. Kimball Co. v. Raw*, 7 Kan. App. 17; 51 Pac. 789; *Morgan v. Nowlin*, 126 Mich. 105; 85 N. W. 468.

⁸ *Morgan v. Nowlin*, 126 Mich. 105; 85 N. W. 468; *Young v. Shepard's Estate*, 124 Mich. 552; 83 N. W. 403.

⁹ *Lee v. McClelland*, 120 Cal. 147; 52 Pac. 300.

¹⁰ *Brown v. Brown*, 142 Ill. 409; 32 N. E. 500.

¹¹ *Precious Blood Society v. Elsythe*, 102 Tenn. 40; 50 S. W. 759.

¹² *Vaughn v. Smith*, 34 Or. 54; 55 Pac. 99.

¹³ *Ruhl v. Mott*, 120 Cal. 668; 53 Pac. 304; *Burnham v. Smith*, 82 Mo. App. 35.

¹⁴ *McLean v. Clapp*; 141 U. S. 429; *Marshall v. Gilman*, 47 Minn. 131; 49 N. W. 688.

¹⁵ *Kingman v. Stoddard*, 85 Fed. 740; 29 C. C. A. 413; *Nounnan v. Land Co.*, 81 Cal. 1; 6 L. R. A. 219; 22 Pac. 515.

¹⁶ *Conrow v. Little*, 115 N. Y. 387; 5 L. R. A. 693; 22 N. E. 346.

¹⁷ *Tarkington v. Purvis*, 128 Ind. 182; 9 L. R. A. 607; 25 N. E. 879.

¹⁸ *Ganz v. Weisenberger*, 66 Mo. App. 110.

¹⁹ *Alabama, etc., Works v. Dallas*, 127 Ala. 513; 29 So. 459; *Da-*

but before the defrauded party has discovered all the evidence tending to prove fraud, may amount to a ratification.²⁰

Notice as an element of ratification must be actual notice. Constructive notice, as is obtained by being a cashier of a bank,²¹ is not the equivalent of knowledge, so as to make acquiescence amount to ratification.

Discovery of one false representation is not constructive notice of the falsity of other representation not yet known to be false.²² If the fraud is discovered during performance, and it is impracticable without great loss to the party guilty of fraud, to stop performance, a continuance of performance is not a ratification.²³ Thus A agreed to drive logs for B, and B fraudulently represented that they did not exceed a certain number. After the logs were in the river and the drive was in progress, A discovered that they greatly exceeded such number. It was held that his completing performance did not waive his right to recover for the excess amount.²⁴

Ratification prevents subsequent rescission, but on principle it should not waive the right of action for damages; and some authorities so hold, on the ground that the action of deceit necessarily presumes that the contract is affirmed.²⁵ Some authorities, however, treat ratification as waiving the right of action for damages.²⁶ Thus possession of leased premises for over a

vis Sewing Machine Co. v. Crutchfield, 117 Ga. 873; 45 S. E. 228; Coles v. Ry., — Ia. —; 99 N. W. 108; American, etc., Ins. Co. v. Judge, 191 Pa. St. 484; 43 Atl. 374; West End Real Estate Co. v. Nash, 51 W. Va. 341; 41 S. E. 182; Bostwick v. Ins. Co., 116 Wis. 392; 92 N. W. 246.

²⁰ Simon v. Shoe Co., 105 Fed. 573; 52 L. R. A. 745; 44 C. C. A. 612.

²¹ Dakota National Bank v. Taylor, 5 S. D. 99; 58 N. W. 297.

²² Ingram v. Abbott, 14 Tex. Civ. App. 583; 38 S. W. 626.

²³ Sell v. Logging Co., 88 Wis. 581; 60 N. W. 1065.

²⁴ Sell v. Logging Co., 88 Wis. 581; 60 N. W. 1065.

²⁵ Wilson v. Nichols, 72 Conn. 173; 43 Atl. 1052; Weaver v. Shriver, 79 Md. 530; 30 Atl. 189; Andrews v. Jackson, 168 Mass. 266; 60 Am. St. Rep. 390; 37 L. R. A. 402; 47 N. E. 412; Morman v. Harrington, 118 Mich. 623; 77 N. W. 242; Lenox v. Fuller, 39 Mich. 268, 273; Warren v. Cole, 15 Mich. 265; McIntyre v. Buell, 132 N. Y. 192; 30 N. E. 396; Suttle v. Hutchinson (Tex. Civ. App.); 31 S. W. 211.

²⁶ Marsalis v. Crawford, 8 Tex. Civ. App. 485; 28 S. W. 371.

year, asking reduction in rent and time to pay rent overdue without making any claim for damages waives such claim.²⁷

If it is impracticable to place the adversary party *in statu quo*, as where a vendee of an electric-light plant retains certain defective parts after he learns that the representations as to their condition were false, where it was practically impossible to make tender of such defective parts,²⁸ ratification does not bar the right to recover damages.

§140. Laches.

Delay for an unreasonable time after the discovery of the fraud, may, without positive acts of ratification amount to a waiver of the right to rescind.¹ Thus, in equity, delay for such lengths of time as eight years,² or three years³ may waive the right to rescind.

The party defrauded has, however, a reasonable time in which to determine whether or not he will avoid the contract, after he discovers the fraud.⁴ Thus, accepting money on the con-

²⁷ Schmidt v. Mesmer, 116 Cal. 267; 48 Pac. 54.

²⁸ Ewing v. Hauss (Ky.); 50 S. W. 249.

¹ Grymes v. Sanders, 93 U. S. 55; Fitzgerald v. Walker, 55 Ark. 148; 17 S. W. 702; Benton v. Ward, 59 Fed. 411; Mortimer v. McMullen, 202 Ill. 413; 67 N. E. 20; Day v. Improvement Co., 153 Ill. 293; 38 N. E. 567; affirming 53 Ill. App. 165; Brown v. Brown, 142 Ill. 409; 32 N. E. 500; Greenwood v. Fenn, 136 Ill. 146; 26 N. E. 487; Perry v. Pearson, 135 Ill. 218; 25 N. E. 636; Stetson v. Investment Co., 104 Ia. 393; 73 N. W. 869; Blackman v. Wright, 96 Ia. 541; 65 N. W. 843; Taylor v. Short, 107 Mo. 384; 17 S. W. 970; American, etc., Association v. Rainbolt, 48 Neb. 434; 67 N. W. 493; Norfolk, etc., Co. v. Arnold, 49 N. J. Eq. 390; 23 Atl. 514; Boyer v. East, 161 N. Y. 580; 76 Am. St.

Rep. 290; 56 N. E. 114; Mahaffey v. Ferguson, 156 Pa. St. 156; 27 Atl. 21. "Where a party desires to rescind upon the ground of mistake or fraud he must, upon the discovery of the facts at once announce his purpose and adhere to it. . . . He is not permitted to play fast and loose." Grymes v. Sanders, 93 U. S. 55, 62; quoted in Day v. Improvement Co., 153 Ill. 293, 304; 38 N. E. 567; affirming 53 Ill. App. 165.

² Boyer v. East, 161 N. Y. 580; 76 Am. St. Rep. 290; 56 N. E. 114; (a case of constructive fraud: a purchase by a guardian of his ward's property at a foreclosure sale).

³ Blackman v. Wright, 96 Ia. 541; 65 N. W. 843; American, etc., Association v. Rainbolt, 48 Neb. 434; 67 N. W. 493.

⁴ Zang v. Adams, 23 Colo. 408; 58 Am. St. Rep. 249; 48 Pac. 509;

tract three days after an offer to rescind,⁵ or two months' delay in rescinding,⁶ do not amount to ratification. Mere delay in discovering fraud does not prevent disaffirmance.⁷

Laches whereby the party guilty of fraud is given an opportunity to effect his fraud is no bar to an action against the guilty party. Thus omission for five years to record a conveyance, giving the grantor an opportunity to record a mortgage on the realty thus conveyed, in favor of a third party, does not bar an action against such grantor therefor.⁸

§141. Equitable relief refused to party equally guilty.

If the parties to a transaction have each tried to defraud the other, equity will not give relief to the less successful party, but will leave him to his rights at law.¹ This principle applies where the party seeking relief has been guilty of constructive fraud, as where a member of a firm forces a sale to himself of the entire partnership business by buying a rival business, hiring the valuable employees of his old firm secretly and threatening dissolution.²

Tarkington v. Purvis, 128 Ind. 182;
9 L. R. A. 607; 25 N. E. 879.

⁵ Tarkington v. Purvis, 128 Ind.
182; 9 L. R. A. 607; 25 N. E. 879.

⁶ Zang v. Adams, 23 Colo. 408;
58 Am. St. Rep. 249; 48 Pac. 509.

⁷ Beckwith v. Ryan, 66 Conn.
589; 34 Atl. 488; Dakota National
Bank v. Taylor, 5 S. D. 99; 58 N.
W. 297.

⁸ Amet v. Boyer, 43 La. Ann.
562; 9 So. 622.

¹ Blackburn v. Wooding, 49 Fed.
902; Stout v. Phillippi Mfg., etc.,
Co., 41 W. Va. 339; 56 Am. St.
Rep. 843; 23 S. E. 571.

² Richardson v. Walton, 49 Fed.
888. (If his former partners are
guilty of fraud, whereby such sale
is made on terms advantageous to
them, he can have no relief in
equity.)

CHAPTER VII.

MISREPRESENTATION IN THE INDUCEMENT.

I. NATURE.

§142. Misrepresentation must be of fact.

To constitute misrepresentation, the statement must be one of fact. If it is clearly on its face a mere matter of opinion or of hearsay, or the statement is avowedly made on the authority of others, misrepresentation cannot exist.¹ Thus a statement in effect of one's opinion as to the value of certain book accounts,² or of certain property,³ or of the location of certain land,⁴ are not misrepresentations. So a prediction is not a misrepresentation.⁵ But where A, while disclaiming any personal knowledge of a material fact, refers to B for information, and B's statements are incorrect, A is in legal effect as liable for such misrepresentation as if he had made it himself.⁶ So in insurance contracts a representation to be operative must be one of fact. A *bona fide* opinion, even if erroneous, is not mispre-

¹ Taylor v. Ford, 131 Cal. 440; 63 Pac. 770; Security Trust Co. v. Tarpey, 182 Ill. 52; 54 N. E. 1041; affirming 80 Ill. App. 378; Hillyer v. Dickinson, 154 Mass. 502; 28 N. E. 905; Hume v. Brelsford, 51 Mo. App. 651; Moore v. Scott, 47 Neb. 346; 66 N. W. 441; Crist v. Dice, 18 O. S. 536; Belmont etc., Mining Co. v. Rogers, 10 Ohio C. C. 305; 3 Ohio Dec. 453; Knights of Honor v. Dickson, 102 Tenn. 255; 52 S. W. 862; Wren v. Moncure, 95 Va. 369; 28 S. E. 588; English v. Grinstead, 12 Wash. 670; 42 Pac. 121.

² Taylor v. Ford, 131 Cal. 440; 63 Pac. 770.

³ Kenton Ins. Co. v. Wigginton, 89 Ky. 330; 7 L. R. A. 81; 12 S. W. 668.

⁴ Beebe v. Birkett, 109 Mich. 663; 67 N. W. 966.

⁵ Pine Mountain, etc., Co. v. Ford (Ky.); 50 S. W. 27; Turner v. Navigation Co., 2 Dev. Eq. (N. C.) 236.

⁶ Irwin v. Wilson, 45 O. S. 426; 15 N. E. 209; Cabaness v. Holland, 19 Tex. Civ. App. 383; 47 S. W. 379.

sentation,⁷ as a mistaken opinion as to the cause of the death of insured's brother professedly given on information derived from others,⁸ or a statement by the examining physician that insured was a "fair" risk, the facts as to his physical condition being given.⁹

§143. Falsity.

To constitute misrepresentation the statement must be false. If substantially true, there is no misrepresentation.¹ Thus where an insured represented that he had not been rejected by any life insurance company, which was true, no misrepresentation existed, though he had been rejected by a beneficial association.²

§144. Representation must mislead.

Further, the party to whom it is made must believe such statement to be true, and must act in reliance on such belief. If the person to whom the representation is made is informed of the facts, no misrepresentation exists.¹ Thus a misrepresentation as to the arrangement of a house, which vendee has inspected,² or as to the execution of a bond, to indemnify against loss on which a second bond is given, where a true copy of the

⁷ Security Trust Co. v. Tarpey, 182 Ill. 52; 54 N. E. 1041; affirming 80 Ill. App. 378; Ins. Co. v. Pickel, 119 Ind. 155; 12 Am. St. Rep. 393; 21 N. E. 546; Henn v. Ins. Co., 67 N. J. L. 310; 51 Atl. 689; Baker v. Ins. Co., 31 Or. 41; 65 Am. St. Rep. 807; 48 Pac. 699; Knights of Pythias v. Cogbill, 99 Tenn. 28; 41 S. W. 340; Knights of Pythias v. Rosenfeld, 92 Tenn. 508; 22 S. W. 204; Dooly v. Ins. Co., 16 Wash. 155; 58 Am. St. Rep. 26; 47 Pac. 507.

⁸ Knights of Honor v. Dickson, 102 Tenn. 255; 52 S. W. 862.

⁹ Security Trust Co. v. Tarpey,

182 Ill. 52; 54 N. E. 1041; affirming 80 Ill. App. 378.

¹ Wright v. Phipps, 90 Fed. 556; Patton v. Glatz, 87 Fed. 283.

² Newton v. Life Association, 116 Ia. 311; 90 N. W. 73.

¹ Stiewell v. Surety Co., 70 Ark. 512; 68 S. W. 1021; Continental Ins. Co. v. Pearce, 39 Kan. 396; 7 Am. St. Rep. 537; 18 Pac. 291; Standard Horseshoe Co. v. O'Brien, 91 Md. 751; 46 Atl. 346; Kister v. Ins. Co., 128 Pa. St. 553; 15 Am. St. Rep. 696; 5 L. R. A. 646; 18 Atl. 447; Trammell v. Ashworth, 99 Va. 646; 39 S. E. 593.

² Trammell v. Ashworth, 99 Va. 646; 39 S. E. 593.

first bond was attached to the second,³ is not operative. So a false statement made after the transaction is entered into cannot be misrepresentation.⁴

So in insurance contracts, to avoid the policy the representation must deceive. If the company can be charged with knowledge of the truth, misrepresentation is not operative.⁵ So a false statement as to the condition of a business is not misrepresentation if the facts in question are shown by the books of the business and the party to whom such representations are made examines such books.⁶ As in cases of fraud, some courts hold that a misrepresentation is not operative if both parties have an equal opportunity to learn the truth.⁷

§145. Materiality.

Wherever misrepresentation is operative, misrepresentation as to a material fact invalidates the contract. In insurance contracts a misrepresentation, even in good faith, of a material fact,¹ such as the interest of the insured in the property covered

³ *Stiwell v. Surety Co.*, 70 Ark. 512; 68 S. W. 1021. (The first bond was executed by B, as attorney in fact for A. The face of the second bond recited that the first was executed by A and B.)

⁴ *Commercial Bank v. Ins. Co.*, 87 Wis. 297; 58 N. W. 391.

⁵ *New Jersey, etc., Ins. Co. v. Baker*, 94 U. S. 610; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458; 36 L. R. A. 374; 45 N. E. 1078; *Lumberman's Mutual Ins. Co. v. Bell*, 166 Ill. 400; 57 Am. St. Rep. 140; 45 N. E. 130; *Hart v. Accident Association*, 105 Ia. 717; 75 N. W. 508; *Carey v. Ins. Co.*, 97 Ia. 619; 66 N. W. 920; *McMurray v. Ins. Co.*, 87 Ia. 453; 54 N. W. 354; *Lamb v. Ins. Co.*, 70 Ia. 238; 30 N. W. 497; *German Ins. Co. v. Gray*, 43 Kan. 497; 19 Am. St. Rep. 150; 8 L. R. A. 70; 23 Pac. 637; *Anderson v. Assurance Co.*,

59 Minn. 182; 50 Am. St. Rep. 400; 28 L. R. A. 609; 60 N. W. 1095; 63 N. W. 241; *Rochester, etc., Co. v. Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745; 62 N. W. 877; *Wood v. Ins. Co.*, 149 N. Y. 382; 52 Am. St. Rep. 733; 44 N. E. 80; *Kister v. Ins. Co.*, 128 Pa. St. 553; 15 Am. St. Rep. 696; 5 L. R. A. 646; 18 Atl. 447; *Graham v. Ins. Co.*, 48 S. Car. 195; 59 Am. St. Rep. 707; 26 S. E. 323.

⁶ *Colton v. Stanford*, 82 Cal. 351; 16 Am. St. Rep. 137; 23 Pac. 16.

⁷ *Mamlock v. Fairbanks*, 46 Wis. 415; 32 Am. Rep. 716; 1 N. W. 167. (Misrepresentation as to solvency of a debtor.)

¹ *Capital Ins. Co. v. Autrey*, 195 Ala. 269; 53 Am. St. Rep. 121; 17 So. 326; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130; 63 Am. St. Rep. 499; 38 Atl. 29; *Goddard v.*

by the policy,² or in life insurance, the age, if understated,³ or the employment, if more hazardous than stated,⁴ or the habits of the insured as to the use of intoxicating liquors,⁵ avoids a policy of insurance. So a statement in an application for insurance against losses for sales to certain classes of debtors which greatly understates the amount of losses from bad debts during the years before, is material.⁶ So in a contract for the sale of realty a representation by the vendor that the area of the tract is substantially greater than it really is is ground for rescission.⁷

On the other hand, misrepresentation as to an immaterial fact has no legal effect.⁸ Thus where A means to buy nursery stock of B, and C induces A to buy of C by stating that he had taken B's place and sold the same quality of stock as B,⁹ or where a surety signing for the first time is told that the note signed by him is a renewal of a former note of his principal's, when in reality it is for an overdraft,¹⁰ misrepresentation does not exist.

Ins. Co., 108 Mass. 56; 11 Am. Rep. 307; *Perine v. Grand Lodge*, 51 Minn. 224; 53 N. W. 367; *Aetna Ins. Co. v. Simmons*, 49 Neb. 811; 69 N. W. 125; *Garrison v. Ins. Co.*, 56 N. J. L. 235; 28 Atl. 8; *March v. Ins. Co.*, 186 Pa. St. 629; 60 Am. St. Rep. 887; 40 Atl. 1100.

² *Capital City Ins. Co. v. Autrey*, 105 Ala. 269; 53 Am. St. Rep. 121; 17 So. 326; *Planters', etc., Ins. Co. v. Loyd*, 67 Ark. 584; 77 Am. St. Rep. 136; 56 S. W. 44; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130; 63 Am. St. Rep. 499; 38 Atl. 29; *contra*, that an innocent mistake as to title does not avoid; *Perry v. Ins. Co.*, 67 N. H. 291; 68 Am. St. Rep. 668; 33 Atl. 731.

³ *Dolan v. Life Association*, 173 Mass. 197; 53 N. E. 398.

⁴ *Triple Link, etc., Association v. Williams*, 121 Ala. 138; 77 Am. St. Rep. 34; 26 So. 19.

⁵ *Malicki v. Life Society*, 119 Mich. 151; 77 N. W. 690.

⁶ *Carrollton Furniture Mfg. Co. v. Indemnity Co.*, 115 Fed. 77; 52 C. C. A. 671.

⁷ *Newton v. Tolles*, 66 N. H. 136; 49 Am. St. Rep. 593; 9 L. R. A. 50; 19 Atl. 1092.

⁸ *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51; 5 So. 116; *Manufacturers', etc., Ins. Co. v. Zeitinger*, 168 Ill. 286; 61 Am. St. Rep. 105; 48 N. E. 179; *Ins. Co. of North America v. Osborn*, 26 Ind. App. 88; 59 N. E. 181; *Deposit Bank v. Peak*, 110 Ky. 579; 62 S. W. 268; *Campbell v. Ins. Co.*, 98 Mass. 381; *Perine v. Grand Lodge*, 51 Minn. 224; 53 N. W. 367; *Perry v. Ins. Co.*, 67 N. H. 291; 68 Am. St. Rep. 668; 33 Atl. 731; *March v. Ins. Co.*, 186 Pa. St. 629; 65 Am. St. Rep. 887; 40 Atl. 1100.

⁹ *Stone v. Robie*, 66 Vt. 245; 29 Atl. 257.

¹⁰ *Deposit Bank v. Peak*, 110 Ky. 579; 62 S. W. 268.

So in insurance, a misrepresentation to be operative must be material to the risk.¹¹ If the representation is of an immaterial matter,¹² as of the coverture of the insured,¹³ or of the fact that all the brothers of insured were alive,¹⁴ the age of the building insured,¹⁵ or its value, where the policy covers only the actual loss,¹⁶ it has no effect on the validity of the policy.

§146. Damage.

The proposition that damage is a necessary element of misrepresentation means nothing more than this: that the party seeking relief must, by reason of the misrepresentation, have received some right, or incurred some liability substantially different from that so represented to him. Wherever misrepresentation is operative, and rescission is given, it is given although in that case the misrepresentation has not caused any financial loss.¹ Thus if a vendor by mistake points out the wrong land and the vendee relies thereon, he may have rescission, even though the tract conveyed is as valuable as the other.² Thus in insurance policies misrepresentation of a fact material to the risk makes the policy voidable, even though the loss was not due to the fact misrepresented.³

¹¹ *Fidelity, etc., Co. v. Alpert*, 67 Fed. 460; 14 C. C. A. 474; *Capital Ins. Co. v. Autrey*, 105 Ala. 269; 53 Am. St. Rep. 121; 17 So. 326; *Campbell v. Ins. Co.*, 98 Mass. 381; *Perine v. Grand Lodge*, 51 Minn. 224; 53 N. W. 367; *Price v. Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166; *Schroeder v. Ins. Co.*, 46 Mo. 174; *Aetna Ins. Co. v. Simmons*, 49 Neb. 811; 69 N. W. 125; *Garrison v. Ins. Co.*, 56 N. J. L. 235; 28 Atl. 8; *March v. Ins. Co.*, 186 Pa. St. 629; 65 Am. St. Rep. 887; 40 Atl. 1100; *Mosley v. Ins. Co.* 55 Vt. 142; *Ins. Co. v. Kasey*, 25 Gratt 268; 18 Am. Rep. 681.

¹² *Manufacturers', etc., Ins. Co. v. Zeitinger*, 168 Ill. 286; 61 Am. St. Rep. 105; 48 N. E. 179; *Ring v. Assurance Co.*, 145 Mass. 426; 14 N. E. 525; *Hann v. National*

Union, 97 Mich. 513; 37 Am. St. Rep. 365; 56 N. W. 834; *Aetna Ins. Co. v. Simmons*, 49 Neb. 811; 69 N. W. 125; *Garrison v. Ins. Co.*, 56 N. J. L. 235; 28 Atl. 8.

¹³ *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51; 5 So. 116.

¹⁴ *Globe, etc., Association v. Wagner*, 188 Ill. 133; 80 Am. St. Rep. 169; 52 L. R. A. 649; 58 N. E. 970; affirming 90 Ill. App. 444.

¹⁵ *Manufacturers', etc., Ins. Co. v. Zeitinger*, 168 Ill. 286; 61 Am. St. Rep. 105; 48 N. E. 179.

¹⁶ *Ins. Co. v. Osborn*, 26 Ind. App. 88; 59 N. E. 181.

¹ See § 127.

² *Clapp v. Greenlee*, 100 Ia. 586; 69 N. W. 1049.

³ See § 144.

§147. By whom misrepresentation may be made.

To be operative a misrepresentation must be made by the party against whom relief is sought, or by some one acting on his behalf or to whom he made such representations for the purpose of having them communicated to the party misled. Thus in insurance contracts if the misrepresentation is made by the agent of the insurance company, to the company, intentionally¹ or unintentionally,² it is not misrepresentation by the insured, and does not avoid the policy. Thus no misrepresentation as to age is made where insured states the facts as far as known to the agent of the company and the officers of the company subsequently fill in the blanks.³ If the representation is made by one acting on behalf of the insured, the insured is as liable therefor as if he had made it himself.⁴

If the party making the false representation is not the adversary party to the contract, the case is controlled by the doctrines of mistake and not by those of misrepresentation or fraud. Thus where the principal obligee on a bond misrepresented its contents to the sureties, telling them it was merely a recommendation, they cannot avoid their liability as against the obligee if they had an opportunity to read the contract and he did not know of the misrepresentation.⁵

¹ *New Jersey, etc., Ins. Co. v. Baker*, 94 U. S. 610; *McElroy v. Assurance Co.*, 94 Fed. 990; 36 C. C. A. 615; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458; 36 L. R. A. 374; 45 N. E. 1078; *Continental Ins. Co. v. Pearce*, 39 Kan. 396; 7 Am. St. Rep. 537; 18 Pac. 291; *German Ins. Co. v. Gray*, 43 Kan. 497; 19 Am. St. Rep. 150; 8 L. R. A. 70; 23 Pac. 637; *Farmers' Ins. Co. v. Williams*, 39 O. S. 584; 48 Am. Rep. 474; *Kister v. Ins. Co.*, 128 Pa. St. 553; 15 Am. St. Rep. 696; 5 L. R. A. 646; 18 Atl. 447.

² *Carey v. Ins. Co.*, 97 Ia. 619; 66 N. W. 920; *Siltz v. Ins. Co.*, 71 Ia. 710; 29 N. W. 605; *Key v. Ins. Co.*, 77 Ia. 174; 41 N. W. 614.

³ *McCarthy v. Catholic Knights*, 102 Tenn. 345; 52 S. W. 142; (citing, *Miller v. Ins. Co.*, 107 N. Y. 292; 14 N. E. 271; *Clemens v. Supreme Assembly*, 131 N. Y. 485; 16 L. R. A. 33; 30 N. E. 496).

⁴ *Fraser v. Ins. Co.*, 114 Wis. 510; 90 N. W. 476.

⁵ *Spring Garden Ins. Co. v. Lemon*, 117 Ia. 691; 86 N. W. 35.

II. EFFECT.

§148. Original common law rule.— Damages.

At common law, as uninfluenced by equity, the original rule seems to have been that misrepresentation which did not affect the formation of the contract and was not made a term thereof had no effect on its validity, even though it concerned a collateral material fact. The action of deceit could not be brought on an innocent misrepresentation in the great majority of jurisdictions.¹ But this rule, apparently elementary, is departed from in some jurisdictions which allow the action of deceit on innocent misrepresentations if material and causing damage.²

- ¹ *Le Lievre v. Gould* (1893) 1 Q. B. Div. 491; *Angus v. Clifford* (1891) 2 Ch. 449; *White v. Sage*, 19 Ont. App. 135; *Dushane v. Benedict*, 120 U. S. 630; *Lord v. Goddard*, 13 How. (U. S.) 198; *Union Pac. Ry. Co. v. Barnes*, 64 Fed. 80; *Farrel v. Bank*, 43 Fed. 123; *Jones v. Ross*, 98 Ala. 448; 13 So. 319; *Toner v. Meussdorffer*, 123 Cal. 462; 56 Pac. 39; *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511; 43 Atl. 615; *Hutchinson, etc., Co. v. Lyford*, 123 Ill. 300; 13 N. E. 844; *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40; 3 L. R. A. 440; 20 N. E. 119; *Furnas v. Friday*, 102 Ind. 129; 1 N. E. 296; *Horse-Importing Co. v. Novak*, 105 Ia. 157; 74 N. W. 759; *Farmers' Stock Breeding Association v. Scott*, 53 Kan. 534; 36 Pac. 978; *Stevens v. Allen*, 51 Kan. 144; 32 Pac. 922; *Kansas Refrigerator Co. v. Pert*, 3 Kan. App. 364; 42 Pac. 943; *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508; 61 Am. Dec. 195; *Hammatt v. Emerson*, 27 Me. 308; 46 Am. Dec. 598; *Nash v. Trust Co.*, 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40 N. E. 1039; same case, 159 Mass. 437; 34 N. E. 625; *Holst v. Stewart*, 154 Mass. 445; 28 N. E. 574; *Hernen v. Neal*, 43 Minn. 315; 45 N. W. 612; *Redpath v. Lawrence*, 42 Mo. App. 101; *Page v. Parker*, 40 N. H. 47; *Crowell v. Jackson*, 53 N. J. L. 656; 23 Atl. 426; *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432; *Marsh v. Falker*, 40 N. Y. 562; *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651; 29 L. R. A. 360; 41 N. E. 414; *Gatlin v. Harrell*, 108 N. Car. 485; 13 S. E. 190; *Taylor v. Leith*, 26 O. S. 428; *Lamberton v. Dunham*, 165 Pa. St. 129; 30 Atl. 716; *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; 17 Atl. 673; *Kern v. Simpson*, 126 Pa. St. 42; 17 Atl. 523; *Wynne v. Allen*, 7 Baxt. (Tenn.) 312; 32 Am. Rep. 562. "It would introduce a new and very dangerous element into the case to say that the jury must decide whether the defendant had reasonable grounds for his belief." *Dilworth v. Bradner*, 85 Pa. St. 238, 240; quoted in *Lamberton v. Dunham*, 165 Pa. St. 129; 30 Atl. 716.
- ² *Einstein v. Marshall*, 58 Ala. 153;

Thus an innocent misrepresentation as to the reliability of a horse, amounting to a warranty,³ or as to the identity of land conveyed where the vendor's agent knew the falsity of his statement, though his principal did not,⁴ or as to the boundaries of land conveyed,⁵ may give rise to an action for damages.⁶ Thus an innocent misstatement by one selling accounts as to what ones are unpaid,⁷ or by a bank director as to the condition of the bank,⁸ may give rise to an action for damages. Where the statement is made positively and as of the knowledge of the party making it, fraud and misrepresentation become almost indistinguishable.⁹ Some courts allow a set-off or recoupment in damages for innocent misrepresentation in an action brought on the contract by the party making such misrepresentations,

29 Am. Rep. 729; *Totten v. Burhans*, 91 Mich. 495; 51 N. W. 1119; *Busch v. Wilcox*, 82 Mich. 315; 46 N. W. 940; affirmed 82 Mich. 336; 21 Am. St. Rep. 563; 47 N. W. 328; *Mooney v. Davis*, 75 Mich. 188; 13 Am. St. Rep. 425; 42 N. W. 802; *Holcomb v. Noble*, 69 Mich. 396; 37 N. W. 497; *Gerner v. Mosher*, 58 Neb. 135; 46 L. R. A. 244; 78 N. W. 384; *Johnson v. Gulick*, 46 Neb. 817; 50 Am. St. Rep. 629; 65 N. W. 883; *Bennett v. Judson*, 21 N. Y. 238; *Culbertson v. Blanchard*, 79 Tex. 486; 15 S. W. 700; *Loper v. Robinson*, 54 Tex. 510; *Davis v. Driscoll*, 22 Tex. Civ. App. 14; 54 S. W. 43; *McCord, Collins, etc., Co. v. Levi*, 21 Tex. Civ. App. 109; 50 S. W. 606; *Mutual, etc., Association v. McGee* (Tex. Civ. App.); 43 S. W. 1030; *Krause v. Busacker*, 105 Wis. 350; 81 N. W. 406; *Cameron v. Mount*, 86 Wis. 477; 22 L. R. A. 512; 56 N. W. 1094; *Gunther v. Ullrich*, 82 Wis. 222; 33 Am. St. Rep. 32; 52 N. W. 88; *Bird v. Kleiner*, 41 Wis. 134; *Cotzhausen v. Simon*, 47 Wis. 103; 1 N. W. 473; *Middleton v. Jerdee*, 73 Wis. 39; 40 N. W. 629; *Montreal River Lumber*

Co. v. Mihills, 80 Wis. 540; 50 N. W. 507; *Beetle v. Anderson*, 98 Wis. 5; 73 N. W. 560. "It is immaterial whether the defendant made the representation wilfully or intentionally or not for he had no right to make even a mistake in facts so material to the contract, except under a penalty of responding in damages." *Cotzhausen v. Simon*, 47 Wis. 103, 106; 1 N. W. 473; quoted in *Gunther v. Ullrich*, 82 Wis. 222; 33 Am. St. Rep. 32; 52 N. W. 88.

³ *Cameron v. Mount*, 86 Wis. 477; 22 L. R. A. 512; 56 N. W. 1094.

⁴ *Gunther v. Ullrich*, 82 Wis. 222; 33 Am. St. Rep. 32; 52 N. W. 88.

⁵ *Davis v. Nuzum*, 72 Wis. 439; 1 L. R. A. 774; 40 N. W. 497.

⁶ In some cases which may seem to follow this rule there was either a knowledge of the false statement, or a statement made in reckless ignorance of its truth or falsity or a warranty.

⁷ *Totten v. Burhans*, 91 Mich. 495; 51 N. W. 1119.

⁸ *Gerner v. Mosher*, 58 Neb. 135; 46 L. R. A. 244; 78 N. W. 384.

⁹ See § 107.

though they might not allow an original action in tort thereon.¹⁰ Further, if the contract has been assigned by the party who has made the misrepresentations, the adversary party may perform and sue for damages.¹¹ It has been suggested that the true rule is that an innocent misrepresentation gives rise to no liability except when made by one party to the contract, and when it is a means of inducing the adversary party to enter into such contract.¹² This distinction is plausible, and, in part, true. On principle, there should be a difference between these two classes of cases. But the States which recognize a liability at law due to misrepresentation recognize, in some cases at least, a liability of a third person for misrepresentations.¹³

§149. Informal rescission at law.

The original common law rule was that an innocent misrepresentation was no ground for repudiating liability on an executory contract nor for informally rescinding a contract during performance or after performance.¹ Thus an executed sale cannot be avoided by the vendor and the goods recovered for an innocent misrepresentation by the vendee as to his solvency;²

¹⁰ *Leavitt v. Sizer*, 35 Neb. 80; 52 N. W. 832 (citing, *Smith v. Richards*, 13 Pet. (U. S.) 26; *Phillips v. Jones*, 12 Neb. 215; 41 Am. Rep. 763; 10 N. W. 708; *Trumbull v. Golden*, 2 Strobb. Eq. (S. Car.) 14); *Mulvey v. King*, 39 O. S. 491.

¹¹ *Haubert v. Mausshardt*, 89 Cal. 433; 26 Pac. 899; (a case of misrepresentation as to the contents of a written instrument).

¹² *Nash v. Trust Co.*, 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40 N. E. 1039.

¹³ *Gerner v. Mosher*, 58 Neb. 135; 46 L. R. A. 244; 78 N. W. 384.

¹ *In re Roalswick*, 110 Fed. 639; (opinion of solvency); *Johnston v. Bent*, 93 Ala. 160; 9 So. 581; (as to opinion of solvency); *Jones v. Foster*, 175 Ill. 459; 51 N. E. 862; *Scroggin v. Wood*, 87 Ia. 497; 54

N. W. 437; *Gill v. Anglo-American Association* (Ky.); 52 S. W. 929; *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508; 61 Am. Dec. 195; *Brooks v. Cannon*, 2 A. K. Mar. (Ky.) 525; *Standard Horseshoe Co. v. O'Brien*, 91 Md. 751; 46 Atl. 346; *Spitze v. R. R.*, 75 Md. 162; 32 Am. St. Rep. 378; 23 Atl. 307; *Pike v. Fay*, 101 Mass. 134; *Byard v. Holmes*, 34 N. J. L. 296; *Daly v. Wise*, 132 N. Y. 306; 16 L. R. A. 236; 30 N. E. 837; *Stitt v. Little*, 63 N. Y. 427; *Wessels v. Weiss*, 156 Pa. St. 591; 27 Atl. 535; *Sankey v. Bank*, 78 Pa. St. 48.

² *South Branch Lumber Co. v. Ott*, 142 U. S. 622; *In re Roalswick*, 110 Fed. 639; *Johnston v. Bent*, 93 Ala. 160; 9 So. 581; *Wessels v. Weiss*, 156 Pa. St. 591; 27 Atl. 535.

nor can the vendee avoid the sale and resist payment of the price for innocent misrepresentations by the vendor.³ Nor can an employee, after receiving injury in an accident, avoid a contract whereby he accepts compensation from a beneficial order of fellow employees and releases the railroad company, on the ground that the railroad company had misrepresented the amount which it had contributed towards the expenses of such society.⁴

§150. Special types of contract.—Insurance.

Even where the rule that innocent misrepresentation does not avoid a contract was most rigidly adhered to at common law, there were two great classes of exceptions thereto: one class of contracts being an exception to this rule on account of the peculiar nature of the subject-matter; the other being an exception on account of the peculiar relations between the parties thereto. Of the first class of contracts, insurance was the most conspicuous example. It was said to be a contract *uberrimæ fidei*—of superabundant good faith—and one which would be avoided by a material misrepresentation even if innocent. This rule originally applied to marine insurance,¹ but it seems now to be applicable to insurance of all kinds,² such as guaranty

³ Taylor v. Ford, 131 Cal. 440; 63 Pac. 770; Scroggin v. Wood, 87 Ia. 497; 54 N. W. 437; Stone v. Robie, 66 Vt. 245; 29 Atl. 257.

⁴ Spitze v. R. R., 75 Md. 162; 32 Am. St. Rep. 378; 23 Atl. 307.

¹ Ionides v. Pender, L. R., 9 Q. B. 531.

² Seaton v. Heath (1899), 1 Q. B. 782; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Capital City Ins. Co. v. Autrey, 105 Ala. 269; 53 Am. St. Rep. 121; 17 So. 326; Security Trust Co. v. Tarpey, 182 Ill. 52; 54 N. E. 1041; affirming 80 Ill. App. 378; Glade v. Ins. Co., 56 Ia. 400; 9 N. W. 320; Gould v. Ins. Co., 47 Me.

403; 74 Am. Dec. 494; Hartford Ins. Co. v. Keating, 86 Md. 130; 63 Am. St. Rep. 499; 38 Atl. 29; Dolan v. Life Association, 173 Mass. 197; 53 N. E. 398; Ring v. Assurance Co., 145 Mass. 426; 14 N. E. 525; Campbell v. Ins. Co., 98 Mass. 381; Hayward v. Ins. Co., 10 Cush. (Mass.) 444; Malicki v. Life Society, 119 Mich. 151; 77 N. W. 690; Seal v. Ins. Co., 59 Neb. 253; 80 N. W. 807; Armour v. Ins. Co., 90 N. Y. 450; Byers v. Ins. Co., 35 O. S. 606; Supreme Lodge v. Dickson, 102 Tenn. 255; 52 S. W. 862; Ryan v. Ins. Co., 46 Wis. 671; 1 N. W. 426.

insurance,³ fire insurance,⁴ and life insurance.⁵

The common law rule concerning insurance contracts is modified in many jurisdictions by statutes which provide that representations must be wilfully false and fraudulently made to avoid the policy issued thereon.⁶ Under such statutes an innocent misrepresentation does not avoid a policy of insurance issued thereon.⁷ Other statutes provide that the representation will avoid the contract if fraudulent *or* material.⁸ A statute of the latter type does not probably change the common-law rule as to misrepresentations.⁹ Such provisions, however, do not apply to actual fraud¹⁰ or to conditions precedent.¹¹

§151. Suretyship.

There is a conflict of authority as to whether an innocent misrepresentation by the obligee to a surety avoids a contract of suretyship. Thus an innocent misrepresentation of the assets

³ *Seaton v. Heath* (1899), 1 Q. B. 782; *Carrollton, etc., Co. v. Indemnity Co.*, 115 Fed. 77; 52 C. C. A. 671.

⁴ *Capital City Ins. Co. v. Autrey*, 105 Ala. 269; 53 Am. St. Rep. 121; 17 So. 326; *Planters', etc., Ins. Co. v. Loyd*, 67 Ark. 584; 77 Am. St. Rep. 136; 56 S. W. 44; *Hartford Ins. Co. v. Keating*, 86 Md. 130; 63 Am. St. Rep. 499; 38 Atl. 29.

⁵ *Triple Link, etc., Association v. Williams*, 121 Ala. 138; 77 Am. St. Rep. 34; 26 So. 19; *Security Trust Co. v. Tarpey*, 182 Ill. 52; 54 N. E. 1041; affirming 80 Ill. App. 378; *Dolan v. Life Association*, 173 Mass. 197; 53 N. E. 398; *Malicki v. Life Society*, 119 Mich. 151; 77 N. W. 690; *Supreme Lodge v. Dickson*, 102 Tenn. 255; 52 S. W. 862.

⁶ No attempt can be made to state and analyze the statutes of the different states which express the same general purpose in different forms. See also § 61.

⁷ *John Hancock, etc., Ins. Co. v.*

Warren, 181 U. S. 73; *Fidelity, etc., Association v. Jeffords*, 107 Fed. 402; 53 L. R. A. 193; *Welch v. Ins. Co.*, 117 Ia. 394; 90 N. W. 828.

⁸ *Durkee v. Ins. Co.*, 159 Mass. 514; 34 N. E. 1133; *Ring v. Assurance Co.*, 145 Mass. 426; 14 N. E. 525; *Keatley v. Ins. Co.*, 187 Pa. St. 197; 40 Atl. 808; *March v. Ins. Co.*, 186 Pa. St. 629; 65 Am. St. Rep. 887; 40 Atl. 1100; *Hermany v. Life Association*, 151 Pa. St. 17; 24 Atl. 1064; *Northwestern Life Association v. Findley*, 29 Tex. Civ. App. 494; 68 S. W. 695.

⁹ "As to mere representations the statute may well be held to be only declaratory, but as to warranties it made a new rule." *White v. Provident, etc., Assurance Society*, 163 Mass. 108, 115; 27 L. R. A. 398; 39 N. E. 771.

¹⁰ *March v. Ins. Co.*, 186 Pa. St. 629; 65 Am. St. Rep. 887; 40 Atl. 1100.

¹¹ *Metropolitan Life Ins. Co. v. Howle*, 62 O. S. 204; 56 N. E. 908.

of a bank, whereby subsequent sureties of a bank-officer are led to believe that no shortage in accounts exists, has been held in some jurisdictions to avoid such contract of suretyship,¹ and in others not to so avoid it.² If the surety knows the facts he cannot avoid his liability.³

§152. The rule in equity.

In equity the weight of authority is that rescission may be allowed to one who is induced to enter into a contract by misrepresentation of a material fact.¹ Thus *bona fide* material

¹ Graves v. Bank, 10 Bush. (Ky.) 23; 19 Am. Rep. 50.

² Lieberman v. Bank, 2 Penn. (Del.) 416; 48 L. R. A. 514; 45 Atl. 901. (Partly on the ground that the report in which such misrepresentation existed was meant for the depositors only.) Savings Bank v. Albee, 63 N. H. 152; 56 Am. Rep. 501.

³ First National Bank v. Mattingly, 92 Ky. 650; 18 S. W. 940.

¹ Wauton v. Coppard (1899), 1 Ch. 92; Turner v. Ward, 154 U. S. 618; Wilcox v. Ry. 111 Fed. 435; Georgia Home Ins. Co. v. Warton, 113 Ala. 479; 59 Am. St. Rep. 129; 22 So. 288; Wainscott v. Loan Association, 98 Cal. 253; 33 Pac. 88; Pursell v. Teller, 10 Colo. App. 488; 51 Pac. 436; Newman v. Claflin Co., 107 Ga. 89; 32 S. E. 943; Borders v. Kattleman, 142 Ill. 96; 31 N. E. 19; Mitchell v. McDougall, 62 Ill. 498; Reed v. Pinney, 35 Ill. App. 610; McCormick v. Malin, 5 Blackf. (Ind.) 509; Weis v. Grove, — Ia. —; 99 N. W. 191; Hunter v. Safety Cure Co., 96 Ia. 573; 65 N. W. 828; Titus v. Ins. Co., 97 Ky. 567; 53 Am. St. Rep. 426; 31 S. W. 127; Prewitt v. Trimble, 92 Ky. 176; 36 Am. St. Rep. 586; 17 S. W. 356; Calhoun v. Teal, 106 La. 47; 30 So. 288; Jordan v. Stevens, 51 Me. 78; 81 Am. Dec. 556; Keene v. Demelman, 172

Mass. 17; 51 N. E. 188; Roberts v. French, 153 Mass. 60; 25 Am. St. Rep. 611; 10 L. R. A. 656; 26 N. E. 416; Spurr v. Benedict, 99 Mass. 463; Crips v. Towsley, 73 Mich. 395; 41 N. W. 332; Beland v. Brewing Association, 157 Mo. 593; 58 S. W. 1; Newton v. Tolles, 66 N. H. 136; 49 Am. St. Rep. 593; 9 L. R. A. 50; 19 Atl. 1092; Eibel v. Von Fell, 55 N. J. Eq. 670; 38 Atl. 201; Berry v. Ins. Co., 132 N. Y. 49; 28 Am. St. Rep. 548; 30 N. E. 254; Irwin v. Wilson, 45 O. S. 426; 15 N. E. 209; Manley v. Carl, 20 Ohio C. C. 161; Braunschweiger v. Waits, 179 Pa. St. 47; 36 Atl. 155; Wilson v. Ott, 173 Pa. St. 253; 51 Am. St. Rep. 767; 34 Atl. 23; Sutton v. Morgan, 158 Pa. St. 204; 38 Am. St. Rep. 84; 27 Atl. 894; Fleming v. Ogden, 152 Pa. St. 419; 25 Atl. 639; Trigg v. Read, 5 Humph. (Tenn.) 529; 42 Am. Dec. 447; Culbertson v. Blanchard, 79 Tex. 486; 15 S. W. 700; Henderson v. R. R., 17 Tex. 560; 67 Am. Dec. 675; Carter v. Cole, (Tex. Civ. App.); 42 S. W. 369; Moore v. Cross (Tex. Civ. App.); 26 S. W. 122; Adams v. Reed, 11 Utah 480; 40 Pac. 720; Grosh v. Improvement Co., 95 Va. 161; 87 S. E. 841; Wilson v. Carpenter, 91 Va. 183; 50 Am. St.

misrepresentations as to the value of collateral security for a note,² or as to the quality,³ or the location of a tract of land,⁴ or facts concerning the oil underlying the land conveyed,⁵ or the condition of property conveyed,⁶ or as to the area of a tract,⁷ as to the covenants in prior deeds affecting the use of the realty to be sold,⁸ or that if the wife of a partner joins in an assignment for the benefit of creditors, made by the firm, it will prevent insolvency,⁹ or as to the amount of the shortage of a defaulting agent, which amount another is going to advance to save him

Rep. 824; 21 S. E. 243; Herron v. Dibrell, 87 Va. 289; 12 S. E. 674; Rorer Iron Co. v. Trout, 83 Va. 397; 5 Am. St. Rep. 285; 2 S. E. 713; Linhart v. Foreman, 77 Va. 540; Bluestone Coal Co. v. Bell, 38 W. Va. 297; 18 S. E. 493; Beetle v. Anderson, 98 Wis. 5; 73 N. W. 560; Porter v. Beattie, 88 Wis. 22; 59 N. W. 499; Miner v. Medbury, 6 Wis. 295.

² Borders v. Kattleman, 142 Ill. 96; 31 N. E. 19.

³ Mitchell v. McDougall, 62 Ill. 498; May v. Snyder, 22 Ia. 525; Irwin v. Wilson, 45 O. S. 426; 15 N. E. 209; Porter v. Beattie, 88 Wis. 22; 59 N. W. 499.

⁴ Spurr v. Benedict, 99 Mass. 463; Irwin v. Wilson, 45 O. S. 426; 15 N. E. 209; Culbertson v. Blanchard, 79 Tex. 486; 15 S. W. 700; McKinnon v. Vollmar, 75 Wis. 82; 17 Am. St. Rep. 178; 6 L. R. A. 121; 43 N. W. 800.

⁵ Braunschweiler v. Waits, 179 Pa. St. 47; 36 Atl. 155.

⁶ Manley v. Carl, 20 Ohio C. C. 161; Miner v. Medbury, 6 Wis. 295.

⁷ Calhoun v. Teal, 106 La. 47; 30 So. 288; Keene v. Demelman, 172 Mass. 17; 51 N. E. 188; Newton v. Tolles, 66 N. H. 136; 49 Am. St. Rep. 593; 9 L. R. A. 50; 19 Atl.

1092. A was negotiating with B for the purchase of two lots owned by B. A examined the assessor's books and found the two lots listed and an area in the column therefor. Thinking that this was the area of one lot, he doubled it and represented to B that that product was the area of the two lots, and had it inserted in the contract. The area on the assessor's books was the area of both lots. The court said: "A court of equity has the power to permit a party to rescind a contract entered into in the manner above set forth on the ground of mistake if the other party will not accept performance of the contract omitting the particular stipulation inserted through mistake." Keene v. Demelman, 172 Mass. 17, 23; 51 N. E. 188 (citing, Rackemann v. Improvement Co., 167 Mass. 1; 57 Am. St. Rep. 427; 44 N. E. 990; Schramm v. Refining Co., 146 Mass. 211; 15 N. E. 571; Spurr v. Benedict, 99 Mass. 463; Noble v. Googins, 99 Mass. 231). The ground on which relief is placed, it will be noted, is mistake.

⁸ Wauton v. Coppard (1899), 1 Ch. 92.

⁹ Fleming v. Ogden, 152 Pa. St. 419; 25 Atl. 639.

from losing his position,¹⁰ or as to the amount due on a bond,¹¹ or as to the amount of debts owing by the vendee who seeks credit,¹² or as to the amount already secured for investment in industrial enterprises in the town in which the land is sold,¹³ are each ground for rescission in equity. So misrepresentation as to the location and quality of land sold¹⁴ is ground for refusing specific performance.

§153. Effect of equity on the common law rule.

The combined effect of the equity rule allowing rescission for a material misrepresentation, and the authority of the common-law courts which treat misrepresentation as fraud, is gradually establishing the doctrine at common law that a misrepresentation of a material fact is ground for an informal rescission at law.¹ Thus an innocent misrepresentation as to the amount of timber on realty conveyed,² or as to the extent of physical injuries,³ or that certain barrels leaked even when properly glued inside,⁴ or as to the existence of insurance on certain property,⁵ or as to the amount⁶ or quality⁷ of articles sold by vendor; or as to the financial condition of a buyer,

¹⁰ *Burke v. Ry. Co.*, 83 Wis. 410; 53 N. W. 692.

¹¹ *Beland v. Brewing Association*, 157 Mo. 593; 58 S. W. 1.

¹² *Ernst v. Cohn* (Tenn. Ch. App.); 62 S. W. 186.

¹³ *Wilson v. Carpenter*, 91 Va. 183; 50 Am. St. Rep. 824; 21 S. E. 243.

¹⁴ *Brown v. Smith* (Ia.); 89 N. W. 1697.

¹ *Woodruff v. Saul*, 70 Ga. 271; *Ruff v. Jarrett*, 94 Ill. 475; *Thorne v. Prentiss*, 83 Ill. 99; *Ellefritz v. Taylor*, 84 Ill. App. 396; *Blue v. Smith*, 46 Ill. App. 166; *Mooney v. Davis*, 75 Mich. 188; 13 Am. St. Rep. 425; 42 N. W. 802; *Hitchcock v. Irrigation Co.* (Neb.); 95 N. W. 638; *Johnson v. Gulick*, 46 Neb. 17; 50 Am. St. Rep. 629;

65 N. W. 883; *Byers v. Chapin*, 28 O. S. 300; *Gallipolis Furniture Co. v. Symmes*, 19 Ohio C. C. 659; 10 Ohio C. D. 514; *Krause v. Busacker*, 105 Wis. 350; 81 N. W. 406; *Montreal River Lumber Co. v. Mihills*, 80 Wis. 540; 50 N. W. 507.

² *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178; 6 L. R. A. 121; 43 N. W. 800; (coupled with a mistake as to the identity of the land).

³ *Wilcox v. Ry.*, 111 Fed. 435; *Houston, etc., Ry. v. Brown* (Tex. Civ. App.); 69 S. W. 651.

⁴ *Byers v. Chapin*, 28 O. S. 300.

⁵ *Wilson v. Ins. Co.*, 5 Fed. 674.

⁶ *Ruff v. Jarrett*, 94 Ill. 475.

⁷ *Thorne v. Prentiss*, 83 Ill. 99; (sale of hams); *Ellefritz v. Taylor*, 84 Ill. App. 396; (sale of a horse).

thereby causing the vendor to extend credit,⁸ or as to the financial condition of a debtor, thereby obtaining an advantageous settlement of his debts,⁹ are each sufficient to enable the party misled thereby to avoid the contract which he is thus induced to make. In many of these cases the reasoning of the court is based on the theory of misrepresentation.¹⁰ "At common law the misrepresentation of a material fact made by one of the parties to a contract, though made by mistake and innocently, if acted on by the opposite party constitutes legal fraud."¹¹ It is said that in order to avoid a contract induced by false representations "it is not necessary to aver or prove that the party making them at the time knew they were untrue."¹² The right to rescind is, however, often placed on other grounds than mere misrepresentation, such as warranty¹³ or mistake,¹⁴ or on the ground that the vendor is bound to know the truth of statements made by him concerning the property sold.¹⁵ This doctrine is the point at which, under the treatment of many courts, fraud and misrepresentation merge into an indistinguishable whole. The difficulty of making the distinction is increased by the inclination of the courts to refer to misrepresentation as "legal fraud."¹⁶ Other courts tend to class such a misrepresentation as "constructive fraud."¹⁷ Indeed, if the false statement is sufficient to avoid the contract, it makes no difference in the specific case as far as the validity of the contract is concerned whether it is a case of misrepresentation or of fraud.

⁸ *Mooney v. Davis*, 75 Mich. 188; 13 Am. St. Rep. 425; 42 N. W. 802.

⁹ *Woodruff v. Saul*, 70 Ga. 271.

¹⁰ *Mooney v. Davis*, 75 Mich. 188; 13 Am. St. Rep. 425; 42 N. W. 802.

¹¹ *Woodruff v. Saul*, 70 Ga. 271.

¹² *Johnson v. Gulick*, 46 Neb. 817; 50 Am. St. Rep. 629; 65 N. W. 883.

¹³ *Byers v. Chapin*, 28 O. S. 300.

¹⁴ *Wilson v. Ins. Co.*, 5 Fed. 674; *Gunley v. Sluter*, 44 Md. 237.

¹⁵ *Ruff v. Jarrett*, 94 Ill. 475; *Thorne v. Prentiss*, 83 Ill. 99. "The seller is bound to know that the representations which he makes to induce the sale of his property are

true." *Beetle v. Anderson*, 98 Wis. 5, 10; 73 N. W. 560.

¹⁶ *Woodruff v. Saul*, 70 Ga. 271; *Henderson v. R. R.*, 17 Tex. 560; 67 Am. Dec. 675.

¹⁷ *Haggarth v. Weaving*, L. R. 12 Eq. 320; *Lampman v. Lampman*, 118 Ia. 140; 91 N. W. 1042; *Miner v. Medbury*, 6 Wis. 295. Thus in speaking of a representation of foreign law made to one in a fiduciary capacity the court said: "Even if made in good faith, the defendant cannot take advantage of the mistake thus induced by his own representations without being chargeable

§154. Ratification and waiver.

If the person to whom a misrepresentation as to a collateral fact is made subsequently learns the truth and with full knowledge of the facts elects not to rescind, he thereby waives his right to rescind and elects to ratify the contract.¹ Such election may be made by voluntary performance with full knowledge of the facts,² or by acquiescence for an unreasonable time, especially if third persons are thereby induced to alter their position to their disadvantage.³ Possession of a written contract has been held equivalent to knowledge of its terms even though it was not read.⁴ While such waiver prevents rescission,⁵ and prevents the party performing from recovering on a *quantum meruit*, ignoring the terms of the contract,⁶ it does not prevent recovery for failure of consideration.⁷

with constructive fraud." *Schneider v. Schneider*, — Ia. —; 98 N. W. 159.

¹ *Wilson v. Riddick*, 100 Ia. 697; 69 N. W. 1039; *American, etc., Co. v. Crawford* (Ky.); 40 S. W. 672; *Saratoga, etc., Ry. v. Row*, 24 Wend. (N. Y.) 74; 35 Am. Dec. 598; *Susquehanna, etc., Ins. Co. v. Oberholtzer*, 172 Pa. St. 223; 32 Atl. 1105.

² *Wilson v. Riddick*, 100 Ia. 697; 69 N. W. 1039; *Saratoga, etc., Ry. v. Row*, 24 Wend. (N. Y.) 74; 35 Am. Dec. 598.

³ *Susquehanna, etc., Ins. Co. v. Oberholtzer*, 172 Pa. St. 223; 32 Atl. 1105. (Where A was induced

by misrepresentation to enter a mutual fire insurance company, and waived his right to rescind by remaining a member for over a year without making objection, during which time new members came in.)

⁴ *Susquehanna, etc., Ins. Co. v. Oberholtzer*, 172 Pa. St. 223; 32 Atl. 1105.

⁵ *Wilson v. Riddick*, 100 Ia. 697; 69 N. W. 1039; *American, etc., Co. v. Crawford* (Ky.); 40 S. W. 672.

⁶ *Saratoga, etc., Ry. v. Row*, 24 Wend. (N. Y.) 74; 35 Am. Dec. 598.

⁷ *American, etc., Co. v. Crawford*, (Ky.); 40 S. W. 672.

CHAPTER VIII.

MISTAKE IN THE INDUCEMENT.

§155. Mistake in the inducement not operative.

Mistake in the inducement exists, as we have seen,¹ when one party enters into a contract with full knowledge of the existence and identity of the essential elements thereof, namely, the adversary party, the subject-matter, the consideration, and the terms; but his willingness to enter into such contract is caused by his erroneous belief as to a collateral but material fact without which he would not have entered into such contract; and such erroneous belief is not due to any statement made by the adversary party. If the fact in question is immaterial the mistake is clearly inoperative since even fraud is inoperative if the statement concerns an immaterial matter.² If on the other hand, the erroneous belief is due to some statement made by the adversary party we have a case either of fraud³ or of misrepresentation.⁴ Mistake in the inducement is therefore limited as indicated. Now it is evident that very few contracts have ever been entered into where each party was fully advised of all the facts which were material, and which affected his willingness to enter into the contract. Whatever may be thought of the propriety from a moral standpoint of holding a person to a contract into which he entered under a mistake as to a collateral material fact, the law is confronted with the necessity of adopting a rule which will make it possible to enforce contracts at all. Accordingly the rule adopted by the great weight of authority is that mere mistake in the inducement is not operative and that a contract induced by reason thereof is perfectly enforceable and valid. A mistake of this sort is "an error for which the law

¹ See §§ 58, 60.

² See § 106.

³ See Chapter VI.

⁴ See Chapter VII.

furnishes no relief.”⁵ The rule is the same in equity.⁶ This distinction between the effect of mistake as to an essential element of a contract and mistake in the inducement has been sharply emphasized.⁷ In a leading English case it was held that a sale of oats by sample is valid though they are new oats and the vendee believes that he is buying old oats.⁸ So the pur-

⁵ *Citizen's Bank v. James*, 26 La. Ann. 264. To the same effect see *Cleaveland v. Richardson*, 132 U. S. 318; *Dewey v. Whitney*, 93 Fed. 533; 35 C. C. A. 414; affirming 85 Fed. 325; *Grannis v. Quintard*, 69 Fed. 206; *Barker v. Ry.*, 65 Fed. 460; *Hamblin v. Bishop*, 41 Fed. 74; *Schurtz v. Romer*, 82 Cal. 474; 23 Pac. 118; *Williams v. Electric Co.*, 160 Ill. 526; 43 N. E. 595; *McDonald v. Minnick*, 147 Ill. 651; 35 N. E. 367; *Post v. Bank*, 38 Ill. App. 259; *City Ry. Co. v. Ry. Co. (Ind.)*; 52 N. E. 157; *Smith v. Tewalt*, 9 Ind. App. 646; 37 N. E. 294; *German Savings Bank v. Geneser*, 116 Ia. 119; 89 N. W. 201; *Kiburz v. Jacobs*, 104 Ia. 580; 73 N. W. 1069; *Bigelow v. Wilson*, 99 Ia. 456; 68 N. W. 798; *Wood v. Stedwell*, 91 Ia. 224; 59 N. W. 28; *Hecht v. Batcheller*, 147 Mass. 335; 9 Am. St. Rep. 708; 17 N. E. 651; *Bridgewater Iron Co. v. Ins. Co.*, 134 Mass. 433; *Miller v. Brooks*, 109 Mich. 174; 66 N. W. 1092; *Haeg v. Haeg*, 53 Minn. 33; 55 N. W. 1114; *Grinnell v. Wisconsin, etc., Co.*, 47 Minn. 569; 50 N. W. 891; *Schields v. Hickey*, 26 Mo. App. 194; *Brong v. Spence*, 56 Neb. 638; 77 N. W. 54; *Moore v. Scott*, 47 Neb. 346; 66 N. W. 441; *Stettheimer v. Killip*, 75 N. Y. 282; *White v. Ry.*, 110 N. C. 456; 15 S. E. 197; *Goldsmith v. Cincinnati*, 14 Ohio C. C. 342; *Seeley v. Traction Co.*, 179 Pa. St. 334; 36 Atl. 229; *Gormly v. Gormly*, 130 Pa. St. 467; 18 Atl. 727; *Pickett v. Fidelity & Casualty Co.*, 60 S. C. 477; 38 S. E.

160, 629; *Ruohs v. Bank*, 94 Tenn. 57; 28 S. W. 303; *Gholson v. Finney* (Tenn. Ch. App.); 46 S. W. 345; *Houston, etc., Ry. v. McCarty*, 94 Tex. 298; 53 L. R. A. 507; 60 S. W. 429; reversing 21 Tex. Civ. App. 568; 54 S. W. 421; *Coughran v. Alderete* (Tex. Civ. App.); 26 S. W. 109; *Adams v. Pardue* (Tex. Civ. App.); 36 S. W. 1015; *Kowalke v. Light Co.*, 103 Wis. 472; 74 Am. St. Rep. 877; 79 N. W. 762; *Wood v. Boynton*, 64 Wis. 265; 54 Am. Rep. 610; 25 N. W. 42.

⁶ “A mere erroneous impression in regard to a collateral matter affecting the value of the land is not a mistake justifying the interposition of a court of equity.” *Moore v. Scott*, 47 Neb. 346 (353); 66 N. W. 441.

⁷ “In a case where there is a mutual mistake of the parties as to the subject-matter of the contract or the price or terms going to show the want of a *consensus ad idem*, without which no contract can arise, such a defense can be made. But here the mistake of the defendants was in relation to a fact wholly collateral and not affecting the essence of the contract itself. The vendees cannot escape from the obligation of their contract because they have been mistaken or disappointed in the quality of the article purchased.” *Wheat v. Cross*, 31 Md. 99, 104; 1 Am. Rep. 28.

⁸ *Smith v. Hughes*, L. R. 6 Q B 597.

chase of realty under a mistake as to the quality of the land,⁹ or its value,¹⁰ the purchase of a horse under a mistake of fact as to its condition,¹¹ the purchase of an interest in a partnership under mistake as to its value,¹² a contract for the settlement of an estate, made under mistake as to the value of bank stock accepted by one of the parties as his share,¹³ the purchase of a machine under the mistaken belief that it was fit for a specific purpose,¹⁴ the purchase of a note under mistake as to the solvency of the maker, whether after¹⁵ or before¹⁶ such maker has made an assignment; the purchase of municipal bonds under a mistake as to their validity,¹⁷ and the purchase of government bonds under mistake as to the amount of premium due thereon,¹⁸ are all examples of contracts entered into under mistake of fact in the inducement, which are valid and binding. So where a party makes a mistaken estimate of the value of property,¹⁹ or where A sold B a note which both parties thought was secured by a first trust-deed, though in fact a prior trust-deed had been overlooked in searching the record,²⁰ such contracts cannot be avoided on the ground of mistake. One of the most extreme cases under this subject is *Wood v. Boynton*.²¹ In this case A sold a stone to B, both believing that it was probably a topaz, and both knowing that they did not know exactly what it was. The

⁹ *Citizens' Bank v. James*, 26 La. Ann. 264; *Moore v. Scott*, 47 Neb. 346; 66 N. W. 441; *Crist v. Dice*, 18 O. S. 536.

¹⁰ *Hunter v. Goundy*, 1 Ohio 449.

¹¹ *Wheat v. Cross*, 31 Md. 99; 1 Am. Rep. 28.

¹² *Schurtz v. Romer*, 82 Cal. 474; 23 Pac. 118; *Stettheimer v. Killip*, 75 N. Y. 282. (A case where the bookkeeper in making a statement of the assets of the firm included the balances of the individual partners on deposit as a part of the firm's assets, making a difference of some thirty-five thousand dollars. Before the sale was made, however, the accuracy of this statement was challenged, and the partners selling

out refused to deal except on that basis.)

¹³ *Smith v. Tewalt*, 9 Ind. App. 646; 37 N. E. 294.

¹⁴ *Chanter v. Hopkins*, 4 M. & W. 399.

¹⁵ *Hecht v. Batcheller*, 147 Mass. 335; 9 Am. St. Rep. 708; 17 N. E. 651.

¹⁶ *Day v. Kinney*, 131 Mass. 37.

¹⁷ *Ruohs v. Bank*, 94 Tenn. 57; 28 S. W. 303.

¹⁸ *Sankey v. Bank*, 78 Pa. St. 48.

¹⁹ *Adams v. Pardue* (Tex. Civ. App.); 36 S. W. 1015.

²⁰ *Sample v. Bridgforth*, 72 Miss. 293; 16 So. 876.

²¹ 64 Wis. 265; 54 Am. Rep. 610; 25 N. W. 42.

price was one dollar. It subsequently turned out that the stone was a rough diamond worth about seven hundred dollars. A on learning of these facts tendered one dollar and interest to B and demanded the stone. On B's refusal to deliver it, A sued him to recover the stone. It was held that A could not recover at law, the court declining to express an opinion as to whether A could obtain relief in a suit in equity. While this is an extreme case, since the actual value was so greatly in excess of the belief of the parties, the decision is undoubtedly correct. If the stone had proved to be worthless B could not have recovered the dollar paid by him. So where A enters into a contract with B by reason of mistake as to other collateral facts he cannot avoid liability on the contract; as where A is mistaken as to the terms of a contract made with X and because of that contracts with B,²² or A employs B as a trainer under mistake as to the speed qualities of A's horse,²³ or A makes a conveyance to B, thinking that the notes and mortgage received by her in payment would not be subject to taxation,²⁴ or A buys the interest of the heirs in an estate, not knowing that some of it has been devised by will to others,²⁵ or A is advised by counsel that a certain claim is a lien,²⁶ or A makes a mistake in estimating the amount of work done.²⁷ So a subscription cannot be rescinded because the purchaser thought she was buying stock in an existing corporation instead of organizing a new corporation,²⁸ and a purchaser of warrants cannot have rescission because seller and purchaser both believe that the bonds issued to take up the warrants will be four per cent. and in fact they are three and one-half per cent.²⁹ So where A is injured in an accident, and settles therefor with the company he cannot avoid the settlement if his in-

²² Brong v. Spence, 56 Neb. 638; 77 N. W. 54.

²³ Kiburz v. Jacobs, 104 Ia. 580; 73 N. W. 1069.

²⁴ Wood v. Stedwell, 91 Ia. 224; 59 N. W. 28.

²⁵ Gholson v. Finney (Tenn. Ch. App.); 46 S. W. 345.

²⁶ Miller v. Brooks, 109 Mich. 174; 66 N. W. 1092.

²⁷ Goldsmith v. Cincinnati, 14 Ohio C. C. 342. (A third person in reliance on A's promise to pay had released liens.)

²⁸ Williams v. Electric Co., 160 Ill. 526; 43 N. E. 595.

²⁹ Grannis v. Quintard, 69 Fed. 206.

juries prove more severe than he had thought.³⁰ Conversely, if a car of fruit is damaged, and the carrier settles therefor, thinking that the car was injured in an accident, he cannot avoid the settlement on discovering that the car was only delayed thereby, and damaged by such delay.³¹ So where A offers to buy land from B, and B disclaims knowledge thereof but tells B what he has heard about the quality and location of the land, neither A nor B having seen it, and B buys it thinking such statement correct, he cannot avoid the sale on learning that it is incorrect.³² Where A published advertising for B, and as payment therefor was to receive a specified credit if he bought a launch from B, and seven years after, A assigned his claim to C, who concealed from B the fact that he was A's brother, and bought a launch from B at a low figure, and then offered this credit in part payment, it was held that B could not avoid the sale to C because he did not know that C held this credit.³³

§156. Contrary view.

There is some authority for holding, contrary to the weight of authority, that mistake in the inducement is operative in some extreme cases.¹ Thus, A sold to B, for eighty dollars, a cow which both thought was barren. If barren the cow was worth eighty dollars; if a breeder, seven hundred and fifty dollars to a thousand dollars. After the contract was made, it was discovered that the cow was with calf. A refused to perform, and B brought suit. It was held that "the mistake was not of the mere quality of the animal, but went to the very nature of the thing."² It needs only the foregoing quotation to show that

³⁰ *Houston, etc., Ry. v. McCarty*, 94 Tex. 298; 53 L. R. A. 507; 60 S. W. 429; reversing 221 Tex. Civ. App. 568; 54 S. W. 421; *Kowalke v. Light Co.*, 103 Wis. 472; 74 Am. St. Rep. 877; 79 N. W. 762.

³¹ *Grinnell v. Wisconsin, etc., Co.*, 47 Minn. 569; 50 N. W. 891.

³² *Moore v. Scott*, 47 Neb. 346; 66 N. W. 441; *Crist v. Dice*, 18 O. S. 536.

³³ *Hand v. Power Co.*, 167 N. Y. 142; 60 N. E. 425. (Decided by a divided court.)

¹ *Bogardus v. Grace*, 78 Fed. 856; *Wilson v. Ins. Co.*, 5 Fed. 674; *Montgomery County v. Emigrant Co.*, 47 Ia. 91; *Nabours v. Cocke*, 24 Miss. 44; *Ketchum v. Catlin*, 21 Vt. 191; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297; 18 S. E. 493.

² *Sherwood v. Walker*, 66 Mich.

the court decided the case on an erroneous theory as to the character of the mistake, from which followed the wrong conclusion as to its effect on the contract. While this case is an extreme one, it is hard to justify it on any theory that does not impair the validity of practically all contracts. Thus where A and B both thought that there was a vein of coal on A's land which could be worked profitably, and A leased the coal and timber privileges to B, at a royalty of ten cents a ton for coal and fifty cents a thousand feet for timber, and it turned out that no coal existed on such land suitable for working, it was held that A could have rescission.³ So a lease under the mistaken belief that an oil well existed on the land,⁴ or that there is a certain amount of timber thereon,⁵ is invalid. So where a county agreed to convey all its claims to swamp lands for a certain price, not knowing that an allowance of four thousand seven hundred and thirty acres had been made on a doubtful claim, rescission was allowed in equity.⁶ So where A sold property to B, both believing that it was in Whitehall, when in fact it was in Boston,⁷ or where A insured B's property, both believing that no

568 (577); 11 Am. St. Rep. 531; 33 N. W. 919.

³ *Bluestone Coal Co. v. Bell*, 38 W. Va. 297; 18 S. E. 493. The timber privilege was leased for much less than it was worth, simply to enable B to use the timber in mining for coal. A sought to enjoy B from removing the timber; which was refused; and B by cross-bill prayed for rescission which was allowed. A similar case is *Fritzler v. Robinson*, 70 Ia. 500; 31 N. W. 61.

⁴ *Mays v. Dwight*, 82 Pa. St. 462.

⁵ *Thwing v. Lumber Co.*, 40 Minn. 184; 41 N. W. 815. (But mistake here is complicated with misrepresentation.) And see *Brickley v. Patterson*, 39 Minn. 250; 39 N. W. 490. *Daniell v. Mitchell*, 1 Story (U. S.) 172. has been cited in support of this proposition. It really comes under the principle of § 61,

since the existence of a certain amount of timber on the land conveyed was made a term in the contract.

⁶ *Montgomery County v. Emigrant Co.*, 47 Ia. 91. The contract was to convey "all the vacant swamp lands owned by the county, being 412 acres, at the price to be therefor of one dollar and twenty-five cents per acre. The said county further agrees to sell, assign and release to said company all the rest and residue of the swamp land claim and the swamp land interest of said county in law and in equity of whatever the same may consist and to as full and as great an extent as the county may hold or be entitled to the same at and for the further sum of \$3,000."

⁷ *Ketchum v. Catlin*, 21 Vt. 191.

insurance was in force thereon, when in fact there was a policy in force which was avoided by the second policy,⁸ or where A and B, husband and wife, both thinking A solvent agreed that B should deed A her separate estate and A should by will divide his property equally among B and his children, her step-children, and A was in fact insolvent, so that B would lose everything unless rescission were allowed,⁹ or A conveyed property under the belief shared by grantee that a forthcoming bond had been properly executed and hence, by statute, had on forfeiture become a lien on such property,¹⁰ rescission has been allowed. Some of the cases cited in support of this proposition can really be explained on other grounds, such as lack of consideration, or breach. Other cases which seem to rest on this theory are cases in which the mistake really affected the identity of the subject-matter. Thus A assigned to B his claim against the Peruvian government for collection. Subsequently the Peruvian government credited this claim on its account against B. A not knowing of such payment agreed to sell this claim to B for an amount less than had already been collected thereon. It was held that A, on learning of the facts could recover the amount collected by B less the amount paid to him by B.¹¹ So a mistake as to the quantity of land sold really involves the subject-matter itself.¹² Those which cannot be explained except on the theory of mistake are excellent examples of the danger of allowing the courts to determine after the event what contract the parties would or would not have made in advance if they had known everything which could affect their liability, and to annul contracts which the court may believe that the parties would not have made.

⁸ *Wilson v. Ins. Co.*, 5 Fed. 674. (In this case after loss the second policy was cancelled by A and it was held that because of the mistake the first policy could be enforced in spite of such clause.)

⁹ *Trippe v. Trippe*, 29 Ala. 637.

¹⁰ *Nabours v. Cocke*, 24 Miss. 44.

¹¹ *Bogardus v. Grace*, 78 Fed. 856.

¹² *Calhoun v. Teal*, 106 La. 47; 30 So. 288. The court said: "This error was the principal cause for making the contract and bore upon the motive for making it." 106 La. 49.

CHAPTER IX.

NON-DISCLOSURE IN THE INDUCEMENT.

§157. Non-disclosure not operative in absence of special circumstances.

The mere omission by one party to disclose facts material to the contract, which are known to him and not to the adversary party does not, in the absence of special circumstances, amount to fraud or affect the validity of the contract.¹ Thus omission to disclose a prior mortgage on certain property,² a dispute as to a boundary line,³ that a larger sum than that offered will be paid for the land,⁴ as non-disclosure by a mortgagee of his intention to pay forty-five thousand five hundred dollars if necessary to get in the equity of redemption, by which he buys it for nineteen thousand dollars;⁵ or to disclose the actual purchase price of realty,⁶ or where land is purchased from the state the non-disclosure by the vendee of his intention to offer revenue bond script in payment in order to obtain a decision as to its validity,⁷ omission by a purchaser of land to disclose the existence of valuable minerals thereon,⁸ as oil,⁹ or granite,¹⁰ or to dis-

¹ Laidlaw v. Organ, 2 Wheat. (U. S.) 178; Mitchell v. McDougal, 62 Ill. 498; Hayner v. Mellwain, 53 Ill. App. 652; Luthy & Co. v. Kline, 56 Ill. App. 314; Williams v. Beazley, 3 J. J. Mar. (Ky.) 578; Court v. Snyder, 2 Ind. App. 440; 50 Am. St. Rep. 247; 28 N. E. 718; Potts v. Chapin, 133 Mass. 276; Wood v. Amory, 105 N. Y. 278; 11 N. E. 636; People's Bank v. Bogart, 81 N. Y. 101; 37 Am. Rep. 481; Wilkinson v. Suplee, 166 Pa. St. 315; 31 Atl. 36; Pennybacker v. Laidley, 33 W. Va. 624; 11 S. E. 39; Dickson v. Pritchard, 111 Wis. 310; 87 N. W. 292.

² May v. Dyer, 57 Ark. 441; 21

S. W. 1064; Littlejohn v. Drennon, 95 Ga. 743; 22 S. E. 657.

³ Baker v. Sherman, 71 Vt. 439; 46 Atl. 57.

⁴ Thorne v. Bowers, 1 Ariz. 239; 25 Pac. 476.

⁵ De Martin v. Phelan, 115 Cal. 538; 56 Am. St. Rep. 115; 47 Pac. 356.

⁶ Spence v. Geilfuss, 89 Wis. 499; 62 N. W. 529.

⁷ Tindal v. Wesley, 167 U. S. 204.

⁸ Harris v. Tryson, 24 Pa. St. 347; 64 Am. Dec. 661.

⁹ Neill v. Shamburg, 158 Pa. St. 263; 27 Atl. 992.

¹⁰ Corby v. Drew, 55 N. J. Eq. 387; 36 Atl. 827.

close the intended construction of a railroad;¹¹ failure to disclose that lessors owned different tracts in severalty,¹² omission to disclose agency,¹³ or that the nominal grantee of a right of way is acquiring it for another corporation,¹⁴ or an expected commission, the fact of agency being known,¹⁵ omission by one dealing in a stock to disclose facts affecting its value, either increasing it,¹⁶ such as the existence of dividends,¹⁷ or decreasing it, such as insolvency of the corporation,¹⁸ or the fact that he is selling other stock at a greater discount than that at which he is selling the stock in question,¹⁹ or the invalidity of the issue of stock,²⁰ omission to disclose the existence of litigation about a land boundary,²¹ an intention to sue in attachment,²² the infancy of a mortgagor,²³ that a bill of exchange offered for sale was accommodation paper,²⁴ or the ownership of claims against a third person,²⁵ or the existence of an old well near a new one for drilling which the contract in question was made, where it was possible that the tools in the old well prevented drilling the new one,²⁶ are none of them grounds for avoiding the contract.

¹¹ *Boyd v. Leith* (Tex. Civ. App.); 50 S. W. 618.

¹² *Merritt v. Dufur*, 99 Ia. 211; 68 N. W. 553.

¹³ *Alabama, etc., Ry. v. Turnbull*, 71 Miss. 1029; 16 So. 346; *Cowan v. Fairbrother*, 118 N. Car. 400; 54 Am. St. Rep. 733; 32 L. R. A. 829; 24 S. E. 212.

¹⁴ *Grundy v. Ry.*, 98 Ky. 117; 32 S. W. 392. (The grantor having been anxious to get the road for years, and having made no attempt to avoid the conveyance until the road was built.)

¹⁵ *Miller v. Miller*, 47 Minn. 546; 50 N. W. 612; *Blewett v. McRae*, 88 Wis. 280; 60 N. W. 258.

¹⁶ *Chicora Fertilizer Co. v. Duran*, 91 Md. 144; 50 L. R. A. 401; 46 Atl. 347.

¹⁷ *Rose v. Barclay*, 191 Pa. St. 594; 45 L. R. A. 392; 43 Atl. 385. (Where A, not knowing through inattention of dividends regularly de-

clared, sold stock to B "with all dividends.")

¹⁸ *Rothmiller v. Stein*, 143 N. Y. 581; 26 L. R. A. 148; 38 N. E. 718.

¹⁹ *State Bank of Indiana v. Gates*, 114 Ia. 323; 86 N. W. 311.

²⁰ *Bank v. Anderson*, 194 Pa. St. 205; 44 Atl. 1066.

²¹ *Baker v. Sherman*, 71 Vt. 439; 46 Atl. 57.

²² *Hart v. Seymour*, 147 Ill. 598; 35 N. E. 246.

²³ *Thormaehlen v. Kaepfel*, 86 Wis. 378; 56 N. W. 1089.

²⁴ *People's Bank v. Bogart*, 81 N. Y. 101; 37 Am. Rep. 481.

²⁵ *Randolph v. Allen*, 73 Fed. 23; 19 C. C. A. 353; *National Bank v. Allen*, 90 Fed. 545; 33 C. C. A. 169; *Gray v. Lindauer*, 33 Ill. App. 371; *Abilene First National Bank v. Naill*, 52 Kan. 211; 34 Pac. 797.

²⁶ *Dickson v. Pritchard*, 111 Wis. 310; 87 N. W. 292.

So a vendor of realty selling land to one buying it to mine ore is not liable for fraud because he does not disclose that the ore on the land is not suitable in quantity or in quality for the purposes of vendee.²⁷ So omission by one partner purchasing the interest of his co-partner to disclose the fact that he had entered into an unlawful monopolistic contract with other dealers which increased the value of the business, does not avoid the sale.²⁸ Even if the party omitting to make disclosure knows that the adversary party is mistaken as to a matter of inducement, and so knowing, keeps silence, the contract is binding.²⁹ Thus in accordance with a statute requiring the official engineer to estimate the quantity and character of excavations, such estimate was made, to be used by bidders. By mistake the engineer estimated the quantity of rock as less, and the quantity of earth as greater, than it really was. A, knowing this mistake, bid high on excavating rock and low on excavating earth, making his bid the lowest on the estimates, though not so on actual quantity. It was held that in the absence of fraud or collusion such bid should be accepted.³⁰ So in a contract made at the end of the war of 1812 for the sale of tobacco, the omission by the vendee to disclose to the vendor that a treaty of peace had been signed, the effect of which was to raise the price of tobacco, was held not to avoid the contract.³¹ So in contracts for compromise, at least where each party has equal means of obtaining knowledge,³² neither party is bound to make disclosure to the other, even if one party acquires a decided advantage by such non-disclosure.³³ While it is not proper to state as a matter of law that mere non-disclosure avoids the contract,³⁴ it may be a question of fact whether in view of the facts, and the partial disclosure

²⁷ *Smith v. Fisher*, 5 J. J. Mar. (Ky.) 188; (a suit in equity for rescission).

²⁸ *Meyers v. Merillion*, 118 Cal. 352; 50 Pac. 662.

²⁹ *Metcalf v. Metcalf*, 85 Me. 473; 27 Atl. 457. This fact exists in most of the cases cited in this section.

³⁰ *People v. Roberts*, 163 N. Y. 70; 57 N. E. 98. (The engineer's

estimate was understood by both parties to be merely a matter of opinion.)

³¹ *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178.

³² *Cleveland v. Richardson*, 132 U. S. 318.

³³ *Hennessy v. Bacon*, 137 U. S. 78.

³⁴ *Hadley v. Importing Co.*, 13 O. S. 502; 82 Am. Dec. 454.

made by one party to the other, full disclosure should have been made.³⁵

§158. Explanation of contrary view.

In some jurisdictions it is said to be the duty of a party to a contract to correct any material mistake made by the other and known to him.¹ Thus it has been said to be the duty of a party to a contract to disclose the existence of a mortgage on property conveyed,² to disclose the fact that coal, believed by the vendee to underlie the land, has been exhausted,³ to disclose facts known to vendee affecting the value of the property conveyed,⁴ to disclose the pendency of an action involving title to the realty conveyed,⁵ to disclose the fact that interest on a mortgage is secured collaterally,⁶ or to disclose the fact that the material to be excavated consisted largely of a conglomerate of clay and gravel very hard to remove.⁷ In many of the cases which lay down this rule, special facts exist which make it possible to decide them on other grounds. In some cases there has been such partial disclosure as coupled with non-disclosure is equivalent to a positive false statement;⁸ in others the mistake which the other party does not correct goes to the existence of the subject-matter, as where a valuable property right which the vendor does not know of, is included in the general terms of the in-

³⁵ *Hadley v. Importing Co.*, 13 O. S. 502; 82 Am. Dec. 454.

¹ *Busch v. Wilcox*, 82 Mich. 315, 336; 21 Am. St. Rep. 563; 46 N. W. 940; 47 N. W. 328.

² *Merritt v. Robinson*, 35 Ark. 483; *Head v. Thompson*, 77 Ia. 263; 42 N. W. 188.

³ *Friend v. Lamb*, 152 Pa. St. 529; 34 Am. St. Rep. 672; 25 Atl. 577.

⁴ *Gottschalk v. Kircher*, 109 Mo. 170; 17 S. W. 905. (The vendor not having the same means of obtaining information.)

⁵ *Rogers v. Thornton*, 101 Ky. 650; 42 S. W. 97. (Such action causing a total failure of consideration by paramount title.)

⁶ *Wilcox v. Tennant*, 13 Tex. Civ. App. 220; 35 S. W. 865. (Where the party holding such security obtains a transfer of part of the mortgage debt in consideration of paying interest.)

⁷ *Ricker v. Sanitary District*, 89 Fed. 251.

⁸ *Ricker v. Sanitary District*, 89 Fed. 251; *Head v. Thompson*, 77 Ia. 263; 42 N. W. 188; *Paddock v. Strobridge*, 29 Vt. 470.

strument,⁹ and in others the omission to disclose is so unconscionable as to prevent specific performance.¹⁰

§159. Special duty to disclose facts.

It is often said that wherever there is a duty to disclose the material facts, non-disclosure constitutes fraud. This proposition is eminently safe, but not very helpful, unless we know what circumstances impose such duty. Some authorities have held, chiefly in obiter, that each party is bound to disclose to the other all facts known to himself, of which such other is ignorant. According to the weight of modern authority this rule is sound morality, but not law. The duty to disclose facts may arise in three general classes of ways. (1) The subject-matter of the contract may be such as to make full disclosure necessary. Such contracts are said to be contracts *uberrimæ fidei*, contracts of superabounding good faith.¹ Among contracts of this class in some states at least, are contracts of insurance and suretyship. (2) The duty to make full disclosure may arise from relations of trust and confidence which actually or technically exist between the parties. Duty to make disclosure in this case is treated under the head of Constructive Fraud. It may be questioned whether the first class here given is not really a part of the second, since trust and confidence in contracts of insurance and suretyship is necessarily reposed by one party in the other. The somewhat arbitrary line between the two is only another instance of the way in which actual fraud or non-disclosure merges into constructive fraud, and that in turn into undue influence. (3) The circumstances of the particular case may make non-disclosure have the effect of a specific fraudulent representation. Thus non-disclosure may be supplemented by some positive misstatement in such a way that neither without the other would amount to fraud, although when taken together they do. So a positive statement believed, when made, to be true, may be discovered to be false before acted upon. In such

⁹ Rescission given in equity. 529; 34 Am. St. Rep. 672; 25 Atl. Thayer v. Knote, 59 Kan. 181; 52 577.

Pac. 433.

¹ Sun Mutual Ins. Co. v. Ins. Co.,

¹⁰ Friend v. Lamb, 152 Pa. St. 107 U. S. 485.

case it is the duty of the party making the statement to correct the misstatement. The doctrine of implied warranties may in a peculiar manner require disclosure in special cases. The first and third general classes of cases here noted will be discussed in this chapter.

§160. Insurance.

In England insurance contracts are held to be avoided if the insured does not make a full disclosure to the insurer of all material facts known to the insured. This principle applies in England to marine insurance,¹ life insurance,² and indemnity insurance.³ In the United States it applies to marine insurance without much question.⁴ So where marine insurance is obtained upon a disclosure of facts then obtainable, it being understood that he is to furnish additional facts in a reasonable time, his failure so to do avoids the policy.⁵ Authorities are in conflict as to whether it applies to life insurance and fire insurance.⁶ Where the kind of insurance involved is held to be *uberrimæ fidei*, non-disclosure of a material fact, as of a fire in the neighborhood, possibly incendiary,⁷ or an attempt to burn the property insured,⁸ avoids the policy. The tendency in modern American law to hold that mere non-disclosure does not avoid

¹ *Ionides v. Pender*, L. R., 9 Q. B. 531; *Elton v. Larkins*, 8 Bing. 198; *Rickards v. Murdock*, 10 B. & C. 527.

² *London Assurance Co. v. Mansel*, 11 Ch. D. 363.

³ *Seaton v. Heath* (1899), 1 Q. B. 782.

⁴ *McLanahan v. Ins. Co.*, 1 Pet. (U. S.) 170; *Allegre v. Ins. Co.*, 8 Gill & J. (Md.) 190; 29 Am. Dec. 536; *Scammell v. Ins. Co.*, 164 Mass. 341; 49 Am. St. Rep. 462; 41 N. E. 649; *Howell v. Ins. Co.*, 7 Ohio (Pt. 1) 276.

⁵ *Scammell v. Ins. Co.*, 164 Mass. 341; 49 Am. St. Rep. 462; 41 N. E. 649.

⁶ That fire insurance is *uberri-*

mæ fidei and that full disclosure is necessary. *Orient Ins. Co. v. Peiser*, 91 Ill. App. 278. That disclosure is not necessary in life insurance. *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183. In fire insurance, *Vankirk v. Ins. Co.*, 79 Wis. 627; 48 N. W. 798; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629; 13 S. E. 77.

⁷ *Orient Ins. Co. v. Peiser*, 91 Ill. App. 278; *Walden v. Ins. Co.*, 12 La. 134; 32 Am. Dec. 116.

⁸ *Beebe v. Ins. Co.*, 25 Conn. 51; 65 Am. Dec. 553; *contra*, *German-American Ins. Co. v. Norris*, 100 Ky. 29; 66 Am. St. Rep. 324; 37 S. W. 267.

the contract of insurance is due largely to the method of effecting insurance now generally prevailing. Specific interrogatories, usually in writing, are submitted to the insured, and upon his answers thereto the policy is usually based, in part at least. As a result of such business methods the view is often expressed that "the insured has a right to suppose that the insurer will make proper inquiries concerning all facts except such as are supposed to be known or are regarded as immaterial."⁹ Mere non-disclosure, therefore, does not avoid a contract of insurance where such view obtains,¹⁰ as long as such non-disclosure is not intentional and fraudulent.¹¹ Thus omission to disclose encumbrances,¹² as a real estate mortgage,¹³ a mechanic's lien,¹⁴ a vendor's lien,¹⁵ or a chattel mortgage,¹⁶ or the nature of the insurer's interest therein,¹⁷ as the retention of title by the vendor

⁹ *Continental Ins. Co. v. Munns*, 120 Ind. 30; 5 L. R. A. 430; 22 N. E. 78. "Assured has the right to assume that the assurer will make proper inquiry with reference to such matters as it may deem material to the risk." *Arthur v. Ins. Co.*, 35 Or. 27; 76 Am. St. Rep. 450; 57 Pac. 62. "Mere silence will not avoid." *Seal v. Ins. Co.*, 59 Neb. 253; 80 N. W. 807. "If no representations are asked or given the insurer must be supposed to assume (all risks)." *Clark v. Ins. Co.*, 8 How. (U. S.) 235, 250.

¹⁰ *Clark v. Ins. Co.*, 8 How. (U. S.) 235; *Continental Ins. Co. v. Munns*, 120 Ind. 30; 5 L. R. A. 430; 22 N. E. 78; *Washington, etc., Mfg. Co. v. Ins. Co.*, 135 Mass. 503; *Guest v. Ins. Co.*, 66 Mich. 98; 33 N. W. 31; *O'Brien v. Ins. Co.*, 52 Mich. 131; 17 N. W. 726; *Seal v. Ins. Co.*, 59 Neb. 253; 80 N. W. 807; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743; 58 Am. St. Rep. 719; 67 N. W. 774; *Insurance Co. v. Bachler*, 44 Neb. 549; *Arthur v. Ins. Co.*, 35 Or. 27; 76 Am. St. Rep. 450; 57 Pac. 62;

Koshland v. Ins. Co., 31 Or. 402; 49 Pac. 866; *Hey v. Indemnity Co.*, 181 Pa. St. 220; 59 Am. St. Rep. 644; 37 Atl. 402; *Dooly v. Ins. Co.*, 16 Wash. 155; 58 Am. St. Rep. 26; 47 Pac. 507; *Sanford v. Ins. Co.*, 11 Wash. 653; 40 Pac. 609; *Vankirk v. Ins. Co.*, 79 Wis. 627; 48 N. W. 798; *Alkan v. Ins. Co.*, 53 Wis. 136; 10 N. W. 91.

¹¹ *Dooly v. Ins. Co.*, 16 Wash. 155; 58 Am. St. Rep. 26; 47 Pac. 507; *Campbell v. Ins. Co.*, 73 Wis. 100; 40 N. W. 661.

¹² *Hall v. Ins. Co.*, 93 Mich. 184; 32 Am. St. Rep. 497; 18 L. R. A. 135; 53 N. W. 727; *Dooly v. Ins. Co.*, 16 Wash. 155; 58 Am. St. Rep. 26; 47 Pac. 507.

¹³ *Delahay v. Ins. Co.*, 8 Humph. (Tenn.) 684.

¹⁴ *Arthur v. Ins. Co.*, 35 Or. 27; 76 Am. St. Rep. 450; 57 Pac. 62.

¹⁵ *Southern Ins. Co. v. Estes*, 106 Tenn. 472; 52 L. R. A. 915; 62 S. W. 149.

¹⁶ *Slobodisky v. Ins. Co.*, 53 Neb. 816; 74 N. W. 270.

¹⁷ *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743; 58 Am. St. Rep. 719;

as security for the purchase price, the vendee effecting the insurance,¹⁸ or that the insured's interest is equitable merely,¹⁹ or that the insured is a married woman,²⁰ or the location of property insured,²¹ do not avoid the policy. Statutes which provide that policies shall be void only if the false statement is fraudulent and material; or fraudulent or material,²² prevent mere innocent non-disclosure from avoiding the contract of insurance.²³ Omission to disclose facts not known to the insured, as in life insurance, an ailment unknown to him,²⁴ does not of course avoid the policy. If an answer to interrogatories in the application on which the policy is issued is on its face incomplete, the insurance company may, of course, refuse to issue the policy; but if it issues the policy the evident omission to make full disclosure is thereby waived.²⁵ It will be seen, therefore, that the weight of authority in the United States is that mere innocent non-disclosure does not avoid a contract of insurance other than marine insurance. In practical results the principles governing marine insurance are not as unlike those governing other kinds of insurance in the United States as would be inferred from their abstract form. In many of the cases cited to show that full disclosure is not necessary in contracts of insurance other than marine, the facts are such that a similar result would have been reached in marine insurance on the theory that the facts were not material. Many of the cases cited to show that non-disclosure avoids marine insurance involve facts, the non-disclosure of which would avoid any other insurance policy on the theory that such non-disclosure was fraudulent.

67 N. W. 774; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747; 53 Am. St. Rep. 848; 24 S. E. 393.

¹⁸ *Light v. Ins. Co.*, 105 Tenn. 480; 58 S. W. 851.

¹⁹ *Franklin Fire Ins. Co. v. Crockett*, 7 Lea (Tenn.) 725; *Manhattan Ins. Co. v. Barker*, 7 Heisk (Tenn.) 503.

²⁰ *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51; 5 So. 110.

²¹ *Hey v. Indemnity Co.*, 181 Pa. St. 220; 59 Am. St. Rep. 644; 37

Atl. 402. (Where located on a river bank, subject to overflow.)

²² See § 61.

²³ *Light v. Ins. Co.*, 105 Tenn. 480; 58 S. W. 851. (Omission to disclose that insured had only an equitable title to personalty, his vendor retaining the legal title for security.)

²⁴ *March v. Ins. Co.*, 186 Pa. St. 629; 65 Am. St. Rep. 887; 40 Atl. 1100.

²⁵ *Phoenix Life Ins. Co. v. Rad-din*, 120 U. S. 183; *Connecticut*

§161. Suretyship.

To what extent a contract of suretyship is *uberrimæ fidei* with reference to non-disclosure is a question upon which there is a conflict of authority. Some courts hold that when a contract of suretyship is made, the creditor is bound to disclose to the surety every material fact which can affect the risk of the surety substantially. The proposition is laid down that non-disclosure releases a surety if it concerns such facts that (1) the surety would not have entered into the contract if he had known them, or (2) his risk is thereby increased.¹ Non-disclosure "which necessarily must have the effect of increasing the responsibility of the surety or operating to the prejudice of his interest" releases him.² Where this view obtains if the creditor omits to disclose all the material facts known to him, the surety may avoid the contract,³ as for omission to disclose the amount of the debt or obligation,⁴ or that the maker and payee of the note to which the party is to become surety were firms having a com-

Ins. Co. v. Luchs, 108 U. S. 498; Hall v. Ins. Co., 6 Gray (Mass.) 185; American Ins. Co. v. Mahone, 56 Miss. 180; Lorillard Ins. Co. v. McCulloch, 21 O. S. 176; Lebanon Ins. Co. v. Kepler, 106 Pa. St. 28.

¹ Powers Dry Goods Co. v. Harlin, 68 Minn. 193; 64 Am. St. Rep. 460; 71 N. W. 16; see to the same effect, Doughty v. Savage, 28 Conn. 146; Traders' Ins. Co. v. Herber, 67 Minn. 106; 69 N. W. 701.

² Comstock v. Gage, 91 Ill. 328; (an obiter here, as neither of such facts existed).

³ Griswold v. Hazard, 141 U. S. 260; Guardian, etc., Co. v. Thompson, 68 Cal. 208; 9 Pac. 1; Doughty v. Savage, 28 Conn. 146; Denton v. Butler, 99 Ga. 264; 25 S. E. 624; Commonwealth v. Berry, 95 Ky. 443; 26 S. W. 7; Graves v. Bank, 10 Bush. (Ky.) 23; 19 Am. Rep. 50; Peck v. Durett, 9 Dana (Ky.) 486; Franklin Bank v. Cooper, 36

Me. 179; Franklin Bank v. Stevens, 39 Me. 532; Powers Dry Goods Co. v. Harlin, 68 Minn. 193; 64 Am. St. Rep. 460; 71 N. W. 16; Smith v. Josselyn, 40 O. S. 409; Dinsmore v. Tidball, 34 O. S. 411; Lauer Brewing Co. v. Riley, 195 Pa. St. 449; 46 Atl. 71; Wayne v. Bank, 52 Pa. St. 343; Jungk v. Holbrook, 15 Utah 198; 62 Am. St. Rep. 921; 49 Pac. 305; Connecticut, etc., Ins. Co. v. Chase, 72 Vt. 176; 53 L. R. A. 510; 47 Atl. 825; Warren v. Branch, 15 W. Va. 21.

⁴ Griswold v. Hazard, 141 U. S. 260; Fassnocht v. Gagen Co., 18 Ind. App. 80; 63 Am. St. Rep. 322; 46 N. E. 45; 47 N. E. 480. Where A was surety on B's note in which B waived homestead rights, but such clause was void because of concealed usury, which payee knew, B can avoid his liability: Denton v. Butler, 99 Ga. 264; 25 S. E. 624.

mon partner,⁵ or in case of a general guaranty, to disclose a former defalcation of the principal obligor,⁶ or former negligence whereby the principal obligor had damaged his employer.⁷ So in a continuing guaranty it is held that the creditor must notify the guarantor or surety of subsequent dishonesty of the principal or the surety will be released.⁸ This rule even in jurisdictions which apply it most strictly does not include omissions of a public officer taking a bond to notify the surety of past negligence on the part of the principal, at least if not criminal.⁹ So the fact that the officer taking a criminal bond does not disclose the fact that other charges of larceny have been brought against the accused, does not relieve the surety.¹⁰ Other courts require a less degree of good faith on the part of the creditor towards the surety, and in the absence of special facts, treat mere non-disclosure as inoperative.¹¹ The duty to make full disclosure, it is said in such jurisdictions, is "peculiar to contracts of insurance and does not extend to contracts of guaranty."¹² "A creditor is not bound in the absence of inquiries from the sureties to communicate to them all the circumstances that may affect their undertaking."¹³ Thus omission to inform the surety of irregularities of the principal in making collections,¹⁴ or to inform him of a judgment in favor of the obligee against the

⁵ *Jungk v. Holbrook*, 15 Utah 198; 62 Am. St. Rep. 921; 49 Pac. 305.

⁶ *Dinsmore v. Tidball*, 34 O. S. 411; *Lauer Brewing Co. v. Riley*, 195 Pa. St. 449; 46 Atl. 71; *Connecticut, etc., Ins. Co. v. Chase*, 72 Vt. 176; 53 L. R. A. 510; 47 Atl. 825.

⁷ *Smith v. Josselyn*, 40 O. S. 409.

⁸ *Saint v. Mfg. Co.*, 95 Ala. 362; 36 Am. St. Rep. 210; 10 So. 539; *Newark v. Stout*, 52 N. J. L. 35; 18 Atl. 943.

⁹ *Fidelity & Deposit Co. v. Commonwealth*, 104 Ky. 579; 47 S. W. 579; (modified on another point, 49 S. W. 467; *Harrisburg v. Guiles*,

192 Pa. St. 191; 44 Atl. 48; (bond of tax collector).

¹⁰ *San Francisco v. Staude*, 92 Cal. 560; 28 Pac. 778.

¹¹ *Roper v. Sangamon Lodge*, 91 Ill. 518; 33 Am. Rep. 60; *Ham v. Greve*, 34 Ind. 18; *Lake v. Thomas*, 84 Md. 608; 36 Atl. 437; *Howe Machine Co. v. Farrington*, 82 N. Y. 121; *Oregon National Bank v. Gardner*, 13 Wash. 154; 42 Pac. 545; *Aetna Life Ins. Co. v. Mabbett*, 18 Wis. 667.

¹² *Aetna Life Ins. Co. v. Mabbett*, 18 Wis. 667.

¹³ *Lake v. Thomas*, 84 Md. 608; 36 Atl. 437.

¹⁴ *Lake v. Thomas*, 84 Md. 608; 36 Atl. 437.

principal,¹⁵ have been held not to release the surety. So mere silence as to the commencement of proceedings to remove a trustee, by which he is enabled to furnish additional bond does not release such surety.¹⁶ Under either theory actual fraud on the part of the creditor avoids the contract of suretyship, as where the obligee represented falsely to that surety that the principal wished him to sign.¹⁷ So the contract of the surety may be avoided if the creditor knows that the principal has induced the sureties to sign by fraud. Thus a payee who knows that the maker means to use fraud to obtain indorsers is responsible therefor unless he informs indorsers of the facts.¹⁸ An attempt has been made to reconcile the conflict of authority by holding that non-disclosure of facts which affect the liability of the surety avoid his contract if such facts constitute a crime,¹⁹ or affect the integrity of the principal debtor,²⁰ while if not of such character, the surety is liable.²¹ This distinction does in fact reconcile many cases, in most of which, however, it is not stated by the court as a ground for its decision. It has, however, been expressly repudiated.²² The surety has in some jurisdictions been held even where the fact that the principal debtor was a defaulter has not been disclosed,²³ in other he is released, though the non-disclosure concerned only the negligence of the principal.²⁴

§162. Non-disclosure coupled with fraud.

The rule that non-disclosure is not fraud is not a technical one. If the concealment is coupled with a false representation,

¹⁵ *Oregon National Bank v. Gardner*, 13 Wash. 154; 42 Pac. 545.

¹⁶ *Lamar v. Walton*, 99 Ga. 356; 27 S. E. 715.

¹⁷ *Meek v. Frantz*, 171 Pa. St. 632; 33 Atl. 413.

¹⁸ *Beath v. Chapoton*, 115 Mich. 506; 69 Am. St. Rep. 589; 73 N. W. 806.

¹⁹ *Charlotte, etc., R. R. v. Gow*, 59 Ga. 685; 27 Am. Rep. 403; *Graves v. Bank*, 10 Bush. (Ky.) 23; 19 Am. Rep. 50; *Franklin Bank v. Cooper*, 36 Me. 179; *Sooey v. State*, 39 N. J. L. 135; *Connecti-*

cut, etc., Ins. Co. v. Chase, 72 Vt. 176; 53 L. R. A. 510; 47 Atl. 825.

²⁰ *Atlantic, etc., Telegraph Co. v. Barnes*, 64 N. Y. 385; 21 Am. Rep. 621; (non-disclosure of facts subsequent to the contract).

²¹ *Home Ins. Co. v. Holway*, 55 Ia. 571; 39 Am. Rep. 179; 8 N. W. 457.

²² *Aetna Life Ins. Co. v. Mabbett*, 18 Wis. 667.

²³ *Aetna Life Ins. Co. v. Mabbett*, 18 Wis. 667.

²⁴ *Smith v. Josselyn*, 40 O. S. 409.

fraud exists even if the concealment was really the operative factor in the deceit.¹ Thus fraud exists where a debtor by misstatement had given the community in which he lived to understand that he was execution-proof and thus knowingly concealing the fact that he had property subject to execution sufficient to pay the whole claim of his creditor, settled for less, making no false representation to the creditor.² Thus giving a statement of liabilities, but omitting a note, as where there was a deliberate omission from a statement of the liabilities of a firm of a note given by it to a bank, which represented the interest of the president of the bank in the firm and which he was to pay,³ amounts to fraud. But where the president of a corporation omitted from a statement of its liabilities a claim then in litigation, which on reasonable grounds he believed could not be enforced against the company, he was held not liable for fraud to the purchasers of bonds,⁴ and omission from the statement of a firm of the liabilities of the individual members is not fraud.⁵ A's stating that stock was worthless, but that he wished it as a memorial of his father, concealing an offer made to him for it,⁶ a statement that title was good, concealing the fact that a prior grantor was insane, when he conveyed it,⁷ stating that A, a prominent business man, has subscribed for stock, concealing the fact that he gets it for nothing,⁸ entering a fictitious deposit on A's bankbook and concealing from B on inquiry that such deposit was never made,⁹ concealing the value of land, and informing vendor who knows nothing of the facts that the better part had been disposed of,¹⁰ or concealing knowledge of valuable deposits of phosphates and stating that the land was valuable only for

¹ *Nairn v. Ewalt*, 51 Kan. 355; 32 Pac. 1110.

² *Howard v. McMillen*, 101 Ia. 453; 70 N. W. 623.

³ *John V. Farwell Co. v. Boyce*, 17 Mont. 83; 42 Pac. 98.

⁴ *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651; 29 L. R. A. 360; 41 N. E. 414.

⁵ *Vermont Marble Co. v. Smith*, 13 Ind. App. 457; 41 N. E. 973.

⁶ *Edelman v. Latshaw*, 180 Pa. St. 419; 36 Atl. 926.

⁷ *Burns v. Dockray*, 156 Mass. 135; 30 N. E. 551.

⁸ *Coles v. Kennedy*, 81 Ia. 360; 25 Am. St. Rep. 503; 46 N. W. 1088.

⁹ *James v. Crosthwait*, 97 Ga. 673; 36 L. R. A. 631; 25 S. E. 754.

¹⁰ *Dean v. Brooks*, 88 Wis. 667; 60 N. W. 255.

pine,¹¹ are cases of fraud. Acquiescence in misstatements by others, together with concealment of the truth, may be fraud.¹²

§163. Duty to disclose subsequent change of fact.

If one has made statements, which were true when made, and a material change takes place,¹ as a change for the worse in financial condition,² or impairment in value of a trade-mark,³ he is guilty of fraud in not disclosing such change where he knows or should know that the other party relies on such original representation. A similar rule obtains where a false statement was made in good faith but the falsity was discovered before the adversary party acted thereon.⁴ But a slight change in financial condition need not be communicated,⁵ nor need change be communicated where it is not known that the adversary party relied on the original statement.⁶

§164. Effect of the doctrine of implied warranties—Personalty.

The rule that disclosure is not necessary except in special cases is modified greatly in its practical operation by the doctrine of implied warranties. In contracts of sale the vendor is, in the absence of express agreement to the contrary, assumed to

¹¹ Stackpole v. Hancock, 40 Fla. 362; 45 L. R. A. 814; 24 So. 914; (citing, Dolman v. Nokes, 22 Beav. 402; Laidlaw v. Organ, 2 Wheat. 178; Kohl v. Lindley, 39 Ill. 195; 89 Am. Dec. 294; Bowman v. Bates, 2 Bibb. 47; 4 Am. Dec. 677; Swimm v. Bush, 23 Mich. 99; Morgan v. Dinges, 23 Neb. 271; 8 Am. St. Rep. 121; 36 N. W. 544; Smith v. Countryman, 30 N. Y. 655; Smith v. Beatty, 2 Ired. Eq. 456; 40 Am. Dec. 435; Caples v. Steel, 7 Or. 492; Harris v. Tyson, 24 Pa. St. 347; 64 Am. Dec. 661).

¹² Firestone v. Werner, 1 Ind. App. 293; 27 N. E. 623; O'Leary v. Tillinghast, 22 R. I. 161; 46 Atl. 754.

¹ Loewer v. Harris, 57 Fed. 368;

Mooney v. Davis, 75 Mich. 188; 13 Am. St. Rep. 425; 42 N. W. 802.

² Loewer v. Harris, 57 Fed. 368; Mooney v. Davis, 75 Mich. 188; 13 Am. St. Rep. 425; 42 N. W. 802.

³ Dant v. Head, 90 Ky. 255; 29 Am. St. Rep. 369; 13 S. W. 1073.

⁴ Loewer v. Harris, 57 Fed. 368; Mooney v. Davis, 75 Mich. 188; 13 Am. St. Rep. 425; 42 N. W. 802; Porter v. Beattie, 88 Wis. 22; 59 N. W. 499.

⁵ Burchinell v. Hirsh, 5 Colo. App. 500; 39 Pac. 352.

⁶ Cortland Mfg. Co. v. Platt, 83 Mich. 419; 47 N. W. 330. (The original statement was made to a commercial agency, and the party making it did not know that the adversary relied thereon.)

warrant by implication the existence of the thing sold,¹ and his title thereto if the property is in his possession.² If food is sold for consumption, there is an implied warranty that it is fit for food.³ If it is sold at wholesale for purposes of resale, there is no implied warranty that it is reasonably fit for food.⁴ Thus no implied warranty exists where animals are sold to a butcher,⁵ or to a jobber.⁶ So if an animal is sold for breeding purposes, there is no implied warranty that it is fit for such purpose.⁷ If drugs are sold for consumption, there is an implied warranty that they are reasonably fit for the use for which such drugs are adapted.⁸ If a manufacturer sells goods of his own make for a

¹ *Meyer v. Richards*, 163 U. S. 385; *Marshall v. Peck*, 1 Dana (Ky.) 609; *J. G. Shaw Blank Book Co. v. Maybell*, 86 Minn. 241; 90 N. W. 392; *Flandrow v. Hammond*, 148 N. Y. 129; 42 N. E. 511; as in a sale of book accounts there is an implied warranty that they are unpaid, valid and subsisting: *J. G. Shaw Blank Book Co. v. Maybell*, 86 Minn. 241; 90 N. W. 392; in a sale of an interest obtained by attaching a judgment, that a lien has been obtained thereon: *Flandrow v. Hammond*, 148 N. Y. 129; 42 N. E. 511; in a sale of commercial paper, that it is genuine, *Brown v. Ames*, 59 Minn. 476; 61 N. W. 448; or in a sale of bonds, that they are valid existing obligations: *Meyer v. Richards*, 163 U. S. 385; (*contra*, *Richardson v. Marshall County*, 100 Tenn. 346; 45 S. W. 440; where the implied warranty was held to cover genuineness, but not authority in the county to issue the bonds). *Ruohs v. Bank*, 94 Tenn. 57; 28 S. W. 303.

² *Kriess v. Faron*, 118 Cal. 142; 50 Pac. 388; *Vance v. McBurnett*, 94 Ga. 251; 21 S. E. 520; *Morris v. Thompson*, 85 Ill. 16; *Payne v. Rodden*, 4 Bibb (Ky.) 304; 7 Am.

Dec. 739; *Brown v. Pierce*, 97 Mass. 46; 93 Am. Dec. 57; *Croly v. Pollard*, 71 Mich. 612; 39 N. W. 853; *Richardson v. Marshall County*, 100 Tenn. 346; 45 S. W. 440; *Cogar v. Lumber Co.*, 46 W. Va. 256; 33 S. E. 219; *Jarrett v. Goodnow*, 39 W. Va. 602; 20 S. E. 575

³ *Wiedeman v. Keller*, 171 Ill. 93; 49 N. E. 210; reversing, 58 Ill. App. 382. The same rule applies to the sale of oats, to a liveryman for food for horses. *Coyle v. Baum*, 3 Okla. 695; 41 Pac. 389; *contra*, *Lukens v. Freidund*, 27 Kan. 664; 41 Am. Rep. 429.

⁴ *Wiedeman v. Keller*, 171 Ill. 93; 49 N. E. 210; reversing, 58 Ill. App. 382; *Jones v. Murray*, 3 T. B. Mon. (Ky.) 83; *Howard v. Emerson*, 110 Mass. 320; 14 Am. Rep. 608; *Hanson v. Hartse*, 70 Minn. 282; 68 Am. St. Rep. 527; 73 N. W. 163; *Good v. Johnson*, 6 Heisk (Tenn.) 340.

⁵ *Warren v. Buck*, 71 Vt. 44; 76 Am. St. Rep. 754; 42 Atl. 979.

⁶ *Wiedman v. Keller*, 171 Ill. 93; 49 N. E. 210; reversing, 58 Ill. App. 382.

⁷ *McQuaid v. Ross*, 85 Wis. 492; 39 Am. St. Rep. 864; 22 L. R. A. 187; 55 N. W. 705.

⁸ *Jones v. George*, 56 Tex. 149;

specific purpose there is an implied warranty that they are reasonably fit for such purpose.⁹ This rule does not apply where the manufacturer makes or sells an article to correspond to specifications selected by the vendee; or a definite article selected by the vendee;¹⁰ or if the vendee actually knows of the existence of the defects.¹¹ A sale by sample,¹² or by description,¹³ implies a warranty that the goods sold correspond to the sample or to the description, but nothing more. If goods are sold without a chance for inspection there is at least an implied warranty that

42 Am. Rep. 689; s. c., 61 Tex. 345; 48 Am. Rep. 280.

⁹ Kellogg Bridge Co. v. Hamilton. 110 U. S. 108; Kennebrew v. Machine Co., 106 Ala. 377; 17 So. 545; Alpha-Check-Rower Co. v. Bradley, 105 Ia. 537; 75 N. W. 369; Clarke v. Machine Co. (Ky.); 42 S. W. 844; Fee v. Sentell, 52 La. Ann. 1957; 28 So. 279; Down-407; West Michigan Furniture Co. v. Dearborn, 77 Me. 457; 1 Atl. v. Glue Co., 127 Mich. 651; 87 N. W. 92; Breen v. Moran, 51 Minn. 525; 53 N. W. 755; Carleton v. Lombard, 149 N. Y. 137; 43 N. E. 422; Rodgers v. Niles, 11 O. S. 48; 78 Am. Dec. 290; Tennessee River Compress Co. v. Leeds, 97 Tenn. 574; 37 S. W. 389; Reedy v. Weakley, (Tenn. Ch. App.); 39 S. W. 739; Fuller-Warren Co. v. Shurts, 95 Wis. 606; 70 N. W. 683.

¹⁰ Grand Avenue Hotel Co. v. Wharton, 79 Fed. 43; 24 C. C. A. 441; Bancroft v. Tool Co., 120 Cal. 228; 52 Pac. 496; reversing 47 Pac. 684; Wheaton Roller Mill Co. v. Mfg. Co., 66 Minn. 156; 68 N. W. 854; Cosgrove v. Bennett, 32 Minn. 371; 20 N. W. 359; Jarecki Mfg. Co. v. Kerr, 165 Pa. St. 529; 44 Am. St. Rep. 674; 30 Atl. 1019; J. Thompson Mfg. Co. v. Gunderson, 106 Wis. 449; 49 L. R. A. 859; 82 N. W. 299; Milwaukee Boiler Co. v.

Duncan, 87 Wis. 120; 41 Am. St. Rep. 33; 58 N. W. 232; so a vendor of food for cattle does not warrant that they will increase in weight; Union Oil Mill Co. v. Kennedy, 105 La. 738; 30 So. 111; so a vendor of a particular brand of seed does not impliedly warrant that it is reasonably fit for the purpose intended by the vendee. Gardner v. Winter, — Ky. —; 63 L. R. A. 647; 78 S. W. 143.

¹¹ Lunsford v. Malsby, 101 Ga. 39; 28 S. E. 496.

¹² Love v. Mfg. Co., 3 Penn. (Del.) 152; 50 Atl. 536; Leitch v. Mfg. Co., 64 Minn. 434; 67 N. W. 352.

¹³ Peoria Grape Sugar Co. v. Turney, 175 Ill. 631; 51 N. E. 587; affirming, 70 Ill. App. 589; Morris v. Wibaux, 159 Ill. 627; 43 N. E. 837; Gossler v. Sugar Refinery, 103 Mass. 331; Gregg v. Belting Co., 69 N. H. 247; 46 Atl. 26; Ivans v. Laury, 67 N. J. L. 153; 50 Atl. 355; Northwestern Cordage Co. v. Rice, 5 N. D. 432; 57 Am. St. Rep. 563; 67 N. W. 298. Thus a sale of "common hard brick" warrants that they are up to the usual standard of such brick, but not that they are suitable for the use to which vendor knows they are to be put. Day v. Construction Co., 174 Mass. 412; 54 N. E. 878.

they are merchantable.¹⁴ Where there is a chance for the vendee to examine the goods sold, there is, at least, an implied warranty that there are no latent defects known to the vendor and not disclosed to the vendee.¹⁵ Since vendor knows such facts, such non-disclosure is in many states held to amount to fraud.¹⁶ Thus where animals are sold, apparently sound, but really diseased, and vendor knows thereof, such sales are voidable.¹⁷ In some of the cases cited on this point, false statements were made intentionally; as where vendor said that an animal was "sound as far as he knew," when he knew of a latent defect,¹⁸ or there has been a partial and misleading disclosure.¹⁹ Thus a sale of an impotent bull for breeding purposes was held fraud.²⁰ So a sale of a blind horse, vendor knowing such fact was held to amount to fraud.²¹ So where vendor knows that his animals are suffering from a contagious disease it has been held fraud for him to sell them to a vendee ignorant thereof; and vendor has been held liable for loss of vendee's other stock.²² Analogous to this principle is the rule that it is fraud in one who sells the note of another not to disclose the known insolvency of such

¹⁴ *Blackwood v. Packing Co.*, 76 Cal. 212; 9 Am. St. Rep. 199; 18 Pac. 248; *Davis v. Sweeney*, 75 Ia. 45; 39 N. W. 174; *Murchie v. Cornell*, 155 Mass. 60; 31 Am. St. Rep. 526; 14 L. R. A. 492; 29 N. E. 207; *Standard Rope & Twine Co. v. Olmen*, 13 S. D. 296; 83 N. W. 271.

¹⁵ *Wisconsin, etc., Co. v. Refrigerator Co.*, 60 Minn. 401; 51 Am. St. Rep. 539; 62 N. W. 550; *McGavock v. Wark, Cooke* (Tenn.) 403.

¹⁶ *Merritt v. Robinson*, 35 Ark. 483; *Reading v. Price*, 3 J. J. Mar. (Ky.) 61; 19 Am. Dec. 162; *Downing v. Dearborn*, 77 Me. 457; 1 Atl. 407; *Grigsby v. Stapleton*, 94 Mo. 423; 7 S. W. 421; *Maynard v. Maynard*, 49 Vt. 297.

¹⁷ *Johnson v. Wallover*, 15 Minn. 472; 18 Minn. 288; *McAdams v.*

Cotes, 24 Mo. 223; (a sale of a filly that had lost her teeth) *Baron v. Alexander*, 27 Mo. 530; *Paddock v. Strobridge*, 29 Vt. 470; the same rule applied to the lease of an unsound slave; *Reading v. Price*, 3 J. J. Mar. (Ky.) 61; 19 Am. Dec. 162; *contra*, that such sale is not fraud unless the vendor intended to deceive, *Hanson v. Edgerly*, 29 N. H. 343.

¹⁸ *Lunn v. Shermer*, 93 N. C. 164.

¹⁹ *Paddock v. Strobridge*, 29 Vt. 470.

²⁰ *Maynard v. Maynard*, 49 Vt. 297. (The vendor was held liable for loss of milk because the cows were not with calf.) Compare case cited *ante* this section, note 7.

²¹ *Dowling v. Lawrence*, 58 Wis. 282; 16 N. W. 552.

²² *Grigsby v. Stapleton*, 94 Mo. 423; 7 S. W. 421. So by statute

ther.²³ This classification of implied warranties, while not exhaustive, furnishes examples of the more common types. In other cases there is no implied warranty. The vendee must judge for himself or exact an express warranty.²⁴ Even where an implied warranty would usually exist, an express warranty excludes an implied warranty.²⁵ Where warranties are implied the vendor if ignorant of the defect warranted against is liable as on breach of contract; while if he knows of the defect when he makes the sale, he is also liable as for fraud.²⁶ The application of this doctrine, therefore, limits the right of the vendor to refrain from disclosing defects known to him; though, as has been said, the doctrine applies even if the vendor acted in good faith.²⁷

§165. Implied warranties—Realty.

It is an implied term of an executory contract for the sale of realty that the title is good.¹ This requires a marketable title

in Georgia providing for an implied warranty of merchantability, even if vendor is ignorant of the disease. *Snowden v. Waterman*, 105 Ga. 384; 31 S. E. 110; same case, 100 Ga. 588; 28 S. E. 121; *contra*, *Ward v. Hobbs*, 3 Q. B. D. 150. (Where the animals were sold in violation of a penal statute, but 'with all faults.') *Hill v. Balls*, 2 H. & N. 299.

²³ *Gordan v. Irvine*, 105 Ga. 144; 31 S. E. 151; *Sebastian May Co. v. Codd*, 77 Md. 293; 26 Atl. 316; *Bridge v. Batchelder*, 9 All. (Mass.) 394. (There were representations in this case that the note was good and was for value.) *Brown v. Montgomery*, 20 N. Y. 287; 75 Am. Dec. 404; (sale of a post-dated check of a third person).

²⁴ *Moore v. Paving Co.*, 118 Ala. 563; 23 So. 798; *Court v. Snyder*, 2 Ind. App. 440; 50 Am. St. Rep. 247; 28 N. E. 718; *Scott v. Renick*, 1 B. Mon. (Ky.) 63; 35 Am. Dec. 177.

²⁵ *Malsby v. Young*, 104 Ga. 205; 30 S. E. 854; *Reeves v. Byers*, 155 Ind. 535; 58 N. E. 713.

²⁶ *Merritt v. Robinson*, 35 Ark. 483.

²⁷ Thus in speaking of non-disclosure the court said: "This negative deceit has been more commonly reached in the English court by engrafting successive exceptions to the general rule of warranty by way of implied warranties." *Padlock v. Strobbridge*, 29 Vt. 470.

¹ *In re Haedicke, etc.*, *Lipski's Contract* (1901), 2 Ch. 666; *Bolton v. Huling*, 195 Ill. 384; 63 N. E. 140; *Carter v. Improvement Association*, 108 La. 143; 32 So. 473; *Walker v. Gillman*, 127 Mich. 269; 86 N. W. 830; *Lamprey v. Whitehead*, 64 N. J. Eq. 408; 54 Atl. 803; *Barger v. Gerry*, 64 N. J. Eq. 263; 53 Atl. 483; *Richards v. Knight*, 64 N. J. Eq. 196; 53 Atl. 452; *McAllister v. Harman*, — Va. —; 42 S. E. 920.

and not an absolutely perfect title.² This rule does not apply to defects of which the vendee has actual or constructive notice.³ This implied term does not survive conveyance. If there is a covenant of warranty it merges such implied term;⁴ if there is no such covenant in the deed, the acceptance of such deed waives such implied term.⁵ The general rule is that there is no implied warranty as to the title of realty after an executed conveyance thereof. Non-disclosure of a defect in title not apparent on the face of the papers shown to establish title has been held to be fraud.⁶ There is no implied warranty that realty leased for a long term is fit for occupancy.⁷ A lease of residence property for a short term impliedly warrants that it is reasonably fit for occupancy.⁸ There is an implied warranty against latent defects, if known to the landlord and not disclosed to the tenant.⁹ Thus there is an implied warranty that it is not affected with any serious contagious disease, as small-pox.¹⁰

² Revoll v. Stroudback, 107 La. 295; 31 So. 665; Sisters of Mercy v. Benzinger, 95 Md. 684; 53 Atl. 448; Gump v. Sibley, 79 Md. 165; 28 Atl. 977; French v. Folsom, 181 Mass. 483; 63 N. E. 938; Conley v. Finn, 171 Mass. 70; 68 Am. St. Rep. 399; 50 N. E. 460; Womack v. Coleman, — Minn. —; 93 N. W. 663; Mathews v. Lightner, 85 Minn. 333; 88 N. W. 992; Hedderly v. Johnson, 42 Minn. 443; 18 Am. St. Rep. 521; 44 N. W. 527; Meyer v. Madreperla, 68 N. J. L. 258; 96 Am. St. Rep. 536; 53 Atl. 477; Kullman v. Cox, 167 N. Y. 411; 53 L. R. A. 884; 60 N. E. 744; Westfall v. Washlagel, 200 Pa. St. 181; 49 Atl. 9+1.

³ Savings Institution v. Jones, 37 N. J. Eq. 449; Thompson v. Hawley, 14 Or. 199; 12 Pac. 276; Leonard v. Woodruff, 23 Utah 494; 65 Pac. 199. 12 Pac. 276.

⁴ See ch. lxiii.

⁵ See ch. lxiii.

⁶ Bryant v. Boothe, 30 Ala. 311; 68 Am. Dec. 117. (This case can

be explained by the doctrine of incomplete disclosure. See § 91.)

⁷ Doyle v. Ry., 147 U. S. 413; Davidson v. Fischer, 11 Colo. 583; 7 Am. St. Rep. 267; 19 Pac. 652; Gallagher v. Button, 73 Conn. 172; 46 Atl. 819; Cowen v. Sunderland, 145 Mass. 363; 1 Am. St. Rep. 469; 14 N. E. 117; Schmalzried v. White, 97 Tenn. 36; 32 L. R. A. 782; 36 S. W. 393.

⁸ Smith v. Marrable, 11 M. & W. 5; Ingalls v. Hobbs, 156 Mass. 348; 32 Am. St. Rep. 460; 16 L. R. A. 51; 31 N. E. 286; *contra*, Murray v. Albertson, 50 N. J. L. 167; 7 Am. St. Rep. 787; 13 Atl. 394.

⁹ Thum v. Rhodes, 12 Colo. App. 245; 55 Pac. 264; Moore v. Parker, 63 Kan. 52; 53 L. R. A. 778; 64 Pac. 975; Cowen v. Sunderland, 145 Mass. 363; 1 Am. St. Rep. 469; 14 N. E. 117; *contra*, Land v. Fitzgerald, 68 N. J. L. 28; 52 Atl. 229.

¹⁰ Minor v. Sharon, 112 Mass. 477; 17 Am. Rep. 122; Cesar v. Karutz, 60 N. Y. 229; 19 Am. Rep. 164.

CHAPTER X.

FRAUD, MISREPRESENTATION, MISTAKE AND NON-DISCLOSURE AS TO MATTERS OF LAW.

§166. Fraudulent misrepresentation of domestic law.

False statements as to the existence or effect of a rule of domestic law, applicable to and affecting the rights of the parties, do not constitute fraud at law; nor in equity in many jurisdictions.¹ This rule rests on two reasons. The one usually given is that every one is presumed to know the law; but this proposition is applicable chiefly to criminal law; and as we shall see later, does not always apply in civil matters. The real reason for the rule is that where the material facts are known, and the parties are on terms of equality, law is a matter of opinion and every one must know that it is. Where the material facts are known, false statement as to the legal effect of a will,² a tax-sale,³ or a contract,⁴ as that insured is bound by an inventory of her property before loss and the company is liable only for three-fourths of such valuation less the value of the goods saved,⁵

¹ *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327; *Upton v. Tribilcock*, 91 U. S. 45; *Georgia Home Ins. Co. v. Warton*, 113 Ala. 479; 59 Am. St. Rep. 129; 22 So. 288; *Champion v. Woods*, 79 Cal. 17; 12 Am. St. Rep. 126; 21 Pac. 534; *Court Valhalla, etc., v. Olson*, 14 Colo. App. 243; 59 Pac. 883; *Dillman v. Nadelhoffer*, 119 Ill. 567; 7 N. E. 88; *Fish v. Cleland*, 33 Ill. 237; *Burt v. Bowles*, 69 Ind. 1; *First National Bank v. Osborne*, 18 Ind. App. 442; 48 N. E. 256; *Thompson v. Ins. Co.*, 75 Me. 55; 46 Am. Rep. 357; *Milks v. Milks*, 129 Mich. 164; 88 N. W. 402; *Mayhew v. Ins. Co.*, 23 Mich. 105; *Joggar v. Winslow* 30 Minn. 263; 15 N. W. 242;

Kingman v. Shawley, 61 Mo. App. 54; *Aetna Ins. Co. v. Reed*, 33 O. S. 283; *Gormely v. Gymnastic Association*, 55 Wis. 350; 13 N. W. 242.

² *Dowdall v. Cannedy*, 32 Ill. App. 207; (here made in good faith by the executor).

³ *Warren v. Ritchie*, 128 Mo. 311; 30 S. W. 1023.

⁴ *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327; *Griel v. Lomax*, 94 Ala. 641; 10 So. 232; *Thompson v. Ins. Co.*, 75 Me. 55; 46 Am. Rep. 357; *Aetna Ins. Co. v. Reed*, 33 O. S. 283.

⁵ *Georgia Home Ins. Co. v. Warten*, 113 Ala. 479; 59 Am. St. Rep. 129; 22 So. 288.

that power to an agent to sell includes power to contract for sale,⁶ that an option is legally binding,⁷ or a statement that a married woman must sign the note evidencing the mortgage debt as well as the mortgage to bar her dower,⁸ are none of them fraud. In other jurisdictions equity gives relief against fraudulent misrepresentations as to the existence or effect of rules of domestic law.⁹ Thus a misrepresentation as to the legal effect of a deed;¹⁰ or as to the liability of an insurance company after loss, as that it was not liable where the insured was not the sole owner of the property insured,¹¹ or where the insured property was mortgaged¹² has been held ground for rescinding a contract

⁶ *McReavy v. Eshelman*, 4 Wash. 757; 31 Pac. 35.

⁷ *Whittaker v. Improvement Co.*, 34 W. Va. 217; 12 S. E. 507.

⁸ *Crofut v. Aldrich*, 54 Ill. App. 541.

⁹ *Titus v. Ins. Co.*, 97 Ky. 567; 53 Am. St. Rep. 426; 31 S. W. 127; *Berry v. Whitney*, 40 Mich. 65; *Berry v. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548; 30 N. E. 254; *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767; 34 Atl. 23. "The weight of authority and the decisions of 'this court would now forbid that a party, who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance and made it more dense by his own false and fraudulent misrepresentations, but has wilfully deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the general doctrine that a mere mistake of law affords no ground for relief." *Titus v. Ins. Co.*, 97 Ky. 567; 53 Am. St. Rep. 426; 28 L. R. A. 478; 31 S. W. 127. "There is an equitable rule to the effect that when there is a mistake of law or fact by one party which is induced, aided or accompanied by inequitable conduct

of the other containing elements of wrongful intent, such as misrepresentation or concealment, a court of equity will lend its aid and relieve from the consequences of the error." *German Savings Bank v. Geneser*, 116 Ia. 119, 125; 89 N. W. 201 (citing, *Williams v. Hamilton*, 104 Ia. 423; 65 Am. St. Rep. 475; 73 N. W. 1029; *Marshall v. Westrope*, 98 Ia. 324; 67 N. W. 257). Under § 1578 of the California Civil Code, allowing relief where all parties misapprehend the law and make substantially the same mistake, relief may be had for misrepresentation of law: as for a misrepresentation as to the right of the mortgagee to the rents and profits before foreclosure. *Gregory v. Clabrough*, 129 Cal. 475; 62 Pac. 72; as to the period for which redemption is allowed after sale in foreclosure. *Benson v. Bunting*, 127 Cal. 532; 78 Am. St. Rep. 81; 59 Pac. 991.

¹⁰ *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767; 34 Atl. 23. (As that it passed a fee, while in reality it passed only a life estate.)

¹¹ *Berry v. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548; 30 N. E. 254.

caused thereby. In many of these cases, however, it will be found that the decisive fact is that a contract has been made or a right surrendered without legal consideration; and that misrepresentation of law has been merely the means of inducing the adversary party to enter into such gratuitous contract.¹³ Some of the cases involving fraudulent misrepresentation of law concern contracts which are otherwise invalid. If, by reason of a misrepresentation of law, a contract without consideration, to surrender legal rights is entered into such contract is unenforceable.¹⁴

§167. Fiduciary relations.—Representation of law.

If the parties are in fiduciary relations in which actual trust and confidence is reposed, such as attorney and client,¹ step-mother and step-son,² or persons about to intermarry,³ so that one of them has a right to rely on the opinion of the other, a misrepresentation of law may amount to fraud. Thus where attorneys represented to their client that their fees must by law be secured in advance, and thus induce him to give a note and mortgage, and afterwards they foreclosed the mortgage and bought in the property without rendering the services, rescission was allowed.⁴ If trust and confidence are actually reposed, a misrepresentation of law may amount to fraud even if the relations between the parties are not such as to imply trust and con-

¹² *Titus v. Ins. Co.*, 97 Ky. 567; 53 Am. St. Rep. 426; 28 L. R. A. 478; 31 S. W. 127. This was said to be "a case of actual fraud where by fraudulent misrepresentations made for the purpose and with intent to deceive, the known ignorance of one of the parties has been taken advantage of and he has thereby been induced to surrender a valid subsisting right without consideration."

¹³ *Titus v. Ins. Co.*, 97 Ky. 567; 53 Am. St. Rep. 426; 28 L. R. A. 478; 31 S. W. 127; *Berry v. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548; 30 N. E. 254; *Wilson v. Ott*,

173 Pa. St. 253; 51 Am. St. Rep. 767; 34 Atl. 23.

¹⁴ *Berry v. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548; 30 N. E. 254; *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767; 34 Atl. 23.

¹ *Allen v. Frawley*, 106 Wis. 638; 82 N. W. 593.

² *West v. West*, 9 Tex. Civ. App. 475; 29 S. W. 242.

³ *Lamb v. Lamb*, 130 Ind. 273; 30 Am. St. Rep. 227; 30 N. E. 36. (A release of dower rights for an inadequate consideration was obtained by misstatement of the legal effect of a written instrument.)

⁴ *Allen v. Frawley*, 106 Wis. 638; 82 N. W. 593.

fidence.⁵ Thus a representation made to a widow by the executors of her husband's will that she has no dower rights and is dependent on the bounty of the heirs for anything in excess of the provisions of the will, is fraud where such executors knew that the widow relied on their advice, and that her husband when living had told her so to rely.⁶ If, on the other hand, trust and confidence are not reposed, the mere fact of a relationship in which trust and confidence normally exist does not of itself make a representation of law operate as fraud.⁷ Thus where divorce proceedings are pending, and the wife is represented by an attorney, her husband's representation that all the property in dispute was his sole property and none of it community property, is not fraud, though false, where the facts were known to her.⁸

§168. Representations involving law and fact.

If the material facts are not known to the party to whom the false representations of law are made, a statement may be in such form as to involve not only law, but fact as well, and may accordingly be fraud. Thus a statement that one has a perfect title, no other facts being given,¹ that a certain title is

⁵ *Peter v. Wright*, 6 Ind. 183; *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767; 34 Atl. 23; *Ludington v. Patton*, 111 Wis. 208; 86 N. W. 571. A contract was set aside, because one party thereto "placed a known trust and confidence in her advisers in a mixed question of law and fact," as to her title to realty, and they misled her. *Peter v. Wright* 6 Ind. 183, 188.

⁶ *Ludington v. Patton*, 111 Wis. 208; 86 N. W. 571. See for somewhat similar facts of a fraudulent misrepresentation of law made by an executor to a devisee who was his sister-in-law; *Schuttler v. Brandfass*, 41 W. Va. 201; 23 S. E. 808.

⁷ *Champion v. Woods*, 79 Cal. 17; 12 Am. St. Rep. 126; 21 Pac. 534.

⁸ *Champion v. Woods*, 79 Cal. 17;

12 Am. St. Rep. 126; 21 Pac. 534. For a further discussion of this subject see ch. XI.

¹ *Burns v. Dockray*, 156 Mass. 135; 30 N. E. 551; *Nash v. Trust Co.*, 159 Mass. 437; 34 N. E. 625; compare same case, 163 Mass. 574; 47 Am. St. Rep. 489; 28 L. R. A. 753; 40 N. E. 1039; *Tretheway v. Hulett*, 52 Minn. 448; 54 N. W. 486; *Carlton v. Hulett*, 49 Minn. 308; 51 N. W. 1053; *Cressler v. Rees*, 27 Neb. 515; 20 Am. St. Rep. 691; 43 N. W. 363. "No doubt even a positive statement that a title is good may involve somewhat matter of opinion, but it also imports that there are no facts that affect its validity." *Burns v. Dockray*, 156 Mass. 135, 137; 30 N. E. 551.

defective,² that a deed to certain realty is the only conveyance thereof,³ that a certain will⁴ or deed⁵ does not pass certain realty, that a tract of land is free from incumbrances,⁶ or that a certain deed is a forgery,⁷ are material facts; and not mere representations of law. However, a mere reference to "my land" is an identification of the tract rather than a statement of title.⁸

So, a statement that a mortgage is the first lien on the premises, no other facts being given from which such statement could be shown to be an opinion,⁹ or that a certain amount of property is covered thereby,¹⁰ are statements of fact. So false representation as to easements and appurtenances affecting the value of the land, which could not have been ascertained by an examination,¹¹ or that a right of way over adjoining land is appurtenant to the tract conveyed,¹² are statements of fact. A false statement of authority as agent,¹³ as to the transfer of rights under a verbal contract whose terms are not given,¹⁴ a

² *Peter v. Wright*, 6 Ind. 183.

³ *Herman v. Hall*, 140 Mo. 270; 41 S. W. 733.

⁴ *Hicks v. Deemer*, 87 Ill. App. 384; 58 N. E. 252.

⁵ *Dashiel v. Harshman*, 113 Ia. 283; 85 N. W. 85.

⁶ *Carpenter v. Wright*, 52 Kan. 221; 34 Pac. 798.

⁷ *Robinson v. Reinhart*, 137 Ind. 674; 36 N. E. 519.

⁸ *Reuter v. Lowe*, 86 Wis. 106; 56 N. W. 472.

⁹ *Bank v. Byers*, 139 Mo. 627; 41 S. W. 325; *People v. Peckens*, 153 N. Y. 576; 47 N. E. 883; *Crebbin v. Bank* (Tex. Civ. App.); 50 S. W. 402.

¹⁰ *Whiting v. Price*, 172 Mass. 240; 70 Am. St. Rep. 262; 51 N. E. 1084; same case, 169 Mass. 576; 61 Am. St. Rep. 307; 48 N. E. 772. (Where the statement was that it covered realty worth half a million. when in fact it covered no realty at

all; and the bond on its face purported to be secured by mortgage "on all the property" of mortgagor); *People v. Peckens*, 153 N. Y. 576; 47 N. E. 883.

¹¹ *Fenley v. Moody*, 104 Ga. 790; 30 S. E. 1002.

¹² *Durkin v. Cobleigh*, 156 Mass. 108; 32 Am. St. Rep. 436; 17 L. R. A. 270; 30 N. E. 474. (Even if not mentioned in the deed except by the general grant of "all the privileges and appurtenances thereunto belonging.")

¹³ *Braithwait v. Bain*, 66 Minn. 325; 69 N. W. 4; *Continental National Bank v. Farris*, 77 Mo. App. 186; *Patterson v. Lippincott*, 47 N. J. L. 457; 54 Am. Rep. 178; *White v. Madison*, 26 N. Y. 117; *Dung v. Parker*, 52 N. Y. 494; *Oliver v. Morawetz*, 97 Wis. 332; 72 N. W. 877.

¹⁴ *Griel v. Lomax*, 94 Ala. 641; 10 So. 232.

statement as to the protection of an invention by a patent,¹⁵ or of a book by copyright,¹⁶ or that a given patent does not infringe another patent,¹⁷ are all statements of material facts, and may constitute fraud; while if the specific facts had been given in detail, and the falsity had consisted in the statement of their legal effect, such statements would not have constituted fraud. So a statement that a certain insurance company has been formed under a specified statute involves fact as well as law.¹⁸

§169. Representations of Foreign Law.

The foregoing propositions apply to representations of domestic law only. In fraud, as generally, foreign law is treated as a fact, and a misstatement thereof may be fraud,¹ as where one is induced thereby to enter into a contract controlled by such foreign law and illegal thereunder.² What law is foreign and what domestic is a question upon which there is some confusion. The rule in force seems to be that the law of the domicile of the party who alleges mistake or misrepresentation of law is as to him domestic law; and the law of other jurisdictions is foreign law, if he brings his suit in the jurisdiction of his domicile. So a mistake made by a citizen of Massachusetts concerning a rule of New York law is treated as a mistake of fact.³ Even if he brings the suit in the jurisdiction concerning the law of which he made the mistake in question, he may treat such mistake as a mistake of fact. A representation by a citizen of Iowa to an alien domiciled and residing in Germany concerning a question of Iowa law affecting title to Iowa land has been held to be a representation of fact.⁴ So

¹⁵ *Moyle v. Silbaugh*, 105 Ia. 531; 75 N. W. 362.

¹⁶ *Coffey v. Hendrick* (Ky.); 65 S. W. 127.

¹⁷ *Pratt v. Coke Co.*, 155 Ill. 531; 40 N. E. 1032.

¹⁸ *Harris-Emery Co. v. Piteairn*, — Ia. —; 98 N. W. 476.

¹ *Bethell v. Bethell*, 92 Ind. 318; *Wood v. Roeder*, 50 Neb. 476; 70 N.

W. 21; *Rosenbaum v. Credit System Co.*, 64 N. J. L. 34; 44 Atl. 966; *King v. Doolittle*, 1 Head (Tenn.) 77.

² *Rosenbaum v. Credit-System Co.*, 64 N. J. L. 34; 44 Atl. 966.

³ *Haven v. Foster*, 9 Pick (Mass.) 112; 19 Am. Dec. 353.

⁴ *Schneider v. Schneider*, — Ia. —; 98 N. W. 159.

one domiciled in Ohio, who there discounts a negotiable instrument illegally issued in New York, under mistake as to New York law, may in an action in New York treat such mistake as one of fact and recover the money paid for such negotiable instrument.⁵

§170. Innocent misrepresentation of law.

The general rule is that no relief can be given for innocent misrepresentation of law.¹ Thus when A sold to B certain municipal bonds, representing that they were valid, the material facts being known to both parties, no relief was given on the ground that it was an erroneous legal opinion.² So a misrepresentation that corporate stock was non-assessable beyond a certain per cent of its face value, all the facts being known, was not ground for rescinding a sale thereof.³ So a misrepresentation as to the legal liability on a contract of indorsement made after the note had been delivered to the payee, who did not indorse it over does not avoid a subsequent indorsement on a new note, extending the time of payment.⁴ So in insurance, to avoid the policy the misrepresentation must be one of fact as distinguished from one of law. Thus, where the agent knows all the facts as to the title of the insured, and the insured, believing that he owns the property in fee represents that he is the sole owner, the policy is valid, though the courts afterwards decide that the insured's interest in three-fourths of the property was a life interest only.⁵ In some cases equity has relieved against a misrepresentation of law. Thus where A gave his daughter B a lease for her life of a house, and after A's death, intestate, the other heirs in good faith represented to B that her lease was invalid and thereby induced her

⁵ Bank v. Dodge, 8 Barb. (N. Y.) 233.

¹ Upton v. Tribilcock, 91 U. S. 45; Kenton Ins. Co. v. Wigginton, 89 Ky. 330; 7 L. R. A. 81; 12 S. W. 668; Ruohs v. Bank, 94 Tenn. 57; 28 S. W. 303.

² Ruohs v. Bank, 94 Tenn. 57; 28 S. W. 303.

³ Upton v. Tribilcock, 91 U. S. 45.

⁴ German Savings Bank v. Geneser, 116 Ia. 119; 89 N. E. 201.

⁵ Kenton Ins. Co. v. Wigginton, 89 Ky. 330; 7 L. R. A. 81; 12 S. W. 668.

to surrender her share of A's estate in return for a lease from such other heirs of the same house, misrepresentation was held to avoid B's release of her share of A's estate.⁶

§171. Mistake of law.

"A mistake of law happens when a party having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect."¹ Some authorities have attempted to lay down the rule that relief should always be given for a mistake of law, arising from the erroneous result of active inquiry into the law,² though no relief should be given for ignorance of the law, arising from omission to make inquiry into the law. This attempted distinction has been very generally repudiated.³

If the parties to the contract know the material facts, but by mistake of law, draw an erroneous conclusion as to the legal consequences flowing from such facts, and are thereby induced to enter into the contract when but for such mistake they would not have done so, the general rule (to be, as we shall see later, sharply hedged in by exceptions) is that such mistake has no effect in making such contract invalid.⁴ Thus, A devised realty to B in fee and B thought that she had a fee, not knowing that A could not deprive his minor children of their homestead. Under this mistake of law, B borrowed money of C to pay off a mortgage on such realty held by X. C, finding that his mortgage was inferior to the homestead rights of A's minor chil-

⁶ *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556. (It will be observed that here B received no consideration for such release. The case also presents circumstances of undue influence.)

¹ *Hurd v. Hall*, 12 Wis. 113, 124; quoted in *Birkhauser v. Schmitt*, 45 Wis. 316; 30 Am. Rep. 740.

² *Lawrence v. Beaubien*, 2 Bailey L. (S. Car.) 623; 23 Am. Dec. 155; *McDaniels v. Bank*, 29 Vt. 230; 70 Am. Dec. 406.

³ *Gruynn v. Hamilton*, 29 Ala. 233; *Boggs v. Fowler*, 16 Cal. 559; 76 Am. Dec. 561; *Kenyon v. Welty*,

20 Cal. 637; 81 Am. Dec. 137; *Hawralty v. Warren*, 18 N. J. Eq. 124; 90 Am. Dec. 613; *Birkhauser v. Schmitt*, 45 Wis. 316; 30 Am. Rep. 740.

⁴ *Hamblin v. Bishop*, 41 Fed. 74; *Coffee v. Emigh*, 15 Colo. 184; 10 L. R. A. 125; 25 Pac. 83; *McDonald v. Minnick*, 147 Ill. 651; 35 N. E. 367; *German Savings Bank v. Gensser*, 116 Ia. 119; 89 N. W. 201; *Kleimann v. Gielselmann*, 114 Mo. 437; 35 Am. St. Rep. 761; 21 S. W. 796; *Ruohs v. Bank*, 94 Tenn. 57; 28 S. W. 303; *Kyes v. Furniture Co.*, 92 Wis. 32; 65 N. W. 735.

dren, sued to be subrogated to X's mortgage. This relief was refused.⁵ A surety who had been released from liability on the original note, and not knowing that by law he is released, signs a new note for an extension of time is liable thereon.⁶ Thus if A makes a contract with full knowledge of its terms under an erroneous belief that it does not bind him,⁷ he cannot have relief. So if A takes a conveyance from her husband B without covenants of warranty under a mistaken belief that A and B are tenancies by entireties,⁸ or if A agreed to and did convey to a railroad a right of way across his farm, not knowing that it would prevent him from recovering damages for injury to the rest of his farm,⁹ no relief can be had.

The early English rule was that relief should be given for a mistake of law if the rule of law was plain,¹⁰ but not if it were doubtful.¹¹ This rule has been criticised and not followed.¹²

§172. Mistake of law involving mistake of fact.

An exception to this general rule is made by some eminent authorities as follows. If the mistake is a mistake as to a general rule of law, the rule already given applies, and no relief can be given; but if it is a mistake as to the private right of a party to the contract, the contract may be avoided therefor.¹ In applying this principle a mistake as to one's

⁵ *Kleimann v. Gieselmann*, 114 Mo. 437; 35 Am. St. Rep. 761; 21 S. W. 796.

⁶ *Churchill v. Bradley*, 58 Vt. 403; 56 Am. Rep. 563; 5 Atl. 189.

⁷ *Milks v. Milks*, 129 Mich. 164; 88 N. W. 402; *McDaniels v. Bank*, 29 Vt. 230; 70 Am. Dec. 406.

⁸ *Hancock v. Wiggins*, 28 Ind. App. 449; 63 N. E. 242.

⁹ *Eldridge v. R. R.*, 88 Me. 191; 33 Atl. 974.

¹⁰ *Naylor v. Winch*, 1 Sim. & Stu. 555.

¹¹ *Leonard v. Leonard*, 2 Ball & B. 171.

¹² *Trigg v. Read*, 5 Humph. (Tenn.) 529; 42 Am. Dec. 447.

¹ *Cooper v. Phibbs*, L. R. 2 H. L.

149; *Bingham v. Bingham*, 1 Ves. Si. 126; *Cocking v. Pratt*, 1 Ves. Si. 400; *Townsend v. Stangroom*, 6 Ves. Jr. 328; *Broughton v. Hutt*, 3 DeG. & J. 501; *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Cann v. Cann*, 1 P. Wms. 723; *Griffith v. Sebastian Co.*, 49 Ark. 24; 3 S. W. 886; *Blakeman v. Blakeman*, 39 Conn. 320; *Wilson v. Ins. Co.*, 60 Md. 150; *Renard v. Clink*, 91 Mich. 1; 30 Am. St. Rep. 458; 51 N. W. 692; *Lane v. Holmes*, 55 Minn. 379; 43 Am. St. Rep. 508; 57 N. W. 132; *Gerdine v. Menage*, 41 Minn. 417; 43 N. W. 91; *Alabama, etc., Ry.*, 73 Miss. 110; 55 Am. St. Rep. 488; 19 So. 105; *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767; 34 Atl.

title to realty,² or as to the validity of a lien on one's realty,³ or a mistake as to the legal effect of a note, such as whether it carried interest,⁴ or ignorance of a right to avoid a contract,⁵ are such mistakes as to private rights as furnish ground for avoiding the contract.

While this distinction is indorsed by excellent authority, it is, nevertheless, a difficult one to apply as a test. In order to be mistaken as to a private right, when all the facts are known, one must generally be mistaken as to some rule of general law and mistakes as to the rules of general law are material, as a rule, only when they cause mistake as to private rights. The commonest form of so-called mistake as to private right is where one party is mistaken as to the ownership of property. Now the question of ownership of property is often treated as an ultimate question of fact, even when its determination depends

23; *Toland v. Carey*, 6 Utah 392; 24 Pac. 190; (affirmed by divided United States Supreme Court without opinion, 154 U. S. 499); *Morgan v. Bell*, 3 Wash. 554; 16 L. R. A. 614; 28 Pac. 925.

² *Renard v. Clink*, 91 Mich. 1; 30 Am. St. Rep. 458; 51 N. W. 692; *Gerdine v. Menage*, 41 Minn. 417; 45 N. W. 91; *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767; 34 Atl. 23; *Morgan v. Bell*, 3 Wash. 554; 16 L. R. A. 614; 28 Pac. 925.

³ *Toland v. Corey*, 6 Utah 392; 24 Pac. 190. (Affirmed by divided court. *Corey v. Toland*, 154 U. S. 499.)

⁴ *Lane v. Holmes*, 55 Minn. 379; 43 Am. St. Rep. 508; 57 N. W. 132. In this case B gave A a note for \$3,000, the rate of interest being left blank, and neither party expecting the note to bear interest. A sent the note to his attorney, X, to foreclose, and X computed the note at seven per cent interest and bid in the property at this amount. B then sued A to recover the differ-

ence between this bid, and the true amount of the debt, \$3,000, plus the costs of foreclosure. A sought to avoid his purchase. It was held that he could do so. In *Gerdine v. Menage*, 41 Minn. 417; 43 N. W. 91, X tried to foreclose a mortgage and thought he had done so in legal form. He then paid off liens on such property. The foreclosure being set aside, he was allowed subrogation to the liens thus paid off. But in *Truesdale v. Sidle*, 65 Minn. 315; 67 N. W. 1004, A, thinking that a note and mortgage given by B included attorney fees, added that amount to the debt, interest and costs of foreclosure, and bid that sum for the property. B sued A to recover the amount of the bid in excess of A's debt and costs, which amounted to the supposed attorney fees. The value of the lots having depreciated, A was not allowed to avoid his bid.

⁵ *Rees v. De Bernardy* (1896), 2 Ch. 437. (Where two illiterate old women were induced to agree to pay

solely on questions of law.⁶ Yet even mistakes as to ownership, due to mistake of law, are not relieved against in equity according to some authorities.⁷ It seems rather that there is a conflict of authority on the question of how far equity will relieve against mistakes of law in the inducement, and that, as a means of reconciling the conflicting decisions, the distinction under discussion is supported rather by *obiter*, and by the reasons assigned by the courts for their decisions than by the principles actually involved in the facts presented for adjudication.

§173. Mistake of law causing gratuitous promise.

There are, however, some exceptions to the general rule, on which the authorities are in substantial accord. If A is not in fact liable at all to B, a promise to pay made under mistake as

one-half of an interest in an estate for information of their interest; and afterwards ratified such agreement by drawing money thereunder.) Alabama, etc., Ry. v. Jones, 73 Miss. 110; 55 Am. St. Rep. 488; 19 So. 105. (In this case, A who had been injured was induced to give a release while under the influence of opium. Subsequently, not knowing that he could rescind his release he ratified. It was held that in an action at law he could avoid the release and the ratification thereof.) According to some authorities ratification after majority of a contract made during infancy, by one who does not know that infancy is a defense may be avoided on the ground of mistake of law. Flexner v. Dickerson, 72 Ala. 318; Eureka Co. v. Edwards, 71 Ala. 248; Fetrow v. Wiseman, 40 Ind. 148; Petty v. Roberts, 7 Bush (Ky.) 410; Owen v. Long, 112 Mass. 403; Baker v. Kennett, 54 Mo. 82; Turner v. Gaither, 83 N. C. 357; 35 Am. Rep. 574; Dunlap v. Hales, 2 Jones L. (N. C.) 381; Alexander v. Hutcherson, 2 Hawks (N. C.) 535; Cur-

tin v. Patten, 11 Serg. & R. (Pa.) 305; Hinely v. Margaritz, 3 Pa. St. 428; Scott v. Buchanan, 11 Humph. (Tenn.) 468; Reed v. Boshears, 4 Sneed (Tenn.) 118; Hatch v. Hatch, 60 Vt. 160; 13 Atl. 791; *Contra*, Clark v. Van Court, 100 Ind. 113; 50 Am. Rep. 774; Morse v. Wheeler, 4 All. (Mass.) 570; Ring v. Jamison, 66 Mo. 424; Anderson v. Soward, 40 Ohio St. 325; 48 Am. Rep. 687.

⁶ "Such mistakes are classed with mistakes of fact and are frequently relieved from where the equity is clear." Gerdine v. Menage, 41 Minn. 417; 43 N. W. 91.

⁷ Upton v. Tribilcock, 91 U. S. 45; United States Bank v. Daniel, 12 Pet. (U. S.) 32; Hamblin v. Bishop, 41 Fed. 74; Allen v. Galloway, 30 Fed. 466; Dill v. Shahan, 25 Ala. 694; 60 Am. Dec. 540; Kleimann v. Gieselmann, 114 Mo. 437; 35 Am. St. Rep. 761; 21 S. W. 796; Gilbert v. Gilbert, 9 Barb. (N. Y.) 532; Zollman v. Moore, 21 Gratt (Va.) 313; Burkhauser v. Schmitt, 45 Wis. 316; 30 Am. Rep. 740.

to his liability is void.¹ Thus, where A gave a release to B's assignee in insolvency, thinking that he would receive a dividend on his claim therefor, but the release was filed too late to enable A to receive a dividend, A was allowed to enforce cancellation of the release and to maintain an action on the original debt.² So where A owned a mare and left it with B, and X, B's husband sold it, and was indicted for larceny, and A and B, mistakenly thinking that the only question involved in X's case was the ownership of the mare, agreed that A should take charge of the mare, but if X were acquitted, he should return her to B, no valid contract existed.³ In cases of this class the presence of the mistake obscures the controlling feature of the case, which is that there is no consideration for the promise and that even if there were no mistake such promise would be unenforceable. If mistake at all, it is really a form of mistake as to the subject-matter.⁴

§174. Mistake of law coupled with inequitable conduct.

If the party acting under mistake of law is also subject to undue influence a still clearer case for equitable relief exists.¹ Thus rescission was given of a conveyance of a homestead by a grantor 86 years old, believing that it could be taken from him by a judgment in a threatened suit for slander.² Thus

¹ Koenig v. Haddix, 21 Ill. App. 53; Blakemore v. Blakemore (Ky.); 44 S. W. 96; (an heir assumed a debt of his ancestor, barred by limitations thinking it a lien on his realty); Underwood v. Brockman, 4 Dana. (Ky.) 309; 29 Am. Dec. 407; (cited and approved in Ray v. Bank, 3 B. Mon. (Ky.) 510; 39 Am. Dec. 479; Louisville, etc., Ry. v. Hopkins County, 87 Ky. 605; 9 S. W. 497; Titus v. Ins. Co., 97 Ky. 567; 53 Am. St. Rep. 426; 28 L. R. A. 478; 31 S. W. 127; Neal v. Coburn, 92 Me. 139; 69 Am. St. Rep. 495; 42 Atl. 348; Warder v. Tucker, 7 Mass. 449; 5 Am. Dec. 62; Skillman v. Teeple, 1 N. J.

Eq. 232; Haviland v. Willetts, 141 N. Y. 35; 35 N. E. 958; Whitehill v. Dacus, 49 S. C. 273; 27 S. E. 200.

² Whitehill v. Dacus, 49 S. C. 273; 27 S. E. 200.

³ Fink v. Smith, 170 Pa. St. 124; 50 Am. St. Rep. 750; 32 Atl. 566.

⁴ See § 72.

¹ Evans v. Funk, 151 Ill. 650; 38 N. E. 230; Baehr v. Wolf, 59 Ill. 470; Sallee v. Sallee, (Ky.); 35 S. W. 437; Jordan v. Stevens, 51 Me. 78; 81 Am. Dec. 556; Flummerfelt v. Flummerfelt, 51 N. J. Eq. 432; 26 Atl. 857.

² Sallee v. Sallee (Ky.); 35 S. W. 437.

where an executor, in whom the legatees confide, takes a release from one of them knowing that it is given under the mistaken belief that such legacy had lapsed, such release may be avoided.³ In cases of this sort, the true ground of relief is not the mistake of law *per se*; but the fact that all the circumstances of the case show that the party seeking relief was the victim of constructive fraud or undue influence.

§175. Mistake as to foreign law.

A mistake as to a rule of foreign law is always treated as a mistake of fact.¹ The question of what law is to be treated as foreign and what as domestic has been considered in connection with misrepresentations of foreign law.²

³ Haviland v. Willets, 141 N. Y. 35; 35 N. E. 958.

¹ Patterson v. Bloomer, 35 Conn. 57; 95 Am. Dec. 218; Haven v. Foster, 9 Pick. (Mass.) 112; Rosenbaum v. Credit-System Co., 64 N. J. L. 34; 44 Atl. 966; Mer-

chants' Bank v. Spalding, 12 Barb. 302; Bank of Chillicothe v. Dodge, 8 Barb. 233; see Pittsburg, etc., Iron Co. v. Iron Co., 118 Mich. 109; 76 N. W. 395.

² See § 169.

CHAPTER XI.

CONSTRUCTIVE FRAUD.

I. NATURE.

§176. Nature of constructive fraud.

It is difficult to frame a definition of constructive fraud which will at once be accurate and include all that the legal concept embraces. The rules of constructive fraud have been developed by courts in cases in which they have refused to frame definitions of fraud, or to be controlled in giving relief by specific and definite rules in regard to fraud.¹ Other facts intensify the difficulty. Unlike one another as the extreme types of fraud, duress, and incapacity may be, there are many cases in which dishonest and inequitable conduct which may not amount to actual fraud, coupled with an amount of moral compulsion which may not amount to technical duress is brought to bear, either on a person who is of feeble capacity, though not suffering from actual insanity or imbecility; or else upon a person who reposes especial trust and confidence in the adversary party to the contract. In cases like this it may be as easy to see that the contract ought not to be enforced as it is difficult to lay down a general principle stating the exact combination of facts which induced the court to give relief in that particular case, and which it will apply in the future to similar cases. When the propriety of granting relief is clear, it is not always necessary under our system of jurisprudence to classify the case carefully as one of constructive fraud or undue influence. Furthermore, the doctrines of constructive fraud have grown by piece meal. Particular classes of cases have been recognized by the courts as referable to constructive fraud, long before the general principles underlying the particular

¹ *Meldrum v. Meldrum*, 15 Colo. 478; 11 L. R. A. 65; 24 Pac. 1083.

classes of cases have been worked out into accurate forms of statement. While such a state of affairs is always to be regretted, it is inevitable under a theory of the law which restricts the power and jurisdiction of its courts to deciding the specific case then on trial, and makes impossible an official and authoritative statement of the general principles which the courts are ready to apply to other cases not before it. A further source of difficulty is that courts and text-writers have included under constructive fraud classes of cases that have no connection with it. One of the clearest and profoundest of writers has included under the head of constructive fraud, illegal contracts.² Fraud, actual or constructive, is operative only when it affects offer and acceptance, making the agreement thus apparently reached either void or voidable. Illegal contracts are unenforceable solely on account of their subject-matter. It is perfectly possible, and usually the case, that in an illegal contract, offer and acceptance result in a perfect meeting of the minds, though on a subject-matter about which the law does not allow parties to contract. A tentative definition of constructive fraud is, however, a necessity. The following may be suggested. Constructive fraud consists of such acts or omissions, not amounting to actual fraud, as on account of the peculiar relations of the parties to the contract, render the contract induced thereby as unenforceable as actual fraud would have made it.³

II. BETWEEN WHAT PARTIES CONSTRUCTIVE FRAUD MAY EXIST.

§177. Constructive fraud limited to relations of trust and confidence.

The definition of constructive fraud here given includes a special relation between the parties to the contract as an essential element. Probably constructive fraud in the accurate sense of the term does not exist between persons of normal status, who repose no especial trust and confidence in each other and deal with each other at arm's length. Where relations of special

² Pomeroy *Equit. Juris.*, §§ 929-936.

³ *Lagrone v. Timmerman*, 46 S. Car. 372; 24 S. E. 290.

trust and confidence exist, however, facts which do not amount to actual fraud may have its legal effect.¹ "A breach of duty is 'constructive fraud.'"² If A occupies a fiduciary relation to B³ and engages in a transaction with B which is prejudicial to B, such transaction is presumptively fraudulent,⁴ and if it appears that B did not have full knowledge of his legal rights,⁵ or even if it does not appear affirmatively that B had such knowledge,⁶ such transaction will be set aside for constructive fraud. In such cases it is for A to show affirmatively that such a transaction is fair and honest or it will be presumed fraudulent. The relations between the parties which make constructive fraud possible are of two different kinds. The trust and confidence reposed may be general, as in relations between husband and wife, parent and child and the like. In other cases, as between principal and agent, partners, directors and the corporation or the stockholders, the trust and confidence may be reposed as to a certain limited subject-matter, while as to other matters the same parties may occupy no relation of trust and confidence. Further, the relations of trust and confidence may be technical ones, such as those between principal and agent, and the like, or though no technical relations of trust and confidence exist, actual trust and confidence may be reposed.

¹ *Alaniz v. Casenave*, 91 Cal. 41; 27 Pac. 521; *Meldrum v. Meldrum*, 15 Colo. 478; 11 L. R. A. 65; 24 Pac. 1083; *Thomas v. Whitney*, 186 Ill. 225; 57 N. E. 808; affirming, 83 Ill. App. 247; *Field v. Banking Co.*, 77 Miss. 180; 26 So. 365; *Barnard v. Gantz*, 140 N. Y. 249; 35 N. E. 430; *Smith v. Smith*, 134 N. Y. 62; 30 Am. St. Rep. 617; 31 N. E. 258.

² *Baker v. Humphrey*, 101 U. S. 494.

³ *Field v. Banking Co.*, 77 Miss. 180; 26 So. 365.

⁴ *Thomas v. Whitney*, 186 Ill. 225; 57 N. E. 808; affirming, 83 Ill. App. 247. "It is well settled that where it appears that a fiduciary or confidential relation exist-

ed between the parties at the time of the transaction alleged to be fraudulent, such as trustee and *cestui que* trust, principal and agent, attorney and client, husband and wife, guardian and ward, or where one of the parties for any other reason possesses influence or power over the other, the law raises a presumption of fraud whenever the party in whom the confidence is reposed obtains from the other a contract to his own profit." *Schneider v. Schneider* — Ia.—; 98 N. W. 159.

⁵ *Field v. Banking Co.*, 77 Miss. 180; 26 So. 365.

⁶ *Thomas v. Whitney*, 186 Ill. 225; 57 N. E. 808; affirming, 83 Ill. App. 247.

§178. Non-disclosure in general as constructive fraud.

The difference between actual and constructive fraud can be seen best by considering the elements of actual fraud and observing which of them are non-essential in constructive fraud. Thus, an active misstatement of a material fact, or a wilful and active concealment thereof is an essential element of actual fraud in order to avoid ordinary contracts.¹ Between persons in relations of especial trust and confidence, constructive fraud may exist by reason of mere non-disclosure. Even if the party reposing trust and confidence does not care with whom he deals and the identity of the adversary party is of no consequence to him, the person in whom trust is reposed cannot conceal his identity and act as the adversary party to the contract. If he does so, constructive fraud exists.² If he discloses his identity, he must furthermore make full and complete disclosure of all material facts known to him,³ and must make a fair and reasonable contract. If he does not do this the contract thus induced is voidable for constructive fraud. If he does, the contract may be valid. The party in whom trust is reposed must not make any secret gain for himself out of the subject-matter of such trust and confidence. If he does so, the person reposing such trust and confidence may make him account for such gain. The propositions here stated will be more fully developed in the following sections.

§179. Principal and agent.

The elements of constructive fraud may best be understood from a discussion of their applications to the particular relations existing between the parties. An agent who makes a contract on his principal's behalf with himself, is guilty of constructive fraud if he does not disclose to the principal the fact that the agent is the adversary party to the contract, even if it is a matter of indifference to the principal with whom he con-

¹ A different rule applies to contracts *uberrimæ fidei*. See 159 et seq.

² See § 179.

³ See §§ 179, 180.

tracts.¹ Thus the agent of an insurance company cannot issue a policy to himself.² An agent cannot buy his principal's property without disclosing his identity and getting his principal's assent.³ Equity will not give specific performance when an agent has sold his principal's property to one in partnership with the agent, without disclosing these facts to the principal.⁴ The existence of constructive fraud is especially clear where the agent has prevented others from attempting to purchase his principal's property.⁵ While an agent cannot by the use of the name of a third person conceal his identity and buy his principal's property, yet if the agent sells property for his principal to a third person by a *bona fide* contract, the agent may subsequently purchase such property from such vendee.⁶ The test of the validity of the contract in such cases is whether the vendee had at the time of making the purchase an understanding with the agent for a reconveyance to the latter, in which case the contract is fraudulent; or whether the agreement between the vendee and the agent for a reconveyance was entered into after such sale, in which case the contract is valid. Where the principal knows that the agent is representing an adverse interest as well as the interest of the principal,⁷ the fact that the alleged agent has concealed his identity and that he is really the adverse party to the contract does not avoid it. An agent in dealing with his principal as adversary party or in making contracts on behalf of his principal with third persons, must

¹ Robertson v. Chapman, 152 U. S. 673; (obiter) Dutton v. Willner, 52 N. Y. 312; Clendenning v. Hawk, 10 N. D. 90; 86 N. W. 114; Peckham Iron Co. v. Harper, 41 O. S. 100.

² Wildberger v. Ins. Co., 72 Miss. 338; 48 Am. St. Rep. 558; 28 L. R. A. 220; 17 So. 282.

³ Dodge v. Black (Ky.); 53 S. W. 1039.

⁴ Fry v. Platt, 32 Kan. 62; 3 Pac. 781.

⁵ Quinn v. Le Duc (N. J. Eq.); 51 Atl. 199.

⁶ Robertson v. Chapman, 152 U. S. 673; Walker v. Carrington, 74 Ill. 446; Oberlin College v. Blair, 45 W. Va. 812; 32 S. E. 203.

⁷ Moore v. Mandelbaum, 8 Mich. 434; Tilly v. Wolverton, 46 Minn. 256; 48 N. W. 908; Hegenmyer v. Marks, 37 Minn. 6; 5 Am. St. Rep. 808; 32 N. W. 785; Porter v. Woodruff, 36 N. J. Eq. 174; Devall v. Burbridge, 4 Watts & S. (Pa.) 305; Vanasse v. Reid, 111 Wis. 303; 87 N. W. 192.

make full and fair disclosure to his principal of all material facts known to the agent which could affect the willingness of the principal to enter into the contract.⁸ Thus an agent must disclose to his principal facts known to the agent which increase the value of the property which he is selling for the principal, such as mineral deposits,⁹ or offers larger than the one he makes himself.¹⁰ If the agent makes a sale for his principal and does not disclose the fact that a more advantageous sale could have been made, he forfeits his right to commissions, as where the agent is effecting a loan to the principal for a commission.¹¹ On this principle a broker cannot recover commissions where he refuses to give his principal the name of the real party to whom he has sold,¹² especially where the principal would have insisted upon a higher price had he known who the real party was.¹³ An agent must not make any secret gain at the expense of the principal.¹⁴ Thus a city may avoid the purchase of a gas separator on learning that the agent of the city received a secret commission on such purchase.¹⁵ Thus an agent employed to do assessment work on a mining claim cannot forfeit

⁸ *Ralston v. Turpin*, 129 U. S. 663; *Green v. Peeso*, 92 Ia. 261; 60 N. W. 531; *Holmes v. Cathcart*, 88 Minn. 213; 97 Am. St. Rep. 513; 60 L. R. A. 734; 92 N. W. 956.

⁹ *Slator v. Trostel* (Tex. Civ. App.); 21 S. W. 285.

¹⁰ *Mason v. Bauman*, 62 Ill. 76; *Green v. Peeso*, 92 Ia. 261; 60 N. W. 531. If he sells to a third person, not disclosing a better offer, he is liable to his principal for the difference between the two offers. *Holmes v. Cathcart*, 88 Minn. 213; 97 Am. St. Rep. 513; 60 L. R. A. 734; 92 N. W. 956.

¹¹ *Talbott v. Manard*, 106 Tenn. 60; 59 S. W. 340.

¹² *Holmes v. Ry.*, 60 Minn. 197; 62 N. W. 264; *Young v. Hughes*, 32 N. J. Eq. 372; *Pratt v. Patterson*, 112 Pa. St. 475; 3 Atl. 858.

¹³ *Hafner v. Herron* 165 Ill. 242; 46 N. E. 211; *Wilkinson v. McCullough*, 196 Pa. St. 205; 46 Atl. 357.

¹⁴ *Donovan v. Champion*, 85 Fed. 71; 29 C. C. A. 30; *Findlay v. Pertz*, 66 Fed. 427; 29 L. R. A. 188; *Boswell v. Cunningham*, 32 Fla. 277; 21 L. R. A. 54; 13 So. 354; *Tyler v. Sanborn*, 128 Ill. 136; 15 Am. St. Rep. 97; 4 L. R. A. 218; 21 N. E. 193; *Kimball v. Ranney*, 122 Mich. 160; 46 L. R. A. 403; 80 N. W. 992; *McNutt v. Dix*, 83 Mich. 328; 10 L. R. A. 660; 47 N. W. 212; *Jansen v. Williams*, 36 Neb. 869; 20 L. R. A. 207; 55 N. W. 279.

¹⁵ *Findlay v. Pertz*, 66 Fed. 427; 29 L. R. A. 188. (Even if two months have elapsed since the sale.)

the claim for his principal by failing to do such work, and then locate the claim for his own benefit.¹⁶ So an agent authorized to buy at a certain maximum price cannot buy at a lower price and charge his principal with the maximum price.¹⁷ By statute an agent who holds for collection a note of his principal's and one of his own against the same debtor must give preference to his principal's note over his own.¹⁸ An agent can act for both adversary parties if both know and consent to such double agency¹⁹ though even in such cases he must exercise the utmost good faith toward each.²⁰ If both principals do not consent to the double agency, the agent cannot act.²¹ A contract thus made is voidable, not void.²² The agent cannot recover his compensation from either principal, and if a principal has paid the agent his compensation in ignorance of the double agency it may be recovered.²³ If the agent makes full and fair disclosure to his principal, he may make a contract with him with reference to a subject-matter concerning which he is acting as agent.²⁴ Thus an architect may make a contract as sub-contractor with the original contractor.²⁵

§180. Attorney and client.

An attorney in dealing with his client must make a full and fair disclosure of all material facts.¹ Thus the omission by the attorney of an estate to disclose material facts to the heirs, may

¹⁶ *Argentine Mining Co. v. Benedict*, 18 Utah 183; 55 Pac. 559.

¹⁷ *Kilbourn v. Sunderland*, 130 U. S. 505.

¹⁸ *Commercial Bank v. Bank*, 8 N. D. 382; 79 N. W. 859.

¹⁹ *Nevada Nickel Syndicate v. Nickel Co.*, 96 Fed. 133.

²⁰ *Morey v. Laird*, 108 Ia. 670; 77 N. W. 835.

²¹ *Donovan v. Champion*, 85 Fed. 71; 29 C. C. A. 30.

²² *Wiley v. Stewart*, 122 Ill. 545; 14 N. E. 835.

²³ *Cannell v. Smith*, 142 Pa. St. 25; 12 L. R. A. 395; 21 Atl. 793.

²⁴ *Kidd v. Williams*, 132 Ala. 140; 56 L. R. A. 879; 31 So. 458.

²⁵ *Orlandi v. Gray*, 125 Cal. 372; 58 Pac. 15.

¹ *Baker v. Humphrey*, 101 U. S. 494; *Cox v. Delmas*, 99 Cal. 104; 33 Pac. 836; *Miller v. Whelan*, 158 Ill. 544; 42 N. E. 59; *Elmore v. Johnson*, 143 Ill. 513; 21 L. R. A. 366; 32 N. E. 413; *Bibb v. Smith*, 1 Dana (Ky.) 580; *Beedle v. Crane*, 91 Mich. 429; 51 N. W. 1070; *Rose v. Mynatt*, 7 Yerg. (Tenn.) 30; *Vannasse v. Reid*, 111 Wis. 303; 87 N. W. 192.

avoid a contract.² If the transaction is advantageous for the attorney, he has the burden of showing that full disclosure was made and that the transaction was fair and reasonable.³ To uphold the transaction he must "prove that the transaction was fair, honest and honorable. Any doubt as to its fairness must be resolved in favor of his client."⁴ In the absence of such showing the contract will be presumed fraudulent.⁵ While in some States this rule has been applied to the original contract of employment, as to the contract fixing the compensation of the attorney⁶ its proper application is to contracts between attorney and client after the employment has begun, and they have entered upon their confidential relations.⁷ A contract after the employment has begun fixing⁸ or increasing⁹ the attorney's compensation,¹⁰ or a contract whereby the attorney purchases from the client property with reference to which the employment has been entered on as where the attorney buys from his client a note,¹¹ or a judgment,¹² or a claim,¹³ placed

² *Beedle v. Crane*, 91 Mich. 429; 51 N. W. 1070.

³ *Robinson v. Sharp*, 201 Ill. 86; 66 N. E. 299; affirming, 103 Ill. App. 239; *Ross v. Payson*, 160 Ill. 349; 43 N. E. 399.

⁴ *Cassem v. Heustis*, 201 Ill. 208; 94 Am. St. Rep. 160; 66 N. E. 283.

⁵ *Willin v. Burdette*, 172 Ill. 117; 49 N. E. 1000; *Shirk v. Neible*, 156 Ind. 66; 83 Am. St. Rep. 150; 59 N. E. 281; *French v. Cunningham*, 149 Ind. 632; 49 N. E. 797; *Bibb v. Smith*, 1 Dana (Ky.) 580; *Merryman v. Euler*, 59 Md. 588; 43 Am. Rep. 564; *Gray v. Emmons*, 7 Mich. 533; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *Rose v. My-natt*, 7 Yerg. (Tenn.) 30.

⁶ *McMahan v. Smith*, 6 Heisk (Tenn.) 167.

⁷ *Cassem v. Heustis*, 201 Ill. 208; 94 Am. St. Rep. 160; 66 N. E. 283; *Dunn v. Dunn*, 42 N. J. Eq. 431; 7 Atl. 842; *Thomas v. Turner*, 87 Va. 1; 12 S. E. 149, 668.

⁸ *Dickinson v. Bradford*, 59 Ala. 581; 31 Am. Rep. 23; *Shirk v. Neible*, 156 Ind. 66; 83 Am. St. Rep. 150; 59 N. E. 281.

⁹ *Lecatt v. Sallee*, 3 Port. (Ala.) 115; 29 Am. Dec. 249; *Cassem v. Heustis*, 201 Ill. 208; 94 Am. St. Rep. 160; 66 N. E. 283.

¹⁰ However a contract for compensation which is not upheld in its entirety, has been upheld as security for a reasonable compensation. *Thomas v. Turner*, 87 Va. 1; 12 S. E. 149, 668.

¹¹ *Burnham v. Heselton*, 82 Me. 495; 9 L. R. A. 90; 20 Atl. 80; (for much less than its value); to same effect see *Marshall v. Joy*, 17 Vt. 546.

¹² *Stubinger v. Frey*, 116 Ga. 396; 42 S. E. 713; *Morrison v. Smith*, 130 Ill. 304; 23 N. E. 241; *Howell v. Ranson*, 11 Paige (N. Y.) 538.

¹³ *Brooks v. Pratt*, 118 Fed. 725; 55 C. C. A. 515. (In this case the clients were incompetent to transact

in his hands for collection is treated as fraudulent. The existence of fraud is especially clear if it is shown that the client does not understand the nature of the transaction.¹⁴ "An attorney can in no case without the client's consent, buy and hold otherwise than in trust any adverse title or interest touching the thing to which his employment relates."¹⁵ A, an attorney employed by B, the owner of realty, to draw a contract of sale of certain realty, discovered a technical defect in the title, the legal title being in X. A then induced X to quit-claim to A's brother. It was held that B could compel A to convey to B, on paying to A what A had paid to X for the quit-claim deed.¹⁶ If the attorney buys his client's land at a sheriff's sale under a contract to hold it for his client, and this fact is announced to the bidders at the sale, the attorney will be held as a trustee for his client.¹⁷ An attorney cannot represent conflicting interests in the same transaction.¹⁸ If fair, reasonable and made on full disclosure of facts, a contract between attorney and client,¹⁹ such as a contract for compensation,²⁰ or an assignment of the client's interest under a decree of foreclosure,²¹ is valid. The mere fact that the property is soon resold at an advance does not make the contract invalid.²² So an agreement whereby an attorney is to buy his client's property on execution sale, for the attorney's own ben-

business, the attorney was a relative and they had no independent advice.)

¹⁴ *Lothian v. Lothian*, 88 Ia. 396; 55 N. W. 465. (In this case the client was a woman of seventy-five.)

¹⁵ *Baker v. Humphrey*, 101 U. S. 494, 501. To the same effect see: *Lewis v. Hillman*, 3 H. L. Cas. 607; *Moore v. Bracken*, 27 Ill. 22; *Case v. Carroll*, 35 N. Y. 385; *Smith v. Brotherline*, 62 Pa. St. 461; *Davis v. Smith*, 43 Vt. 269.

¹⁶ *Baker v. Humphrey*, 101 U. S. 494.

¹⁷ *Holmes v. Holmes*, 106 Ga. 858; 33 S. E. 216.

¹⁸ *In re Four Solicitors* (1901), 1 Q. B. 187.

¹⁹ *Bowdoin College v. Merritt*, 75 Fed. 480; *Tippett v. Brooks*, 95 Tex. 335; 67 S. W. 512; writ of error denied, 95 Tex. 335; 67 S. W. 495.

²⁰ *Ballard v. Carr*, 48 Cal. 74; *Lindt v. Linder*, 117 Ia. 110; 90 N. W. 596.

²¹ *Ah Foe v. Bennett*, 35 Or. 231; 58 Pac. 508.

²² *Ah Foe v. Bennett*, 35 Or. 231; 58 Pac. 508.

efit, is upheld if fair and reasonable,²³ and the client's creditors cannot attack such sale.²⁴ If the transaction between attorney and client is not intended to be for the advantage of the attorney, fraud is not presumed. Thus, fraud is not presumed in deed of trust from client to attorney where not to attorney's advantage.²⁵

§181. Officers of private and public corporations.

A director or officer of a private corporation may contract with the corporation if he discloses his interest, deals fairly with the corporation, and does not himself act for it in the matter in which his personal interest is adverse to that of the corporation, but leaves its interests in the hands of those directors and officers who are interested solely in the corporation.¹ Thus he may make a valid contract of loan,² sale,³ purchase,⁴ or employment,⁵ or a contract in payment of a prior debt due from the corporation to the director,⁶ or to indemnify him for becoming liable

²³ *Fisher v. McInerney*, 137 Cal. 28; 92 Am. St. Rep. 68; 69 Pac. 622, 907.

²⁴ *Fisher v. McInerney*, 137 Cal. 28; 92 Am. St. Rep. 68; 69 Pac. 622, 907.

²⁵ *Donahoe v. Cricket Club*, 177 Ill. 351; 52 N. E. 351.

¹ *Costa Rica Ry. v. Forwood* (1900) 1 Ch. 756; *American, etc., Bank v. Ward*, 117 Fed. 782; 49 C. C. A. 611; 55 L. R. A. 357; *Crymble v. Mulvaney*, 21 Colo. 203; 40 Pac. 499; *Stetson v. Investment Co.*, 104 Ia. 393; 73 N. W. 869; *Union Pacific Ry. v. Credit Mobilier*, 135 Mass. 367; *Gamble v. Water Co.*, 123 N. Y. 91; 9 L. R. A. 527; 25 N. E. 201; *Peter v. Mfg. Co.*, 56 O. S. 181; 46 N. E. 894; *Jameson v. Coldwell*, 23 Or. 144; 31 Pac. 279; *Tenison v. Patton*, 95 Tex. 284; 67 S. W. 92.

² *Richardson v. Green*, 133 U. S. 30; *Mullanphy Savings Bank v. Schott*, 135 Ill. 655; 25 Am. St.

Rep. 401; 26 N. E. 640; affirming, 34 Ill. App. 500; *Rollins v. Shaver Wagon, etc., Co.*, 80 Ia. 380; 20 Am. St. Rep. 427; 45 N. W. 1037; *Millsaps v. Chapman*, 76 Miss. 942; 71 Am. St. Rep. 547; *Klein v. Funk*, 82 Minn. 3; 84 N. W. 460; *Patterson v. Smelting Works*, 35 Or. 96; 56 Pac. 407. *In re Estate of Mechanics' Building and Savings Association*, 202 Pa. St. 589; 52 Atl. 58.

³ *Stetson v. Investment Co.*, 104 Ia. 393; 73 N. W. 869.

⁴ *Crymble v. Mulvaney*, 21 Colo. 203; 40 Pac. 499; *Ashhurst's Appeal*, 60 Pa. St. 290; *Tenison v. Patton*, 95 Tex. 284; 67 S. W. 92.

⁵ *Bagley v. Carthage, etc., Co.*, 165 N. Y. 179; 58 N. E. 895; *Watts v. R. R.*, 48 W. Va. 262; 37 S. E. 700.

⁶ *Smith v. Water Works*, 73 Conn. 626; 48 Atl. 754; *Blake v. Ray*, 110 Ky. 705; 62 S. W. 531.

as accommodation indorser⁷ for the corporation. So a director may buy up claims against the corporation at a discount, and enforce them in full, if in his official capacity he is under no duty to pay the claim.⁸ So, if a mining corporation has forfeited its claim and a stranger re-locates it without any arrangement to re-sell to anyone, a director of the mining corporation may subsequently in good faith purchase such claim.⁹ As such officers and directors occupy relations of trust and confidence to the stockholders and creditors of the corporation, their dealings with it are sharply scrutinized. "Any arrangement by which directors of a corporation become interested adversely to such corporation in contracts with it, or organize or take stock in companies or associations for the purpose of entering into contracts with the corporation, or become parties to any undertaking to secure to themselves a share in the profits of any transactions to which the corporation is also a party, will be looked upon with suspicion."¹⁰ Hence if the officer or director represents the corporation in the matter in which he is adversely interested¹¹ as where, as directors, they buy from themselves,¹²

⁷ Klein v. Funk, 82 Minn. 3; 84 N. W. 460; New Memphis Gaslight Co. Cases, 105 Tenn. 268; s. c. *sub nomine* Rawlings v. Gaslight Co., 60 S. W. 206.

⁸ Glenwood Mfg. Co. v. Syme, 109 Wis. 355; 85 N. W. 432.

⁹ McDermott Mining Co. v. McDermott, 27 Mont. 143; 69 Pac. 715.

¹⁰ McGourkey v. Ry., 146 U. S. 536. To the same effect see Richardson v. Green, 133 U. S. 30; Wardell v. R. R., 103 U. S. 651; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Oliver v. Oliver, 118 Ga. 362; 45 S. E. 232; Nye v. Storer, 168 Mass. 53; 46 N. E. 402; Church v. Cement Co., 75 Minn. 85; 77 N. W. 548; Singer v. Mfg. Co., 17 Utah 143; 70 Am. St. Rep. 773; 53 Pac. 1024.

¹¹ McGourkey v. Ry., 146 U. S. 536; Goodell v. Water Co., 138 Cal. 308; 71 Pac. 354; Graves v. Mining Co., 81 Cal. 303; 22 Pac. 665; Adams v. Burke, 201 Ill. 395; 66 N. E. 235; affirming, 102 Ill. App. 148; Macklem v. Fales, 130 Mich. 66; 89 N. W. 581; Flint, etc., Ry. v. Dewey, 14 Mich. 477; Davis v. Davis Co., 63 N. J. Eq. 572; 52 Atl. 717; Hoyle v. Ry. 54 N. Y. 314; 13 Am. Rep. 595; Parsons v. Refining Co., 25 Wash. 492; 65 Pac. 765.

¹² McGourkey v. Ry., 146 U. S. 536; Wardell v. R. R., 103 U. S. 651; Gilman, etc., R. R. v. Kelley, 77 Ill. 426; Scott v. Bank, — Tex. —; 75 S. W. 7; reversing (Tex. Civ. App.); 67 S. W. 343; which affirmed (Tex. Civ. App.); 66 S. W. 485.

or sell to themselves,¹³ as individuals, the transaction is characterized as a "constructive fraud."¹⁴ So, if a director's presence is necessary to make the requisite majority of the board, and he votes to lease the property of the corporation to another corporation in which he is interested, such lease may be avoided at the suit of a stockholder of the lessor corporation.¹⁵ If the directors represent the corporation in its dealings with themselves in an adverse interest, the transaction may be avoided by the corporation even if it is fair and the directors have acted in good faith,¹⁶ and the right of the corporation to avoid the contract is of course still more clear when the directors have acted in bad faith.¹⁷ So, if the directors conceal their adverse personal interests,¹⁸ as where they purchase property and by selling it to the corporation at advance receive the difference personally without disclosing to the corporation the actual cost,¹⁹ or where they receive secret commissions or contracts entered into between the corporation and third persons,²⁰ or in any way

¹³ *Miller v. Brown*, 1 Neb. Rep. Unofficial 754; 95 N. W. 797; *Goodin v. Canal Co.*, 18 O. S. 169; 98 Am. Dec. 95; *Sweeney v. Refining Co.*, 30 W. Va. 443; 8 Am. St. Rep. 88; 4 S. E. 431. Bill of sale for collateral security; *Hill v. Marston*, 178 Mass. 285; 59 N. E. 766.

¹⁴ *McGourkey v. Ry.*, 146 U. S. 536.

¹⁵ *Parsons v. Refining Co.*, 25 Wash. 492; 65 Pac. 765.

¹⁶ *Graves v. Mining Co.*, 81 Cal. 303; 22 Pac. 665; *Pearson v. Ry. Corporation*, 62 N. H. 537; 13 Am. St. Rep. 590. *Contra*, that such contract is voidable only if unfair and oppressive. *Lagunas Nitrate Co. v. Lagunas* (1899), 2 Ch. 392; *Salem Iron Co. v. Iron Mines*, 112 Fed. 239; 50 C. C. A. 213.

¹⁷ *Macklem v. Fales*, 130 Mich. 66; 89 N. W. 581.

¹⁸ *McGourkey v. Ry.*, 146 U. S.

536; *Lagarde v. Stone Co.*, 126 Ala. 496; 28 So. 199; *Center Creek, etc., Co. v. Lindsay*, 21 Utah 192; 60 Pac. 559.

¹⁹ *Kroegher v. Colonization Co.*, 119 Fed. 641; *Gerry v. Bank*, 19 Mont. 191; 47 Pac. 810; *First Avenue Land Co. v. Hildebrand*, 103 Wis. 530; 79 N. W. 753; *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149; 42 N. W. 259.

²⁰ *Continental Trust Co. v. Ry.*, 86 Fed. 929; *Loudenslager v. Woodbury Heights Land Co.*, 56 N. J. Eq. 411; 41 Atl. 1115; affirming, 55 N. J. Eq. 78; 35 Atl. 436; *Barbar v. Martin*, — Neb. —; 93 N. W. 722; *Bird, etc., Co. v. Humes*, 157 Pa. St. 278; 37 Am. St. Rep. 727; 27 Atl. 750; *Rutland Electric Light Co. v. Bates*, 68 Vt. 579; 54 Am. St. Rep. 904; 35 Atl. 480; *Spaulding v. Town Site Co.*, 106 Wis. 481; 81 N. W. 1064.

take secret profits,²¹ they are guilty of constructive fraud; especially if they have misrepresented the value of the property and sold it to the corporation at an excessive price.²² Such transactions, even if voidable for constructive fraud, are not void,²³ and may be ratified by the stockholders if they act with full knowledge of the facts,²⁴ though action without full knowledge is not binding.²⁵ If the corporation does not complain, the officer cannot treat the contract as void.²⁶ Such contracts have been held to be voidable at the election of a minority of the stockholders.²⁷ If the tendency of the contract which is voidable for constructive fraud is to injure the security of the bondholders it may be set aside on their application.²⁸ The relation of trust and confidence between officers or directors on the one hand, and stockholders on the other, exists only with reference to the management and control of the corporation.²⁹ Thus if one director buys corporate stock from another³⁰ or directors buy stock from stockholders³¹ they are not bound to

²¹ *D. M. Steward Mfg. Co. v. Steward*, 109 Tenn. 288; 70 S. W. 808.

²² *Gerry v. Bank*, 19 Mont. 191; 47 Pac. 810.

²³ *Thomas v. Ry.*, 109 U. S. 522; *Copsey v. Bank*, 133 Cal. 659; 66 Pac. 7; *Ft. Payne Rolling Mill v. Hill*, 174 Mass. 224; 54 N. E. 532; *Ten Eyck v. Pontiac, etc., Ry.*, 74 Mich. 226; 16 Am. St. Rep. 633; 3 L. R. A. 378; 41 N. W. 905; *Hodge v. U. S. Steel Corporation*, — N. J. Eq. —; 60 L. R. A. 742; 54 Atl. 1; reversing 64 N. J. Eq. 90; 53 Atl. 601; *Troy Mining Co. v. White*, 10 S. D. 475; 42 L. R. A. 549; 74 N. W. 236; *Singer v. Mfg. Co.*, 17 Utah 143; 70 Am. St. Rep. 773; 53 Pac. 1024.

²⁴ *Crymble v. Mulvaney*, 21 Colo. 203; 40 Pac. 499; *Nye v. Storer*, 168 Mass. 53; 46 N. E. 402; *Hodge v. U. S. Steel Corporation*, — N. J. Eq. —; 60 L. R. A. 742; 54 Atl. 1;

reversing 64 N. J. Eq. 90; 53 Atl. 601; *Marvin v. Anderson*, 111 Wis. 387; 87 N. W. 226.

²⁵ *Flint, etc., Ry. v. Dewey*, 14 Mich. 677.

²⁶ *Pungs v. Brake Beam Co.*, 200 Ill. 306; 65 N. E. 645; affirming, 102 Ill. App. 76.

²⁷ *Graves v. Mining Co.*, 81 Cal. 303; 22 Pac. 665.

²⁸ *McGourkey v. Ry.*, 146 U. S. 536.

²⁹ *Perry v. Pearson*, 135 Ill. 218; 25 N. E. 636; *Walsh v. Goulden*, 130 Mich. 531; 90 N. W. 406; *Klein v. Funk*, 82 Minn. 3; 84 N. W. 460; *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108; *Haartsick v. Fox*, 9 Utah 110; 33 Pac. 251.

³⁰ *Perry v. Pearson*, 135 Ill. 218; 25 N. E. 636.

³¹ *Walsh v. Goulden*, 130 Mich. 531; 90 N. W. 406; *Haarstick v. Fox*, 9 Utah 110; 33 Pac. 251.

disclose material facts acquired in their official capacity, which affect the value of the stock.

In the absence of statute the validity of a contract between a municipality or other public corporation and an officer thereof depends first on whether such officer is avowedly contracting in his own name, or is secretly receiving compensation to influence his official conduct. In the latter case the city is free to avoid the contract on the ground of such fraud, if it chooses,³² and the contract is invalid. If the officer acts openly and avowedly in his own interest, the validity of his contract depends on whether he is acting both for himself and the city, in inconsistent attitudes, in which case the contract is invalid,³³ or whether he acts for himself alone, and other agents independent of himself represent the city, in which case such contract is valid.³⁴ The courts do not agree on the validity of a contract made by a board, council or other aggregate body with one of its own members, some holding such contracts valid at common law,³⁵ and others, void.³⁶ In the absence of statute, contracts between a public corporation and an officer thereof, if not valid, are voidable rather than either void or illegal. Thus if no statute makes it unlawful, a contract between a city official and a city may be avoided, but recovery can be had on a *quantum meruit*,³⁷ or the

³² Findlay v. Pertz, 66 Fed. 427; 13 C. C. A. 559; 29 L. R. A. 188.

³³ Macon v. Huff, 60 Ga. 221; Ft. Wayne v. Rosenthal, 75 Ind. 156; 39 Am. Rep. 127; Weitz v. Independent District, 87 Ia. 81; 54 N. W. 70; Stroud v. Water Co., 56 N. J. L. 422; 28 Atl. 578; Smith v. Albany, 61 N. Y. 444; Cincinnati, etc., Ry. v. Morris, 10 Ohio C. C. 502; Dalzell, etc., Co. v. Findlay, 5 Ohio C. C. 435; Bellaire Goblet Co. v. Findlay, 5 Ohio C. C. 418; Pickett v. School District, 25 Wis. 551; 3 Am. Rep. 105.

³⁴ Tippecanoe County v. Mitchell, 131 Ind. 370; 15 L. R. A. 520; 30

N. E. 409; McBride v. Grand Rapids, 47 Mich. 236; 10 N. W. 353; Niles v. Muzzy, 33 Mich. 61; 20 Am. Rep. 670; Detroit v. Redfield, 19 Mich. 376; Edmunds v. Bullett, 59 N. J. L. 312; 36 Atl. 774; Boland v. Luzerne County, 186 Pa. St. 68; 40 Atl. 156.

³⁵ Willis v. Baker (Ky.); 29 S. W. 872; Sylvester v. Webb, 179 Mass. 236; 52 L. R. A. 518; 60 N. E. 495; Myers v. Adams, 9 Utah 8; 33 Pac. 222.

³⁶ Dalzell, etc., Co. v. Findlay, 5 Ohio C. C. 435; Bellaire Goblet Co. v. Findlay, 5 Ohio C. C. 418.

³⁷ Spearman v. Texarkana, 58 Ark. 348; 22 L. R. A. 855; 24 S. W.

proper officers of the municipality may if they choose ratify such contract.³⁸ In many states the questions here considered are settled by statute making a contract with a municipality unlawful if any officer thereof is interested directly or indirectly in such contract.³⁹ Under such a statute a board of school trustees cannot employ the wife of one of the trustees as a teacher.⁴⁰ Under such statute no recovery can be had on such contract, or for reasonable compensation for materials and services furnished,⁴¹ and under some statutes the officer can be compelled to repay to the government what he has received under such contract.⁴² Such statute does not apply to the right to recover for such articles as gas furnished in accordance with the requirements of law and the ordinance giving the gas company its franchise, and not under an express contract.⁴³ By some statutes, a corporation the stockholders of which are city officials cannot

883; *Mayor, etc., v. Huff*, 60 Ga. 221; *Concordia v. Hagaman*, 1 Kan. App. 35; 41 Pac. 133; *Currie v. School District*, 35 Minn. 163; 27 N. W. 922; *Call Publishing Co. v. Lincoln*, 29 Neb. 149; 45 N. W. 245; *Gardner v. Butler*, 30 N. J. Eq. 702; *Pickett v. School District*, 25 Wis. 551; 3 Am. Rep. 105.

³⁸ *Findlay v. Pertz*, 66 Fed. 427; 29 L. R. A. 188; 13 C. C. A. 559; *State v. Buttles*, 3 O. S. 309.

³⁹ *Berka v. Woodward*, 125 Cal. 119; 73 Am. St. Rep. 31; 45 L. R. A. 420; 57 Pac. 777; *Capron v. Hitchcock*, 98 Cal. 427; 33 Pac. 431; *State v. Windle*, 156 Ind. 648; 59 N. E. 276; *Sedgwick County v. State*, 66 Kan. 634; 72 Pac. 284; *Nunemacher v. Louisville*, 98 Ky. 334; 32 S. W. 1091; *Goodrich v. Waterville*, 88 Me. 39; 33 Atl. 659; *Stone v. Bevans*, 88 Minn. 127; 97 Am. St. Rep. 506; 92 N. W. 520; *McElhinney v. Superior*, 32 Neb. 744; 49 N. W. 705; *Woodworth v. Bennett*, 43 N. Y. 273; 3 Am. Rep.

706; *Marsh v. Hartwell*, 2 Ohio N. P. 389; *Commonwealth v. De Camp*, 177 Pa. St. 112; 35 Atl. 601; *Milford v. Water Co.*, 124 Pa. St. 610; 3 L. R. A. 122; 17 Atl. 185; *Palmer v. State*, 11 S. D. 78; 75 N. W. 818; (*City of*) *Northport v. Town Site Co.*, 27 Wash. 543; 68 Pac. 204; *Land, etc., Co. v. McIntyre*, 100 Wis. 245; 69 Am. St. Rep. 915; 75 N. W. 964.

⁴⁰ *Nuckols v. Lyle*, — Ida. —; 70 Pac. 401.

⁴¹ *Berka v. Woodward*, 125 Cal. 119; 73 Am. St. Rep. 31; 45 L. R. A. 420; 57 Pac. 777; *Goodrich v. Waterville*, 88 Me. 39; 33 Atl. 659; *Palmer v. State*, 11 S. D. 78; 75 N. W. 818.

⁴² *Stone v. Bevans*, 88 Minn. 127; 97 Am. St. Rep. 506; 92 N. W. 520; *Land, etc., Co. v. McIntyre*, 100 Wis. 245; 69 Am. St. Rep. 915; 75 N. W. 964.

⁴³ *Capital Gas Co. v. Young*, 109 Cal. 140; 29 L. R. A. 463; 41 Pac. 869.

contract with such city.⁴⁴ In the absence of statute a contract between a corporation and a city under such circumstances is not invalid.⁴⁵ So where the legislature let the state printing to a corporation whose president was a member of the legislature it was held that such contract was valid, since it appeared that his compensation as president was a fixed salary, and not dependent on the profits earned by such corporation.⁴⁶

§182. Contracts between corporations having common officers.

While a contract requires two parties, the legal fiction of the separate existence of a corporation from its members and officers makes it possible for a valid contract to be made between two corporations which have the same directors¹ or the same officers, as the same treasurer, auditors, and cashier,² or a common agent.³ Such contracts are subject to sharp scrutiny because of the opportunities for fraud thus given,⁴ and if such contract is so framed as to give to one corporation an unfair advantage at the expense of the other, and the common directors represent both corporations at once the corporation of which such advantage is taken may avoid the contract.⁵ Such con-

⁴⁴ *Finch v. Ry.*, 87 Cal. 597; 25 Pac. 765; *Gas Co. v. West*, 28 Neb. 852; 45 N. W. 242; *Foster v. Cape May*, 60 N. J. L. 78; 36 Atl. 1089; *Bellaire Goblet Co. v. Findlay*, 5 Ohio C. C. 418; *Milford v. Water Co.*, 124 Pa. 610; 3 L. R. A. 122; 17 Atl. 185; *Duncan v. Charleston*, 60 S. C. 532; 39 S. E. 265.

⁴⁵ *City of London Electric Lighting Co. v. London Corporation* (1900), W. N. 116.

⁴⁶ *State v. Rickards*, 16 Mont. 145; 50 Am. St. Rep. 476; 28 L. R. A. 298; 40 Pac. 210.

¹ *San Diego, etc., R. R. Co. v. Beach Co.*, 112 Cal. 53; 33 L. R. A. 788; 44 Pac. 333; *Evansville, etc., Co. v. Bank*, 144 Ind. 34; 42 N. E. 1097; *Salina Nat. Bank v. Prescott*, 60 Kan. 490; 57 Pac. 121; *reversing*, 53 Pac. 769; *Cannon v. Brush*

Electric Co., 96 Md. 446; 54 Atl. 121; *Manufacturers', etc., Bank v. Iron Co.*, 97 Mo. 38; 10 S. W. 865.

² *Davidson v. Ry.*, 58 Fed. 653.

³ *Aldine Mfg. Co. v. Phillips*, 129 Mich. 240; 88 N. W. 632.

⁴ *Memphis, etc., Ry. v. Woods*, 88 Ala. 630; 7 L. R. A. 605; 16 Am. St. Rep. 81; 7 So. 108; *Parker v. Nickerson*, 112 Mass., 195; *Pearson v. Ry. Corp.*, 62 N. H. 537; 13 Am. St. Rep. 590; *Robotham v. Ins. Co.*, 64 N. J. Eq. 673; 53 Atl. 842; *Mercantile Library Hall Co. v. Library Association*, 173 Pa. St. 30; 33 Atl. 744; *Sweeney v. Sugar Refining Co.*, 30 W. Va. 443; 8 Am. St. Rep. 88; 4 S. E. 431.

⁵ *O'Connor, etc., Co. v. Furnace Co.*, 95 Ala. 614; 36 Am. St. Rep. 251; 10 So. 290; *Burden v. Burden*, 159 N. Y. 287; 54 N. E. 17; *Good-*

tracts are, however, voidable, not void.⁶ A majority of the stockholders may ratify it,⁷ and if the majority of the stockholders acquiesce therein, a single stockholder cannot avoid such contract.⁸

§183. Promoters of corporations.

Promoters of corporations stand in a relation of trust and confidence to the corporation and to the stockholders thereof.¹ If promoters wish to sell their property to the corporation promoted by them, they must deal with independent and impartial directors who represent the corporation and not the promoters:² they must make full disclosure of their own identity and their interest in the property which they convey to the company,³ and they must disclose the material facts affecting the value of the property transferred by them to the corporation, and therefore affecting the value of the corporate stock.⁴ If the promoters conceal the fact that they are acting in an interest adverse to that of the corporation and thereby attempt to obtain a secret profit for themselves,⁵ or to obtain a secret commission for sell-

in *v. Canal Co.*, 18 O. S. 169; 98 Am. Dec. 95.

⁶ *San Diego, etc., Co. v. Beach Co.*, 112 Cal. 53; 33 L. R. A. 788; 44 Pac. 333; *Burden v. Burden*, 159 N. Y. 287; 54 N. E. 17.

⁷ *San Diego, etc., Co. v. Beach*, 112 Cal. 53; 33 L. R. A. 788; 44 Pac. 333.

⁸ *Burden v. Burden*, 159 N. Y. 287; 54 N. E. 17.

¹ *Erlanger v. Phosphate Co.*, L. R. 3 App. Cas. 1218; *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 118; *Dickerman v. Trust Co.*, 176 U. S. 181; *Burbank v. Dennis*, 101 Cal. 90; 35 Pac. 444; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219; 27 Atl. 1094; *Pittsburgh Mining Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149; 42 N. W. 259.

² *Dickerman v. Trust Co.*, 176 U. S. 181.

³ *Gluckstein v. Barnes* (1900), App. Cas. 240; *In re Olympia* (1898), 2 Ch. 153; *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 118; *Burbank v. Dennis*, 101 Cal. 90; 35 Pac. 444.

⁴ *Directors, etc., v. Kisch*, L. R., 2 H. L. App. Cas. 99; *Brewster v. Hatch*, 122 N. Y. 349; 19 Am. St. Rep. 498; 25 N. E. 505; *Virginia Land Co. v. Haupt*, 90 Va. 533; 44 Am. St. Rep. 939; 19 S. E. 168; *Bosher v. Land Co.*, 89 Va. 455; 37 Am. St. Rep. 879; 16 S. E. 360.

⁵ *In re Leeds & Hanley Theaters* (1902), 2 Ch. 809; *Yale Gas. Stove Co. v. Wilcox*, 64 Conn. 101; 42 Am. St. Rep. 159; 25 L. R. A. 90; 29 Atl. 303; *Urner v. Sollenberger*, 89 Md. 316; 43 Atl. 810; *Hayward v. Leeson*, 176 Mass. 310; 49 L. R. A. 725; 57 N. E. 656; *South Joplin Land Co. v. Case*, 104 Mo. 572;

ing such property,⁶ constructive fraud exists. An action for secret profits may be maintained,⁷ or the contract of the corporation may be rescinded.⁸ If, however, the promoter makes full disclosure of the fact of his adverse interest and of all material facts, he may sell to the corporation at a profit.⁹

§184. Partners.

Partners occupy a relation of especial trust and confidence towards each other with reference to partnership matters.¹ In dealing with each other with reference to partnership matters, each must make full and fair disclosure to the other of all material facts known to him and not to the other.² Thus, omission by a partner to disclose to his co-partner facts affecting the value of partnership property may constitute fraud.³ Thus, a purchase of one partner's interest in mining property by the other is voidable where the vendee does not disclose the existence of a valuable vein of ore on such property.⁴ A partner who, in the absence of the other partner, effects a purchase of partnership property must show affirmatively that the transaction was

16 S. W. 390; Shawnee, etc., Co. v. Miller, 24 Ohio C. C. 198; Simons v. Vulcan Oil & Mining Co., 61 Pa. St. 202; 100 Am. Dec. 628; Franey v. Warner, 96 Wis. 222; 71 N. W. 81.

⁶Limited Investment Association v. Investment Association, 99 Wis. 54; 74 N. W. 633.

⁷Hayward v. Leeson, 176 Mass. 310; 49 L. R. A. 725; 57 N. E. 656.

⁸Limited Investment Association v. Investment Association, 99 Wis. 54; 74 N. W. 633.

⁹Lagunas Nitrate Co. v. Lagunas Syndicate (1899), 2 Ch. 392; (distinguishing, Erlanger v. Phosphate Co., L. R. 3 App. Cas. 1218;) Tompkins v. Sperry, 96 Md. 560; 54 Atl. 254.

¹Patrick v. Bowman, 149 U. S. 411; Goldsmith v. Eichold, 94 Ala.

116; 33 Am. St. Rep. 97; 10 So. 80; Caldwell v. Davis, 10 Colo. 481; 3 Am. St. Rep. 599; 15 Pac. 696; Raymond v. Vaughn, 128 Ill. 256; 15 Am. St. Rep. 112; 4 L. R. A. 440; 21 N. E. 566; Wells v. McGeoch, 71 Wis. 196; 35 N. W. 769.

²Patrick v. Bowman, 149 U. S. 411; Meyers v. Merillion, 118 Cal. 352; 50 Pac. 662; Warren v. Schainwald, 62 Cal. 56; Baker v. Cummings, 4 App. D. C. 230; Roby v. Colehour, 135 Ill. 300; 25 N. E. 777; Jones v. Dexter, 130 Mass. 380; 39 Am. Rep. 459; Wells v. McGeoch, 71 Wis. 196; 35 N. W. 769.

³Baker v. Cummings, 4 D. C. App. 230.

⁴Hanley v. Sweeny, 109 Fed. 712; 48 C. C. A. 612. (The vendee learned of its existence by tunneling from an adjoining mine which he managed.)

fair and upon full disclosure of material facts.⁵ So, a surviving partner stands in a relation of trust and confidence to the executor of the deceased partner, so that a contract whereby the surviving partner buys the partnership assets from such executor will be closely scrutinized and will be enforced only if reasonable, fair and just.⁶ A partner cannot without the consent of his co-partners acquire an interest in partnership property adverse to his co-partners from third persons.⁷ A partner cannot, without the consent of his co-partners, acquire a renewal of a lease held by the firm of realty on which the firm has made valuable improvements.⁸ So he cannot deal with the firm, concealing his identity, and thereby make a contract which the firm cannot avoid.⁹ A partner cannot acquire secret profit for himself in the same business as the partnership and in competition with it. He must account for such profits to the partnership.¹⁰ He may, however, engage in business for himself outside the business of the partnership,¹¹ and he is not liable to the partnership for such profits even if the partnership contract bound him not to engage in other business.¹² He cannot buy property for the firm and charge the firm therefor more than the amount thus paid by him.¹³ He cannot represent the firm in a transaction and in the same transaction represent an adverse interest from which he receives a commission.¹⁴ A partner may, however, deal with the firm if the remaining part-

⁵ Patrick v. Bowman, 149 U. S. 411.

⁶ Mack v. Mack, 23 Can. S. C. 146; Tennant v. Dunlap, 97 Va. 234; 33 S. E. 620.

⁷ Kinsman v. Parkhurst, 18 How. (U. S.) 289; Roby v. Colehour, 135 Ill. 300; 25 N. E. 777.

⁸ Mitchell v. Reed, 61 N. Y. 123; 19 Am. Rep. 252.

⁹ Whitman v. Bowden, 27 S. C. 53; 2 S. E. 630

¹⁰ Aas v. Benham (1891), 2 Ch. 244; Kimberly v. Arms, 129 U. S. 512; Lockwood v. Beckwith, 6 Mich. 168; 72 Am. Dec. 69.

¹¹ Latta v. Kilbourn, 150 U. S. 524; Sullivan v. R. R., 128 Ala. 77; 30 So. 528; Belcher v. Whittemore, 134 Mass. 330.

¹² Dean v. MacDowell, 8 Ch. Div. 345; Latta v. Kilbourn, 150 U. S. 524; Metcalfe v. Bradshaw, 145 Ill. 124; 36 Am. St. Rep. 478; 33 N. E. 750; Murrell v. Murrell, 33 La. Ann. 1233.

¹³ Yeoman v. Lasley, 40 O. S. 190; Gates v. Paul, 117 Wis. 170; 94 N. W. 55.

¹⁴ Newell v. Cochran, 41 Minn. 374; 43 N. W. 84; Grant v. Hardy, 33 Wis. 668.

ners know all the material facts and represent the firm in the transaction.¹⁵ Thus he may sell property to the firm in consideration of which the firm assumes certain debts which he owes.¹⁶

§185. Co-owners.

"It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will enure to the benefit of all."¹ It is even clearer that a co-tenant cannot take advantage of his own breach of duty to acquire interests in the property owned in common adverse to those of his co-tenants. Thus a co-tenant who buys at a tax sale the property owned in common holds for his co-tenants if they choose to contribute.² So, where two co-tenants, A and B, bought of C and as part of the purchase price assumed a debt due from C to X, and A made default in paying such debt by reason of which the property was sold to Y, who conveyed to A's son, it was held that as it appeared that A's son was advancing the money for the property as a loan to his father, and took the title in his own name for security, A held B's original interest in the property in trust for B.³ Omission by a co-owner in a partition suit to disclose to the court and to his co-tenants that the realty is selling below its actual value, and his receiving an additional compensation to remain silent and allow confirmation

¹⁵ *Bartlett v. Smith*, 1 Neb. Rep. Unofficial 328; 95 N. W. 661.

¹⁶ *Bartlett v. Smith*, 1 Neb. Rep. Unofficial 328; 95 N. W. 661.

¹ *Turner v. Sawyer*, 150 U. S. 578, 586. To the same effect see *Bissell v. Foss*, 114 U. S. 252; *Mills v. Hart*, 24 Colo. 505; 65 Am. St. Rep. 241; 52 Pac. 680; *Franklin Mining Co. v. O'Brien*, 22 Colo. 129; 55 Am. St. Rep. 118; 43 Pac. 1016; *Boyd v. Boyd*, 176 Ill.

40; 68 Am. St. Rep. 169; 51 N. E. 782; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137; *Downer v. Smith*, 38 Vt. 464; *Cedar Canyon, etc., Co. v. Yarwood*, 27 Wash. 271; 67 Pac. 749; *Cecil v. Clark*, 44 W. Va. 659; 30 S. E. 216.

² *Hake v. Lee*, 106 La. 482; 31 So. 54; *Cecil v. Clark*, 44 W. Va. 659; 30 S. E. 216.

³ *Hall v. Caldwell*, 97 Va. 311; 33 S. E. 596.

has been treated as fraud.⁴ After the interest in common has once fairly ended, the former co-owners owe no more duty to each other than to any other persons.⁵ It has been held that the omission of a tenant in common to disclose the existence of extrinsic facts affecting the value of the land held in common as his omission to disclose the existence of oil on other land⁶ is not fraud.

§186. Guardian and ward.

A guardian occupies relations of trust and confidence toward his ward.¹ During the continuance of the guardianship contracts between guardian and ward are voidable at the ward's election because of his disability² as well as on the ground of constructive fraud. So if A, who is in a relation of personal trust to B, a guardian, obtains funds of B's ward, C, A is held as trustee for C.³ Such a contract may be ratified by the ward after acquiring full legal capacity.⁴ In a judicial proceeding in which the ward was represented by a guardian *ad litem* and the interests of the regular guardian and the ward were openly adverse, the guardian may by force of the decree acquire an interest adverse to that of the ward.⁵ A guardian cannot acquire the property of his ward at his own sale, without disclosing his identity and obtaining the ward's consent, after the ward has full capacity to contract.⁶ So a guardian to whom his ward gave a power of attorney before he was appointed guardian, cannot sell to himself under such power.⁷ So a sale by the

⁴ Tappan v. Brewing Co., 80 Cal. 570; 13 Am. St. Rep. 174; 5 L. R. A. 428; 22 Pac. 257.

⁵ Reagan v. McKibben, 11 S. D. 270; 76 N. W. 943.

⁶ Neill v. Shamburg, 158 Pa. St. 263; 27 Atl. 992.

¹ Gillett v. Wiley, 126 Ill. 310; 9 Am. St. Rep. 587; 19 N. E. 287.

² During minority: Fridge v. State, 3 Gill & J. (Md.) 103; 20 Am. Dec. 463.

³ Montgomery v. Rauer, 125 Cal. 227; 57 Pac. 894.

⁴ Tenney v. Evans, 14 N. H. 343; 40 Am. Dec. 194.

⁵ Corker v. Jones, 110 U. S. 317.

⁶ Hindman v. O'Connor, 54 Ark. 627; 13 L. R. A. 490; 16 S. W. 1052; Frazier v. Jeakins, 64 Kan. 615; 57 L. R. A. 575; 68 Pac. 24; Dickinson v. Durfee, 139 Mass. 232; 1 N. E. 416; Mann v. McDonald, 10 Humph (Tenn.) 275.

⁷ Horton v. Maine, 22 R. I. 126; 46 Atl. 403.

guardian to her husband may be set aside at the application of the ward, even after confirmation, though the full price of the property was paid and no actual fraud existed.⁸ So a guardian cannot acquire any interest in the ward's property adverse to the interest of the ward.⁹ If the guardian buys a claim against the estate, he cannot charge the ward's estate with more than he actually paid for such claim.¹⁰ Even if he discloses his identity he must furthermore make full and complete disclosure to the ward of all material facts.¹¹ Thus omission of a guardian to disclose the ward's property to the ward is constructive fraud, and avoids the contract.¹² Such contract must furthermore be fair and reasonable.¹³ The same principles apply to transactions after the relationship has terminated, but while the influence, trust and confidence continue.¹⁴ After the guardianship has terminated and the ward has acquired full contractual capacity, the relations of trust and confidence are presumed to continue for a while; and contracts between the parties,¹⁵ whether before¹⁶ or after¹⁷ the settlement between them are constructively fraudulent unless it is shown affirmatively that the transaction was fair, and upon full disclosure of all material facts. Thus contracts for the purchase or sale of property,¹⁸ or

⁸ *Frazier v. Jeakins*, 64 Kan. 615; 57 L. R. A. 575; 68 Pac. 24. (The ward may recover in ejectment from a subsequent grantee who took with knowledge of the facts.)

⁹ *Taylor v. Calvert*, 138 Ind. 67; 37 N. E. 531.

¹⁰ *Hanna v. Spotts*, 5 B. Mon. (Ky.) 362; 43 Am. Dec. 132; *Sparhawk v. Allen*, 21 N. H. 9; *Moore v. Shields*, 69 N. C. 50.

¹¹ *Lataillade v. Orena*, 91 Cal. 565; 25 Am. St. Rep. 219; 27 Pac. 924; *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587; 19 N. E. 287; *Berkmeyer v. Kellerman*, 32 O. S. 239.

¹² *Lataillade v. Orena*, 91 Cal. 565; 25 Am. St. Rep. 219; 27 Pac. 924.

¹³ *Earhart v. Holmes*, 97 Ia. 649;

66 N. W. 898; *Tucke v. Buchholz*, 43 Ia. 415.

¹⁴ *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587; 19 N. E. 287; *Earhart v. Holmes*, 97 Ia. 649; 66 N. W. 898; *Tucker v. Buchholz*, 43 Ia. 415; *McConkey v. Cockey*, 69 Md. 286; 14 Atl. 465; *Smith v. Boyd*, 61 N. J. Eq. 175; 47 Atl. 816.

¹⁵ *Tucke v. Buchholz*, 43 Ia. 415; *Williams v. Powell*, 1 Ired. Eq. (N. C.) 460.

¹⁶ *McParland v. Larkin*, 155 Ill. 84; 39 N. E. 609.

¹⁷ *Richardson v. Linney*, 7 B. Mon. (Ky.) 571; *Berkmeyer v. Kellermann*, 32 O. S. 239.

¹⁸ *McParland v. Larkin*, 155 Ill. 84; 39 N. E. 609; *Eberts v. Eberts*, 55 Pa. St. 110.

a contract settling the account of the guardian and releasing him from liability,¹⁹ are held to be presumptively fraudulent if entered into soon after the termination of the guardianship. A gift by a ward to the guardian is *prima facie* fraudulent.²⁰ A contract between guardian and ward made after full disclosure and with independent advice,²¹ or acquiesced in for a considerable time with full knowledge of the facts,²² is valid. A sale after the guardianship has terminated, upon full disclosure of all material facts, and at the full market value, cannot be avoided because the value soon afterwards has greatly increased.²³

§187. Trustees.

A trustee cannot, without the consent of the beneficiaries, acquire an interest in the trust property. If he attempts to do so without disclosing his identity and obtaining their consent, he is still held as trustee,¹ even if he pays a fair and adequate price therefor.² Thus a trust company cannot buy at its own sale as trustee.³ The trustee cannot make profit for himself out of the trust estate.⁴ If the trustee discloses his identity and obtains the consent of the beneficiaries to his acquiring interests in the trust property, he must make full and complete disclosure of all material facts, and must make a fair and reasonable

¹⁹ Ferguson v. Lowery, 54 Ala. 510; 25 Am. Rep. 718; Gillett v. Wiley, 126 Ill. 310; 9 Am. St. Rep. 587; 19 N. E. 287; Carter v. Tice, 120 Ill. 277; 11 N. E. 529; Clay v. Clay, 3 Met. (Ky.) 548; McConkey v. Cockey, 69 Md. 286; 14 Atl. 465; Wills's Appeal, 22 Pa. St. 325; Johnson v. Johnson, 2 Hill Eq. (S. C.) 277; 29 Am. Dec. 72.

²⁰ Ashton v. Thompson, 32 Minn. 25; 18 N. W. 918; Wade v. Pulsifer, 54 Vt. 45.

²¹ Brown v. Adkinson (Ky.); 58 S. W. 524.

²² Davis v. Richards (Ky.); 58 S. W. 477.

²³ Kirschner v. Kirschner, 113 Mo. 290; 20 S. W. 791.

¹ Mareck v. Trust Co., 74 Minn. 538; 77 N. W. 428; Newman v. Newman, 152 Mo. 398; 54 S. W. 19; Shelby v. Creighton, — Neb. —; 91 N. W. 369; Bohle v. Hassebroch, 64 N. J. Eq. 334; 51 Atl. 508; reversing, 61 N. J. Eq. 470; 48 Atl. 916; Board of Trustees v. Blair, 45 W. Va. 812; 32 S. E. 203.

² Smith v. Miller, 98 Va. 535; 37 S. E. 10.

³ St. Paul Trust Co. v. Strong, 85 Minn. 1; 88 N. W. 256.

⁴ Frazier v. Jeakins, 64 Kan. 615; 57 L. R. A. 575; 68 Pac. 24.

contract with the beneficiaries. If he makes such full disclosure and reasonable contract, the beneficiaries are bound by their agreement.⁵ Even after the trusteeship has ended the former trustee can acquire an interest in the trust property from the beneficiary only on full disclosure of material facts.⁶ Where under such circumstances the trustee bought trust property after the termination of the trust without disclosing to the beneficiary the existence of mines thereon and for a price inadequate in view of the existence of such mines, the sale was set aside.⁷ In matters outside the trust, the trustee and beneficiary may deal with each other as with parties not in confidential relations.⁸ Thus a trustee of one tract may buy the interest of the beneficiaries in a distinct tract at execution sale;⁹ and one who is trustee of one undivided half and owner of the other in his own right may, to protect his own interests, buy at partition sale.¹⁰

§188. Executors and administrators.

An executor or administrator who buys property of the estate at his own sale, without the consent of the persons beneficially interested therein and without disclosing his identity to them, is guilty of constructive fraud.¹ If, however, the lien of the executor on the decedent's realty existed before his appointment as executor, as where a mort-

⁵ Woodbridge v. Bockes, 170 N. Y. 596; 63 N. E. 362; Brownfield's Estate, 193 Pa. St. 151; 44 Atl. 246; Brown v. Brown, 107 Tenn. 349; 65 S. W. 413.

⁶ Tate v. Williamson, L. R., 2 Ch. App. 55.

⁷ Tate v. Williamson, L. R., 2 Ch. App. 55.

⁸ Fuller v. Abbe, 105 Wis. 235; 81 N. W. 401.

⁹ Kern v. Kern, 36 Or. 5; 58 Pac. 527.

¹⁰ Corbin v. Baker, 167 N. Y. 128; 60 N. E. 332.

¹ Boyd v. Blankman, 29 Cal. 19;

87 Am. Dec. 146; Moore v. Carey, 116 Ga. 28; 42 S. E. 258; Murphy v. Teter, 56 Ind. 545; Darcus v. Crump, 6 B. Mon. (Ky.) 363; Bassett v. Shoemaker, 46 N. J. Eq. 538; 19 Am. St. Rep. 435; 20 Atl. 52; Caldwell v. Caldwell, 45 O. S. 512; 15 N. E. 297; Piatt v. Longworth, 27 O. S. 159; Riddle v. Roll, 24 O. S. 572; Glass v. Greathouse, 20 Ohio 503; Musselman v. Eshleman, 10 Pa. St. 394; 51 Am. Dec. 493; Davies v. Hughes, 86 Va. 909; 11 S. E. 488. *Contra* under special statute. Baldwin v. Dalton, 168 Mo. 20; 67 S. W. 599.

gatee,² or judgment creditor,³ is made executor and buys in the property covered by the lien no fraud exists. An administrator cannot, in his official capacity, give a mortgage to himself in his individual capacity.⁴ The consent of the beneficiaries in advance to such sale,⁵ or their ratification of such sale,⁶ or their laches after the sale in setting such sale aside,⁷ may keep them from avoiding it. An executrix cannot make secret profit against the heirs.⁸ If an executor buys in claims against the estate and charges the estate only what he paid for them he is not guilty of constructive fraud.⁹ If the executor discloses his identity and the contract is fair and reasonable, the executor may deal with the beneficiaries with reference to the estate.¹⁰ While an executor does not necessarily occupy such a relation of trust toward the heirs as to prevent him from dealing with them at arm's length for their interest in the estate of which he is in charge, when he discloses his adverse interest he may assume a special fiduciary relationship. Thus if the administrator agrees with his cousin, the sole heir, a non-resident, to act for her interests, and urges her not to employ an attorney, he assumes a fiduciary relation and must make full disclosure of all the material facts.¹¹

§189. Husband and wife.

Husband and wife occupy mutual relations of trust and confidence.¹ Neither of them can make a secret profit or gain a

² Fleming v. McCutcheon, 85 Minn. 152; 88 N. W. 433.

³ Cottingham v. Moore, 128 Ala. 209; 30 So. 784.

⁴ Gorham v. Meacham, 63 Vt. 231; 22 Atl. 572; *sub nomine* Burditt v. Colburn, 13 L. R. A. 676.

⁵ Voorhees v. Bailey, 59 N. J. Eq. 292; 44 Atl. 657.

⁶ Comegys v. Emerick, 134 Ind. 148; 39 Am. St. Rep. 245; 33 N. E. 899; Grim's Appeal, 105 Pa. St. 375.

⁷ Williams v. Rhodes, 81 Ill. 571; Shelby v. Creighton, — Neb. —; 91 N. W. 369.

⁸ Woods v. Roberts, 185 Ill. 489; 57 N. E. 426; reversing in part, 82 Ill. App. 630.

⁹ Baldwin v. Dalton, 168 Mo. 20; 67 S. W. 599.

¹⁰ Lombard v. Carter, 36 Or. 266; 59 Pac. 473.

¹¹ Schneider v. Schneider, — Ia. —; 98 N. W. 159.

¹ Meldrum v. Meldrum, 15 Colo. 478; 11 L. R. A. 65; 24 Pac. 1083; Darlington's Appeal, 86 Pa. St. 512; 27 Am. Rep. 726.

separate advantage out of transactions between them without the consent of the other. Thus a husband and wife deeded property in trust to secure a debt of the husband's. After the wife's death the husband bought the property at a sale for such debt. He was held a trustee for his wife's heirs as to her share.² A post-nuptial contract which is disadvantageous to the wife is presumptively fraudulent³ and if the husband or those claiming under him wish to uphold such contract it is for them to show the absence of fraud.⁴ In cases of gratuitous transfers by a wife to a husband, especially if under circumstances of suspicion,⁵ as where the transfer is made shortly before her death,⁶ fraud is presumed to exist unless the husband shows affirmatively that no fraud existed. No presumption of fraud arises in conveyances from the husband to the wife.⁷ If the wife is in fact guilty of taking an unfair advantage of her husband,⁸ as in procuring the substitution of her name for his as grantee in a deed conveying property paid for by the husband which he intended to have conveyed to himself,⁹ such transaction may be avoided by the husband or those claiming under him. Under the California statute, a wife who seeks specific performance against her husband of a contract entered into between them to induce her to dismiss a proceeding for divorce as well as an action against him on notes which she claims to hold against him, must show that such contract is fair in order to have such relief.¹⁰

² Jones v. Thorn, 45 W. Va. 186; 32 S. E. 173.

³ Witbeck v. Witbeck, 25 Mich. 439; Hovorka v. Havlik, — Neb. —; 93 N. W. 990; Farmer v. Farmer, 39 N. J. Eq. 211; Boyd v. De La Montagnie, 73 N. Y. 498; 29 Am. Rep. 197.

⁴ Darlington's Appeal, 86 Pa. St. 512; 27 Am. Rep. 726.

⁵ Way v. Ins. Co., 61 S. C. 501; 39 S. E. 742.

⁶ Lewis v. McGrath, 191 Ill. 401; 61 N. E. 135.

⁷ McDougall v. McDougall, 135 Cal. 316; 67 Pac. 778; Sheehan v. Sullivan, 126 Cal. 189; 58 Pac. 543; Ford v. Ford, 193 Pa. St. 530; 44 Atl. 561.

⁸ Birdsong v. Birdsong, 2 Head. (Tenn.) 289.

⁹ Lins v. Lenhardt, 127 Mo. 271; 29 S. W. 1025; and see Stone v. Wood, 85 Ill. 603.

¹⁰ Stiles v. Cain, 134 Cal. 170; 66 Pac. 231.

§190. Persons under contract to intermarry.

Persons under contract to intermarry stand in confidential relations to each other,¹ and must ordinarily make full disclosure to each other of material facts affecting contracts entered into between them affecting their property.² The exact extent to which the prospective husband must make full disclosure to his prospective wife of his property in an ante-nuptial contract concerning their property rights is a question upon which the courts have not always expressed the same views. In some cases it has been said that if the prospective husband does not make full disclosure of the nature, character and amount of his property, the ante-nuptial contract must be set aside.³ In other cases, it seems to be held that if the prospective husband is not guilty of intentional or fraudulent concealment, the contract may be valid though the prospective wife does not have full information as to the extent of his property or as to her prospective legal rights therein.⁴ In order to uphold such a contract it must be shown to be fair.⁵ If unfair and unreasonable it will be set aside,⁶ and especially will specific performance be refused where such inadequate contract is signed without being read,⁷ or where it is shown that the intended wife does not understand the nature of the rights that she is surrendering,⁸ or the character of the instrument that she is signing.⁹ If it is not shown that the provision was inade-

¹ Fisher v. Koontz, 110 Ia. 498; 80 N. W. 551; Peet v. Peet, 81 Ia. 172; 46 N. W. 1051; Simpson v. Simpson, 94 Ky. 586; 23 S. W. 361; *In re* Pulling, 93 Mich. 274; 52 N. W. 1116; Pierce v. Pierce, 71 N. Y. 154; 27 Am. Rep. 22; Kline's Estate, 64 Pa. St. 122.

² Simpson v. Simpson, 94 Ky. 586; 23 S. W. 361; Kline v. Kline, 57 Pa. St. 120; 98 Am. Dec. 206.

³ Hessick v. Hessick, 169 Ill. 486; 48 N. E. 712; Taylor v. Taylor, 144 Ill. 436; 33 N. E. 532.

⁴ Hudnell v. Ham, 183 Ill. 486; 75 Am. St. Rep. 124; 48 L. R. A.

557; 56 N. E. 172; 172 Ill. 76; 49 N. E. 985; Neely's Appeal, 124 Pa. St. 406; 10 Am. St. Rep. 594; 16 Atl. 883; Spurlock v. Brown, 91 Tenn. 241; 18 S. W. 868.

⁵ Shea's Appeal, 121 Pa. St. 302; 1 L. R. A. 422; 15 Atl. 629.

⁶ Brooks v. Brooks (Ky.); 58 S. W. 450; Proetzel v. Schroeder, 83 Tex. 684; 19 S. W. 292.

⁷ Barker v. Barker, 126 Ala. 503; 28 So. 587.

⁸ Simpson v. Simpson, 94 Ky. 586; 23 S. W. 361.

⁹ Graham v. Graham, 143 N. Y. 573; 38 N. E. 722.

quate when the contract was entered into, subsequent increase in the husband's property cannot make it invalid.¹⁰ A contract making an inadequate provision will be upheld if entered into by the prospective wife voluntarily and with full knowledge of the facts.¹¹ The question whether a provision is adequate or not does not depend solely upon the extent of the husband's estate. The financial condition of the wife before marriage is also to be considered.¹² It may be shown that, as a matter of fact, no especial trust and confidence existed between the parties to an ante-nuptial contract with reference thereto, but that the prospective wife relied on independent advice.¹³ With reference to the contract to intermarry in the future as distinguished from the ante-nuptial contract fixing their property rights, the woman is bound to disclose her prior unchastity with other men.¹⁴ She is not bound to make disclosure as to other facts,¹⁵ but if she makes any disclosure as to such facts it must be fair and not misleading.¹⁶ This last rule has of course no application to contracts performed by the intermarriage of the parties.

§191. Parent and child.

The relation of parent and child is one of trust and confidence. Transactions between parents and children but slightly past the age of majority are sharply scrutinized by the courts.¹ It has been held that even if advantageous to the parent, fraud and undue influence are not presumed if the child is of full age.²

¹⁰ Devoe's Estate, 113 Ia. 4; 84 N. W. 923.

¹¹ Yarde v. Yarde, 187 Ill. 636; 58 N. E. 600.

¹² Achilles v. Achilles, 137 Ill. 589; 28 N. E. 45; Devoe's Estate, 113 Ia. 4; 84 N. W. 923.

¹³ Achilles v. Achilles, 137 Ill. 589; 28 N. E. 45.

¹⁴ Butler v. Eschleman, 18 Ill. 44; Williams v. Fahn, 119 Ia. 746; 94 N. W. 252; Guptill v. Verback, 58 Ia. 98; 12 N. W. 125; Stratton v. Dole, 45 Neb. 472; 63 N. W. 875;

Kelley v. Highfield, 15 Or. 277; 14 Pac. 744; Goodall v. Thurman, 1 Head. (Tenn.) 209.

¹⁵ Van Houten v. Morse, 162 Mass. 414; 44 Am. St. Rep. 373; 26 L. R. A. 430; 38 N. E. 705; (as that her family was poor and that she was part negro.)

¹⁶ Van Houten v. Morse, 162 Mass. 414; 44 Am. St. Rep. 373; 26 L. R. A. 430; 38 N. E. 705.

¹ Jenkins v. Pye, 12 Pet. (U. S.) 241.

² Mallow v. Walker, 115 Ia. 238;

A gratuitous deed made by one who is just of age to one *in loco parentis* has been held not to be *prima facie* voidable for constructive fraud.³ So where a daughter a few months after arriving at majority deeded to her mother her interest in her deceased father's estate at the request of her mother, it having been largely accumulated by the efforts of her mother, it was held that there was no constructive fraud.⁴ Such contracts must be made with "*uberrima fides*, that fulness of candor and fairness required in transactions between parent and child."⁵ Misrepresentations which between parties not in confidential relations would fall far short of fraud⁶ or suspicious circumstances attending the transaction⁷ may amount to constructive fraud.⁸ So if in reliance upon the parent, the children convey to him under an unenforceable oral contract, as a contract by him not to convey the property away, but to manage it during his life-time;⁹ or a contract to destroy the conveyance and thus keep it from the record and never to make use of it,¹⁰ breach of such contract may amount to constructive fraud. Conveyances, gifts, and other transactions advantageous to the child are not presumed to be caused by fraud but to be by way of advancement.¹¹ If the child is shown to have actual influence and control over the parent, the burden may rest on the child to explain suspicious circumstances. A conveyance by parent to child under an executory contract, as under a contract by him to sell for their benefit¹² may be avoided in case of breach, on the theory of constructive fraud.

88 N. W. 452; *Gregory v. Bowlsby*, 115 Ia. 327; 88 N. W. 822; *Coleman's Estate*, 193 Pa. St. 605; 44 Atl. 1085.

³ *Couchman v. Couchman*, 98 Ky. 109; 32 S. W. 283.

⁴ *Murray v. Hilton*, 8 App. B. C. 281.

⁵ *Taylor v. Taylor*, 8 How. (U. S.) 183.

⁶ *Taylor v. Taylor*, 8 How. (U. S.) 183.

⁷ *Gibson v. Hammang*, 63 Neb. 349; 88 N. W. 500.

⁸ *Muzzy v. Tompkinson*, 2 Wash. 616; 27 Pac. 456; 28 Pac. 652.

⁹ *Gregory v. Bowlsby*, 115 Ia. 327; 88 N. W. 822.

¹⁰ *Peek v. Peek*, 101 Mich. 304; 59 N. W. 604.

¹¹ *Carney v. Carney*, 196 Pa. St. 34; 46 Atl. 264.

¹² *Wilcox v. Mann*, 115 Ia. 91; 87 N. W. 748. (This transaction was subsequently ratified by the parent.)

§192. Mortgagor and mortgagee.

In making the contract and conveyance whereby they enter upon the relation of mortgagor and mortgagee the parties usually deal at arm's length, no especial trust and confidence being reposed by either in the other. It is impossible, however, for them to make a valid contract contemporaneous with the giving of the mortgage whereby the right to redeem is waived.¹ So a contract where the mortgagor agrees that while the mortgage is in force he will sell no malt liquor on the premises except such as is bought from the mortgagee is invalid as tending to clog the equity of redemption.² On account of the advantage possessed by the mortgagee and the necessities of the mortgagor, subsequent contracts waiving the right of redemption are sharply scrutinized.³ "Contracts between the mortgagor and the mortgagee for the purchase or extinguishment of the equity of redemption are always regarded with jealousy by courts of equity,"⁴ and if unfair,⁵ as for an inadequate consideration,⁶ or if induced by the mortgagee's denial of the mortgagor's right to redeem and his refusal to assent to the correction of a mistake

¹ *Seton v. Slade*, 7 Ves. Jr. 265; *Peugh v. Davis*, 96 U. S. 332; *Lounsbury v. Norton*, 59 Conn. 170; 22 Atl. 153; *Horton v. Murden*, 117 Ga. 72; 43 S. E. 786; *Cassem v. Heustis*, 201 Ill. 208; 94 Am. St. Rep. 160; 66 N. E. 283; *Jackson v. Lynch*, 129 Ill. 72; 21 N. E. 580; 22 N. E. 246; *Turpie v. Lowe*, 114 Ind. 37; 15 N. E. 834; *Skinner v. Miller*, 5 Litt. (Ky.) 84; *Fahay v. Bank*, 1 Neb. Rep. Unofficial 89; 95 N. W. 505; *First National Bank v. Sargent*, — Neb. —; 91 N. W. 595; *State Bank v. Mathews*, 45 Neb. 659; 50 Am. St. Rep. 565; 63 N. W. 930; *Youle v. Richards*, 1 N. J. Eq. 534; 23 Am. Dec. 722; *Macauley v. Smith*, 132 N. Y. 524; 30 N. E. 997; *Stover v. Bounds*, 1 O. S. 107; *Marshall v. Stewart*, 17 Ohio 356; *Cherry v. Bowen*, 4 Sneed (Tenn.)

415; *Shank v. Groff*, 43 W. Va. 337; 27 S. E. 340; *Moeller v. Moore*, 80 Wis. 434; 50 N. W. 396.

² *Rice v. Noakes* (1900), 2 Ch. 445.

³ *Russell v. Southard*, 12 How. (U. S.) 139; *Ritchie v. McMullen*, 79 Fed. 522; 25 C. C. A. 50; *Scanlan v. Scanlan*, 134 Ill. 630; 25 N. E. 652; *Seymour v. Mackay*, 126 Ill. 341; 18 N. E. 552.

⁴ *Cassem v. Heustis*, 201 Ill. 208; 94 Am. St. Rep. 160; 66 N. E. 283.

⁵ *Cassem v. Heustis*, 201 Ill. 208; 94 Am. St. Rep. 160; 66 N. E. 283.

⁶ *Peugh v. Davis*, 96 U. S. 332; *Russell v. Southard*, 12 How. (U. S.) 139; *Brown v. Gaffney*, 28 Ill. 149; *Hall v. Hall*, 41 S. C. 163; 44 Am. St. Rep. 696; 19 S. E. 305; *Thacker v. Morris*, 52 W. Va. 220; 43 S. E. 141.

in expression,⁷ the contract and conveyance will be set aside. So a contract made after the property has been advertised for sale, by which the mortgagor agrees to forfeit certain payments already made by him will be relieved against in equity.⁸ To determine whether it is fair the court will look to the relations between the parties.⁹ If fair such a contract will be upheld.¹⁰ It is not essential to its validity that any consideration in addition to the discharge of the mortgage debt should exist.¹¹ So a contract whereby the mortgagor delivers a deed to the mortgaged realty in escrow, to be re-delivered to him if he pays the mortgage debt in a certain time; and if he does not pay it in such time to be delivered to the mortgagee, the latter in such case to surrender to the mortgagor the note evidencing the mortgage deed, is valid even under a statute forbidding contracts in restraint of the right of redemption, no circumstances of oppression being shown.¹² Whether a mortgagee who is selling or causing the sale of the mortgaged realty under a power of sale contained in the mortgage can purchase such property at such sale is a question upon which there is some divergence of authority.¹³ The mortgagor may, how-

⁷ Russell v. Southard, 12 How. (U. S.) 139.

⁸ Knight v. Jackson, 36 S. C. 10; 14 S. E. 982.

⁹ Cassem v. Heustis, 201 Ill. 208; 84 Am. St. Rep. 160; 66 N. E. 283; Burton v. Perry, 146 Ill. 71; 34 N. E. 60; Conant v. Riseborough, 139 Ill. 383; 28 N. E. 789.

¹⁰ Bradbury v. Davenport, 114 Cal. 593; 55 Am. St. Rep. 92; 46 Pac. 1062; Seymour v. Mackay, 126 Ill. 341; 18 N. E. 552; Trull v. Skinner, 17 Pick. (Mass.) 213; Shouler v. Bonander, 80 Mich. 531; 45 N. W. 487; De Lancey v. Finnegan, 86 Minn. 255; 90 N. W. 387; Youle v. Richards, 1 N. J. Eq. 534; 23 Am. Dec. 722; Hall v. Hall, 41 S. C. 168; 44 Am. St. Rep. 696; 19 S. E. 307;

Hyndman v. Hyndman, 19 Vt. 9; 46 Am. Dec. 171.

¹¹ Goree v. Clements, 94 Ala. 337; 10 So. 906; Cramer v. Wilson, 202 Ill. 83; 66 N. E. 869; apparently *contra*, Hall v. Hall, 41 S. C. 163; 44 Am. St. Rep. 696; 19 S. E. 305. (In this case, however, there were other circumstances of oppression, the mortgagors being old and feeble; and the mortgagee not having made an affirmative showing of its fairness.)

¹² Bradbury v. Davenport, 120 Cal. 152; 52 Pac. 301.

¹³ That he cannot buy. Imboden v. Hunter, 23 Ark. 622; 79 Am. Dec. 116; Houston v. Loan Association, 80 Miss. 31; 92 Am. St. Rep. 565; 31 So. 540; Shew v. Call, 119 N. C. 450; 56 Am. St. Rep. 678; 26

ever, assent to the mortgagee's making such purchase.¹⁴

§193. Debtor and creditor.

No relations of trust and confidence exist between debtor and creditor as such. Hence omission by a debtor whose debt was payable when a specified claim is collected, to disclose the fact that such claim was collected,¹ or the denial by a debtor bank of liability upon a lost certificate of deposit,² are none of them such fraud as to prevent the running of the statute of limitations. So omission of a debtor bank to disclose to the representatives of a depositor the existence of the deposit is not such fraud as to charge the bank with interest.³ It has been held that where payee sent a note for collection to an attorney who had personally assumed it, omission by such attorney to disclose his liability was held not fraud.⁴

§194. Actual trust and confidence.

It is not necessary, however, that any technical relations of trust should exist to make concealment operate as fraud. If confidence is in fact known to both parties to be reposed, as where one is a son-in-law of the other party,¹ or where without any relationship, one party knows that the other relies on his judgment,² omission to disclose material facts is a constructive fraud. So, omission by a priest to disclose his parishioner

S. E. 33. That he can buy. *Smith v. Black*, 115 U. S. 308; *Richards v. Holmes*, 18 How. (U. S.) 143.

¹⁴ *Griffin v. Marine Co.*, 52 Ill. 130; *Medsker v. Swaney*, 45 Mo. 273.

¹ *Jackson v. Combs*, 18 D. C. (7 Mack.) 608; 1 L. R. A. 742.

² *Mereness v. Bank*, 112 Ia. 11; 84 Am. St. Rep. 318; 51 L. R. A. 410; 83 N. W. 711.

³ *Hamilton v. Toner*, 17 Ind. App. 389; 46 N. E. 921.

⁴ *Stinson v. Aultman*, 54 Kan. 537; 38 Pac. 788. (As to the run-

ning of the statute of limitations.)

¹ *Cooper v. Lee*, 1 Tex. Civ. App. 9; 21 S. W. 998.

² *Emmons v. Moore*, 85 Ill. 305. *Bennett v. McMillin*, 179 Pa. St. 146; 57 Am. St. Rep. 591; 36 Atl. 188; *Sub nomine Zahn v. McMillen* in *Pennsylvania Report*. (Omission to disclose that better terms for the property sold were offered by others.) *Friend v. Lamb*, 152 Pa. St. 529; 34 Am. St. Rep. 672; 25 Atl. 577. (Omission to disclose that deposits of coal had been removed from the land sold.)

the invalidity of a will, whereby he obtains a deed for the purpose of the invalid will, is fraud.³

III. WHAT FACTS MAY AMOUNT TO CONSTRUCTIVE FRAUD.

§195. Opinions.

Matters of opinion cannot be the basis of false statements in actual fraud. Between persons occupying relations of trust and confidence, a false statement as to matters of opinion may constitute constructive fraud.¹ Thus as between principal and agent,² or partners,³ or a promoter of a corporation and a stockholder,⁴ or a president of a corporation and a stockholder⁵ constructive fraud may exist through a false statement of what is strictly a matter of opinion. Where no technical relations of trust and confidence exist, but trust and confidence are actually reposed, a false statement of an opinion may amount to constructive fraud.⁶ Accordingly if the parties are not on an equality, as where the opinion relied on is that of an expert,⁷

³ *Finegan v. Theisen*, 92 Mich. 173; 52 N. W. 619.

¹ *Baum v. Holton*, 4 Colo. App. 406; 36 Pac. 154; *Hauk v. Brownell*, 120 Ill. 161; 11 N. E. 416; *Hullett v. Kennedy*, 4 Ind. App. 33; 30 N. E. 310; *Smith v. Patterson*, 33 O. S. 70; *Fisher v. Budlong*, 10 R. I. 525.

² *Merritt v. Wassenich*, 49 Fed. 785; *Barnard v. Coffin*, 138 Mass. 37; *Cheney v. Gleason*, 125 Mass. 166; *Lofgren v. Peterson*, 54 Minn. 343; 56 N. W. 44; *Shute v. Johnson*, 25 Or. 59; 34 Pac. 965; *Boyd v. Jacobs*, 6 Tex. Civ. App. 442; 25 S. W. 681.

³ *Davenport v. Buchanan*, 6 S. D. 376; 61 N. W. 47.

⁴ *Teachout v. Van Hoesen*, 76 Ia. 113; 14 Am. St. Rep. 206; 1 L. R. A. 66; 40 N. W. 96.

⁵ *Fisher v. Budlong*, 10 R. I. 525.

(Where the president made fraudulent representations as to the value of stock to a stockholder to get him to sell to another, who was in fact buying for the president.)

⁶ *Nolte v. Reichelm*, 96 Ill. 425; *White v. Sutherland*, 64 Ill. 181; *Nichols v. Colgan*, 130 Ind. 341; 30 N. E. 301; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Wells v. McGeoch*, 71 Wis. 196; 35 N. W. 769.

⁷ *French v. Ryan*, 104 Mich. 625; 62 N. W. 1016. (As to possible earnings.) *Vilett v. Moler*, 82 Minn. 12; 84 N. W. 452. (Statement by a manager of a barbers' college that the trade can be learned in eight weeks.) *Conlan v. Roemer*, 52 N. J. L. 53; 18 Atl. 858; *Hickey v. Morrell*, 102 N. Y. 454; 55 Am. Rep. 824; 7 N. E. 321; *Hirschberg Optical Co. v. Dalton, etc., Co.*, 7 Utah 433; 27 Pac. 83.

such as a physician,⁸ or a civil engineer,⁹ such opinion can be fraud. So a statement of opinion by one who knows that the party to whom it is made has not the means of determining the question, but must and does rely on the opinion thus expressed, can be fraud.¹⁰ So the expression of an opinion or a statement of the value of property made to one who has not the means of ascertaining the facts, and is known to rely on such statement of value is fraud.¹¹ So if the party to whom such statements are made is mentally deficient, though not insane or idiotic, a statement of opinion may be constructive fraud.¹²

Where a party making a false statement as to a matter of opinion actively interferes to prevent the other party from making an investigation,¹³ as where he bribes the agents of the adversary party on whose expert knowledge and opinion

⁸ *Hedin v. Surgical Institute*, 62 Minn. 146; 54 Am. St. Rep. 628; 35 L. R. A. 417; 64 N. W. 158. (That a certain person can be cured.)

⁹ *Louisville, etc., Ry. Co. v. Stone Co.*, 141 Ind. 251; 39 N. E. 703; (that a track cannot be laid to a given road).

¹⁰ *Hirschberg Optical Co. v. Dalton, etc., Co.*, 7 Utah 433; 27 Pac. 83.

¹¹ *Watts v. Mortgage Co.*, 60 Fed. 483; *Montgomery So. Ry. Co. v. Matthews*, 77 Ala. 357; 54 Am. Rep. 60; *Loaiza v. Superior Court*, 85 Cal. 11; 20 Am. St. Rep. 197; 9 L. R. A. 37; 24 Pac. 707; *Kent, etc., Ry. Co. v. Wilson*, 5 Houst. (Del.) 49; *Murray v. Tolman*, 162 Ill. 417; 44 N. E. 748; *Borders v. Kattleman*, 142 Ill. 96; 31 N. E. 19; *Nichols v. Colgan*, 130 Ind. 341; 30 N. E. 301; *Lillibridge v. Allen*, 100 Ia. 582; 69 N. W. 1031; *Andrews v. Jackson*, 168 Mass. 266;

60 Am. St. Rep. 390; 37 L. R. A. 402; 47 N. E. 412; *Collins v. Jackson*, 54 Mich. 186; 19 N. W. 947; *Griffin v. Farrier*, 32 Minn. 474; 21 N. W. 553; *McKnight v. Thompson*, 39 Neb. 752; 58 N. W. 453; *Ruberg v. Brown*, 50 S. Car. 397; 27 S. E. 873; *Newton v. Ganss*, 7 Tex. Civ. App. 90; 26 S. W. 81; *Menz v. Beebe*, 102 Wis. 342, 350; 77 N. W. 913; 78 N. W. 601; *Parry v. Parry*, 80 Wis. 122; 48 N. W. 654; as that a horse is sound as far as he knows. *Whitworth v. Thomas*, 83 Ala. 308; 3 Am. St. Rep. 725; 3 So. 781; *Tyre v. Causey*, 4 Harr. (Del.) 425; *Timmis v. Wade*, 5 Ind. App. 139; 31 N. E. 827; *West v. Emery*, 17 Vt. 583; 44 Am. Dec. 356.

¹² *De Frees v. Carr*, 8 Utah 488; 33 Pac. 217; *Menz v. Beebe*, 102 Wis. 342, 350; 77 N. W. 913; 78 N. W. 601.

¹³ *Mudsill Mining Co. v. Watrous*, 61 Fed. 163.

such adversary party relies entirely,¹⁴ such expression of opinion may amount to fraud.¹⁵

§196. Price.

In some jurisdictions a statement of the price paid for an article is held not to be such a statement of fact as can amount to actual fraud. Between persons in confidential relations a false statement as to the price paid is constructive fraud. Such a misstatement may constitute fraud as between principal and agent.¹ A misstatement by an agent to his principal of the price for which he has bought property for the principal, overstating the price,² or of the price for which he sells his principal's property, understating the price,³ constitutes constructive fraud. By such conduct the agent forfeits his right to his commissions, as where he charges the principal an excessive price for property which he buys as agent,⁴ or where he sells property for his principal at a price agreed upon by his principal, failing to disclose a better offer.⁵ So a false statement by a promoter to the other members of the association as to the price paid for property may constitute constructive fraud.⁶ Constructive fraud between co-owners merges into actual fraud where one co-owner buys for all, and misrepresents the price, thereby causing the remaining co-owners to pay more than

¹⁴ Baltimore Sugar Refining Co. v. Zell Co., 83 Md. 36; 34 Atl. 369.

¹⁵ See § 124.

¹ Rorebeck v. Van Eaton, 90 Ia. 82; 57 N. W. 694.

² Shaeffer v. Blair, 149 U. S. 248; Salsbury v. Ware, 183 Ill. 505; 56 N. E. 149; reversing, 80 Ill. App. 485.

³ Wadsworth v. Adams, 138 U. S. 380; Bellinger v. Collins, 117 Ia. 173; 90 N. W. 609.

⁴ Shaeffer v. Blair, 149 U. S. 248.

⁵ Wadsworth v. Adams, 138 U. S. 380.

⁶ Huiskamp v. West, 47 Fed. 236; McDowell v. Joice, 149 Ill. 124; 36 N. E. 1012; affirming, 46 Ill. App. 627; Teachout v. Van Hoesen, 76 Ia. 113; 14 Am. St. Rep. 206; 1 L. R. A. 664; 40 N. W. 96. *Contra*, it is not fraud for a promoter to insert in a prospectus of a corporation "cost of ground \$40,000," the ground not costing the promoter that amount as it is a representation of the estimated value in the transfer to the corporation. Cold Storage Co. v. Dexter, 99 Wis. 214; 40 L. R. A. 837; 74 N. W. 976.

their share of the purchase money while he pays less.⁷ Accordingly if one of several co-owners, who acts for the rest, mistates to them the price at which the property in question has been bought or sold by him on behalf of such principal, or co-owner, thereby inducing them to pay more or to take less for their property, constructive or actual fraud exists.⁸ So if a husband, acting on an understanding with the grantee, mistates to his wife the price received for the homestead, whereby she is induced to release her interest therein,⁹ misstatement as to cost constitutes fraud.

§197. Value.

A statement as to value, as distinguished from price, is very generally held to be a mere expression of opinion. As between persons in confidential relations, however, an expression of opinion as to value may, if intended to deceive, amount to constructive fraud. A statement of value made by an attorney to his client may amount to fraud; as a false statement by an attorney to an ignorant client as to the value of his inheritance, the probable amount of attorney's fees and the retention of all the other attorneys in town by the opposite party.¹ Representa-

⁷ *Davis v. Hoffman*, 167 Mo. 573; 67 S. W. 234.

⁸ *King v. White*, 119 Ala. 429; 24 So. 710; *Bunn v. Schnellbacher*, 163 Ill. 328; 45 N. E. 227; affirming 59 Ill. App. 222; *Iler v. Griswold*, 83 Ia. 442; 49 N. W. 1023; *Page v. Parker*, 43 N. E. 363; 80 Am. Dec. 172; *Yeoman v. Lasley*, 40 O. S. 190; *Bennett v. McMillin*, 179 Pa. St. 146; 57 Am. St. Rep. 591; 36 Atl. 188; *sub nomine Zahn v. McMillen* in *Pennsylvania Report*; *Katz v. Johnston*, 178 Pa. St. 346; 35 Atl. 981; *Shoufe v. Griffiths*, 4 Wash. 161; 31 Am. St. Rep. 910; 30 Pac. 93; *Kennah v. Huston*, 15 Wash. 275; 46 Pac. 236; *Bergeron v. Miles*, 88 Wis. 397; 43 Am. St. Rep. 911; 60 N. W. 783. The remedy given in such

cases is sometimes an accounting. *Dickson v. Patterson*, 160 U. S. 584; *Katz v. Johnston*, 178 Pac. St. 346; 35 Atl. 981; *Kennah v. Huston*, 15 Wash. 275; 46 Pac. 236; sometimes damages, *King v. White*, 119 Ala. 429; 24 So. 710; and sometimes a decree dividing the property in proportion to advances made. *Shoufe v. Griffiths*, 4 Wash. 161; 31 Am. St. Rep. 910; 30 Pac. 93. But it was held not fraud where A sold to B and C at a given price and without C's knowledge made a present to B to enable B to pay his share of the price. *Snyder v. Hegan*, (Ky.); 40 S. W. 693.

⁹ *Stallings v. Hullum*, 79 Tex. 421; 15 S. W. 677.

¹ *Manley v. Felty*, 146 Ind. 194; 45 N. E. 74.

tions as to value do not constitute fraud though made between parties whose relation is such as to be usually classed as one of trust and confidence, if no confidence is in fact reposed. So a contract between persons about to intermarry, in which the woman did not rely on the representations of her prospective husband but on the advice and judgment of her son, is not subject to the ordinary rules of confidential relations.²

§198. False statement of law.

A statement as to a matter of law is ordinarily not such a statement of fact as amounts to actual fraud. Between persons in confidential relations, however, a false statement as to a matter of law may amount to constructive fraud. A mistake, or misrepresentation of law, as between attorney and client may be a ground for avoiding a transaction.¹ Thus A, a client, conveyed realty to B, his attorney, in order to secure for A a more advantageous settlement from his wife. A did not know the power of the attorney with reference to a reconveyance. It was held that after A and his wife had resumed marital relations, A might have reconveyance on account of such mistake.² So a false statement of law made by an executor to the heirs may be ground for avoiding a transaction induced thereby, where there is actual trust and confidence reposed.³ Thus if an heir is induced to consent to a redivision of her father's estate less advantageous to her than the interest given to her by his will, through the false statement made by the executor that unless she consented to such redivision the property would have to be sold, such conveyance will be canceled by the court of equity.⁴ So a false statement of law made by a husband to his wife may amount to constructive fraud. Thus where a husband falsely represented to his wife that she was liable on certain debts, and thus induced her to convey her

² *Achilles v. Achilles*, 137 Ill. 589; 28 N. E. 45.

¹ *James v. Steere*, 16 R. I. 367;

² *L. R. A.* 164; 16 *Atl.* 143.

³ *James v. Steere*, 16 R. I. 367;

² *L. R. A.* 164; 16 *Atl.* 143.

³ *Schneider v. Schneider*, — Ia. —; 98 N. W. 159; *Schuttler v. Brandfass*, 41 W. Va. 201; 23 S. E. 808.

⁴ *Schuttler v. Brandfass*, 41 W. Va. 201; 23 S. E. 808.

property to him to defraud her creditors, it was held that constructive fraud existed, that they were not on equal terms and that she might have cancellation.⁵ A false statement as to a matter of law may be the means of perpetrating constructive fraud where actual trust and confidence is in fact reposed, even if no technical relationship exists between the parties. If A enters into a contract under mistake of law in the inducement, and B is guilty of inequitable conduct with reference to such mistake A may have rescission. Thus, if B knows of A's mistake and takes advantage thereof,⁶ or if B, by concealing the truth, confirms A in his mistake,⁷ or if A's mistake is due to B's misrepresentation⁸ A may have rescission. Thus, where after loss the agent of the insurance company represented to the insured that his policy was void as because insured was not the sole owner,⁹ or because the property insured was encumbered by liens¹⁰ and thereby induced a compromise, the insured is allowed rescission. So where A entered into a mutual assessment fire insurance company on the representation of the officers and other members that the premium note given by him is the limit of his liability, he cannot on the insolvency of the company be made to pay the statutory liability necessary to pay the losses.¹¹ So where A who was not a man of strong mind, was residing on Indian lands as tenant of B, at

⁵ *Boyd v. De La Montagnie*, 73 N. Y. 498; 29 Am. Rep. 197.

⁶ *McCormick v. Miller*, 102 Ill. 208; 40 Am. Rep. 577; *Clark v. Clark*, 55 N. J. Eq. 814; 42 Atl. 98; *Haviland v. Willetts*, 141 N. Y. 35; 35 N. E. 958.

⁷ *Clark v. Clark*, 55 N. J. Eq. 814; 42 Atl. 98; *Haviland v. Willetts*, 141 N. Y. 35; 35 N. E. 958.

⁸ *State v. Paup*, 13 Ark. 129; 56 Am. Dec. 303; *Titus v. Ins. Co.*, 97 Ky. 567; 53 Am. St. Rep. 426; 31 S. W. 127; *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556; *Freeman v. Curtis*, 51 Me. 140; 81 Am. Dec. 564; *Macklem v. Bacon*, 57 Mich. 334; 24 N. W. 91; *Lane v. Holmes*,

55 Minn. 379; 43 Am. St. Rep. 508; 57 N. W. 132; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; 33 N. W. 38; *Berry v. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548; 30 N. E. 254; *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767; 34 Atl. 23; *Sparks v. White*, 7 Humph. (Tenn.) 86; *Trigg v. Read*, 5 Humph. (Tenn.) 529; 42 Am. Dec. 447.

⁹ *Berry v. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548; 30 N. E. 254.

¹⁰ *Titus v. Ins. Co.*, 97 Ky. 567; 53 Am. St. Rep. 426; 31 S. W. 127.

¹¹ *Macklem v. Bacon*, 57 Mich. 334; 24 N. W. 91.

a time when a statute was passed giving the occupant of such lands the first right to purchase them at a fixed price, and A, being under the influence of B and B's agent C, was led to believe that B, of whom he was holding, had the legal right to make such purchase, and accordingly agreed to convey his right to B for less than a fifteenth of its real value, A was allowed to avoid such agreement on learning that he had the legal right to make such purchase.¹² So if a quit-claim deed is given by a mortgagee to a mortgagor, not knowing that it discharged the mortgage, cancellation of such quit-claim deed may be had in equity.¹³ So an agreement to give a release to the children of a devisee who had died before testator may be avoided as to the executory part thereof if entered into because the promisor did not know that the death of the devisee before the testator caused the devise to lapse.¹⁴ It must be admitted that the results reached in some of these cases are contrary to those reached in others on substantially similar facts.¹⁵ The doctrine of constructive fraud is invoked in some cases, while in others it is held that the parties were really dealing at arm's length and that no trust or confidence was or should have been reposed. Thus it was held that rescission could not be had where grantor voluntarily conveyed a right of way, not knowing that such conveyance prevented him from recovering damages caused to the rest of his property by the use of such right of way; even though the grantee knew of such mistake and did not advise grantor of the effect of the deed.¹⁶ The views expressed in some of the cases are a relic of the doctrine originally entertained by the English courts of equity; namely that if one acting in ignorance of a known and established principle of the Common Law should convey property, equity would presume fraud or undue influence, and so would grant relief.¹⁷

¹² Sparks v. White, 7 Humph. (Tenn.) 86.

¹³ Benson v. Markoe, 37 Minn. 30; 5 Am. St. Rep. 816; 33 N. W. 38.

¹⁴ Haviland v. Willetts, 141 N. Y. 35; 35 N. E. 958. (Payments made

under such contract cannot, it is said, be recovered.)

¹⁵ See § 166.

¹⁶ Eldridge v. R. R., 88 Me. 191; 33 Atl. 974.

¹⁷ Gordon v. Gordon, 3 Swanst. 400.

§199. Mistake or fraud in the execution.

In some jurisdictions a person who signs a written instrument in ignorance of its contents, but with an opportunity to read it and without reasonable excuse for omitting to read it, cannot avoid the instrument even if the adversary party misrepresented its contents and effect.¹ Even between parties not in confidential relations there is much authority for the better rule, that such fraud prevents any contract from ever existing.² As between persons in confidential relations the rule first given has no application.³ If a wife, in reliance upon her husband, executes an instrument such as an assignment of insurance⁴ or a deed⁵ the contents and nature of which she does not understand, and which conveys her rights contrary to her understanding of the transaction, fraud exists. Thus if an aunt, in whom her nephews repose great confidence, induces them to execute a deed conveying realty to her, by representing to them that it merely authorizes her to collect rents, they may avoid it even if they have signed it without reading it.⁶ Even between persons in confidential relations, fraud in the execution does not exist by reason of a failure of the promisor to attend to the terms of a written contract which the promisor read, or which was read correctly to him. The relationship of parent and child does not excuse the parent for failure to give due attention to the terms of a written contract which is read over to her correct and executed by her; and she cannot avoid such contract.⁷

§200. Breach of contract.

A breach of contract is ordinarily not fraud.¹ Between persons in confidential relations, if the contract is one of the means whereby the particular confidence is obtained and the breach the means whereby it is betrayed, it may amount

¹ See § 64.

² See § 64.

³ Kahn v. Klaus, 64 Kan. 24; 67 Pac. 542.

⁴ Way v. Ins. Co., 61 S. C. 501; 39 S. E. 742.

⁵ Chittenden v. Chittenden, 22 Ohio C. C. 498; 12 Ohio C. D. 526.

⁶ Smith v. Smith, 134 N. Y. 62; 30 Am. St. Rep. 617; 31 N. E. 258.

⁷ Cassilly v. Cassilly, 57 O. S. 582; 49 N. E. 795.

¹ See § 99.

to fraud.² Thus if property is conveyed by a principal to an agent for use under his agency³ a breach of the contract of agency may be treated as a constructive fraud. So if A delivers money to B under a contract whereby B agrees to pay a judgment against A, and B does not pay such judgment, but allows A's property to be sold on execution and buys it in, using A's money and some of B's money for that purpose, B acquires no title to such property as against A.⁴ A mere breach of contract by B to buy for A at a judicial sale is held not to be fraud.⁵ A breach of contract may amount to fraud as between parties in the confidential relation of husband and wife, "independent of any element of actual fraud."⁶ Thus if a husband conveys to his wife to avoid making a will, so that she may enjoy the property in case of his death, and she has agreed to reconvey whenever he wishes, a breach of such contract is constructive fraud.⁷ So if a husband agrees to hold realty for his wife's brothers, and thus induces her not to make a will leaving such realty to them, his breach of such contract is constructive fraud.⁸ So between parties in relations of actual, though not technical, trust and confidence, a breach of a contract induced by such trust, as of a contract to reconvey, whereby the promisee was induced to convey to the promisor⁹ may amount to fraud. The practical importance of this question arises out of the fact that in most of cases the contract itself is unenforceable for some reason, often because of the statute of frauds; while if breach of the contract is treated as fraud, the party in default can be held as trustee under a constructive trust.

² *Holmes v. Holmes*, 106 Ga. 858; 33 S. E. 216.

³ *Kimball v. Tripp*, 136 Cal. 631; 69 Pac. 428.

⁴ *Everly v. Harrison*, 167 Pa. St. 355; 31 Atl. 668.

⁵ *Whiting v. Dyer*, 21 R. I. 278; 43 Atl. 181.

⁶ *Brison v. Brison*, 90 Cal. 323; 27 Pac. 186; same case, *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep.

189; 17 Pac. 689; *Stone v. Wood*, 85 Ill. 603; *Basye v. Basye*, 152 Ind. 172; 52 N. E. 797; *Bartlett v. Bartlett*, 15 Neb. 593; 19 N. W. 691.

⁷ *Brison v. Brison*, 90 Cal. 323; 27 Pac. 186; same case, *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep. 189; 17 Pac. 689.

⁸ *Ransdel v. Moore*, 153 Ind. 393; 53 L. R. A. 753; 53 N. E. 767.

⁹ *Alaniz v. Casenave*, 91 Cal. 41; 27 Pac. 521.

CHAPTER XII.

UNDUE INFLUENCE.

I. GENERAL NATURE OF DOCTRINE.

§201. Nature of undue influence.

It has become the established doctrine, according to the weight of authority at Modern Law, that the test for duress is not whether a courageous man, or even a man of ordinary firmness, would have been overpowered by the duress, but whether the specific individual against whom the duress was exerted was in fact overpowered.¹ So in fraud the modern tendency is to hold that the test for fraud is not whether the representation would have deceived a man of unusual shrewdness, or whether it would have deceived a man of ordinary shrewdness, but whether it did deceive the specific individual who is made the victim of such fraud.² The application and extension of this doctrine results in the doctrine of undue influence.

Undue influence may be presumed where the evidence shows that the parties to the transaction occupied certain confidential relations.³ Other facts may strengthen this presumption, or, existing in combination, may, without the aid of such presumption, establish the fact of undue influence.⁴ Of these facts the most important are the following: (1) A weakness of mind which amounts to a technical incapacity, makes the transaction voidable, and if proven, eliminates the question of undue influence.⁵ Weakness of mind not amounting to technical incapacity, is an important element in connection with other facts in establishing the existence of undue influence. (2) A mis-

¹ See § 245.

² See § 117 *et seq.*

³ See § 208 *et seq.*

⁴ See § 218 *et seq.*

⁵ See ch. xxxix. and ch. xl.

statement of fact which amounts to fraud, or in some jurisdictions to misrepresentation, makes the contract voidable. If such fraud or misrepresentation is proved, the question of the additional existence of undue influence is ordinarily immaterial. A misstatement which falls short of technical fraud, such as a misrepresentation of law, may be an important element in establishing the fact of undue influence.⁶ (3) Non-disclosure may in certain specific cases, make the contract voidable.⁷ In other cases, however, which do not fall within any of the recognized classes, non-disclosure may, in connection with other facts, serve to establish the existence of undue influence.⁸ (4) Inadequacy of consideration does not destroy the validity of a contract, if there is a thing of value as consideration, and there is no fraud, misrepresentation or mistake.⁹ In connection with other facts, inadequacy of consideration is an important element in determining whether undue influence exists.¹⁰ (5) The circumstances of oppression which amount to technical duress will be discussed.¹¹ However, circumstances of oppression short of duress, and not of themselves avoiding the contract, may, in connection with other facts, be important as establishing the presence of undue influence.¹²

§202. Some influence must exist.

To constitute undue influence, there must be influence of some sort exerted upon the person who seeks relief.¹ In the absence of influence exerted by another, undue influence cannot be said to exist.² A conveyance by a grantor of weak mind who is shown to be the active agent in the transaction is not caused by undue influence.³

⁶ See § 223.

⁷ See ch. ix.

⁸ See §§ 220, 233.

⁹ See §§ 322-324.

¹⁰ See §§ 224-234.

¹¹ See ch. xiii.

¹² See § 204.

¹ *Gardner v. Lightfoot*, 71 Ia. 577; 32 N. W. 510; *White v. Johnson*, 4 Wash. 113; 29 Pac. 932.

² *McMillan v. McMillan*, 184 Ill. 230; 56 N. E. 302; *Neel v. Neel*, (Ky.); 26 S. W. 805.

³ *Gardner v. Lightfoot*, 71 Ia. 577; 32 N. W. 510.

§203. Influence exerted must overpower the will.

A contract or conveyance may be caused by the influence of the adversary party without being caused by undue influence.¹ Thus solicitation and importunity,² suggestion and advice,³ appeals to the reason and conviction of the party influenced,⁴ and appeals to the emotions or affections,⁵ while all forms of influence are not necessarily undue influence. Even the fact that the importunity is urgent,⁶ that it is accompanied by tears,⁷ or that it subjects the grantor to vexation and annoyance,⁸ does not establish the fact that the influence was undue. To what degree influence must extend to be termed undue is a question stated in the abstract by the courts in varying terms. It has been said that the influence must be such as to deprive the party of free agency,⁹ that it must overcome his will,¹⁰ that it must render his act the offspring of another's will,¹¹ or that he must stand *in vinculis*.¹² So it has been said that, to be undue, the

¹ Conveyance, *Hammond v. Welton*, 106 Mich. 244; 64 N. W. 25; *Doran v. McConlogue*, 150 Pa. St. 98; 24 Atl. 357; *Seat v. McWhirter*, 93 Tenn. 542; 29 S. W. 220; *Delaplain v. Grubb*, 44 W. Va. 612; 67 Am. St. Rep. 788; 30 S. E. 201; change of beneficiary in insurance policy, *Seward v. Seward*, 59 Kan. 387; 53 Pac. 63; contract, *Rogers v. Higgins*, 57 Ill. 244.

² *Rogers v. Higgins*, 57 Ill. 244.

³ *Seward v. Seward*, 59 Kan. 387; 53 Pac. 63; *Seat v. McWhirter*, 93 Tenn. 542; 29 S. W. 220; *Delaplain v. Grubb*, 44 W. Va. 612; 67 Am. St. Rep. 788; 30 S. E. 201.

⁴ *Hammond v. Welton*, 106 Mich. 244; 64 N. W. 25.

⁵ *Sawyer v. White*, 122 Fed. 223; *Adair v. Craig*, 135 Ala. 332; 33 So. 902; *Burt v. Quisenberry*, 132 Ill. 385; 24 N. E. 622; *Doran v. McConlogue*, 150 Pa. St. 98; 24 Atl. 357; *Orr v. Pennington*, 93 Vt. 268; 24 S. E. 928; *Delaplain v. Grubb*,

44 W. Va. 612; 67 Am. St. Rep. 788; 30 S. E. 201.

⁶ *Finlayson v. Finlayson*, 17 Or. 347; 11 Am. St. Rep. 836; 3 L. R. A. 801; 21 Pac. 57.

⁷ *Doran v. McConlogue*, 150 Pa. St. 98; 24 Atl. 357.

⁸ *Rendleman v. Rendleman*, 156 Ill. 568; 41 N. E. 223.

⁹ *Earle v. Norfolk, etc., Co.*, 36 N. J. Eq. 188. So in case of a grantor, *Shea v. Murphy*, 164 Ill. 614; 56 Am. St. Rep. 215; 45 N. E. 1021; *Farnsworth v. Noffsinger*, 46 W. Va. 410; 33 S. E. 246.

¹⁰ *Towson v. Moore*, 173 U. S. 17; *Mallow v. Walker*, 115 Ia. 238; 88 N. W. 452.

¹¹ So in case of a grantor, *Francis v. Wilkinson*, 147 Ill. 370; 35 N. E. 150; *Farnsworth v. Noffsinger*, 46 W. Va. 410; 33 S. E. 246; *Delaplain v. Grubb*, 44 W. Va. 612; 67 Am. St. Rep. 788; 30 S. E. 201.

¹² *Conley v. Nailor*, 118 U. S. 127; *Bell v. Campbell*, 123 Mo. 1;

influence must cause him to do something which he would not have done had he been allowed to exercise his own free judgment.¹³

§204. Relation of undue influence to duress.

Undue influence has been said to consist of compulsion insufficient to constitute technical duress.¹ The same idea, differently expressed is that "duress is but the extreme of undue influence."² Undue influence has been said to be distinguishable from duress in being only a social, moral or domestic force.³ Facts which in most States would be held to amount to duress are said in others to avoid the contract for undue influence.⁴ Thus where a married woman signed a contract for her separate maintenance and a release of her dower and homestead rights because while sick she had been treated by her husband in a cruel manner, locked in her room, and finally taken to a strange place and ordered to sign, it was said that the contract was voidable because she signed under an undue influence which amounted to a moral duress.⁵ A contract or conveyance induced by threats of criminal prosecution, either of the party or of those in near relations to him, is said in many States to be induced by duress.⁶ On the other hand such facts have been said not to amount to duress, but to undue influence.⁷

45 Am. St. Rep. 505; 25 S. W. 359; *Erwin v. Hedrick*, 52 W. Va. 537; 44 S. E. 165; *Delaplain v. Grubb*, 44 W. Va. 612; 67 Am. St. Rep. 788; 30 S. E. 201.

¹³ *Seward v. Seward*, 59 Kan. 387; 53 Pac. 63.

¹ *Edwards v. Bowden*, 107 N. C. 58; 12 S. E. 58.

² (Commercial), *National Bank v. Wheelock*, 52 O. S. 534, 551; 40 N. E. 636.

³ *Munson v. Carter*, 19 Neb. 293; 27 N. W. 208.

⁴ *Haydock v. Haydock*, 33 N. J. Eq. 494; 38 Am. Rep. 385.

⁵ *Willets v. Willets*, 104 Ill. 122.

⁶ *Heaton v. Bank*, 59 Kan. 281; 52 Pac. 876; *Thompson v. Niggley*, 53 Kan. 664; 35 Pac. 290; *Bank v. Croco*, 46 Kan. 620; 26 Pac. 939; *Morse v. Woodworth*, 155 Mass. 233, 248; 27 N. E. 1010; 29 N. E. 525; *Miller v. Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101; *Insurance Co. v. Hull*, 51 O. S. 270; 46 Am. St. Rep. 571; 25 L. R. A. 37; 37 N. E. 1116.

⁷ *Bell v. Campbell*, 123 Mo. 1; 45 Am. St. Rep. 505; 25 S. W. 359. "It is not an accurate use of language to apply the term duress to the facts upon which the plaintiff seeks to recover. The

Thus contracts, mortgages and the like caused by a threatened arrest of the party himself,⁸ or of a son,⁹ or a husband¹⁰ have been held voidable on the ground of undue influence.

§205. Relation of undue influence to fraud.

Undue influence has on the other hand been classed as "a species of fraud."¹ So it has been said to be not fraud, but like fraud.² The type of fraud referred to is, of course, constructive fraud and not actual fraud. It must be admitted that while certain types of constructive fraud can be distinguished clearly from undue influence, there are other forms of constructive fraud which blend into undue influence, and which render the division between the two an arbitrary one, made chiefly for convenience in discussion, and not controlled by principle.

§206. Undue influence a question of fact.

Whether undue influence exists in a particular case is a question of fact.¹ Accordingly many cases exist in which similar facts as to the compulsion used, the situation of the parties and the like, produce opposite results because in some

case falls rather within the equitable principle which renders voidable contracts obtained by undue influence." *Adams v. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447; 6 L. R. A. 491; 23 N. E. 7.

⁸ *Peckham v. Van Bergen*, 10 N. D. 43; 84 N. W. 566.

⁹ *Meech v. Lee*, 82 Mich. 274; 46 N. W. 383.

¹⁰ *Adams v. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447; 6 L. R. A. 491; 23 N. E. 7.

An almost identical set of facts except that the compulsion was less than in *Adams v. Bank*, was said in (*Commercial*) *National Bank v. Wheelock*, 52 O. S. 534; 49 Am. St. Rep. 738; 40 N. E. 636, to amount to duress, if of any operative effect.

¹ *In re Smith*, 95 N. Y. 516, 522; quoted in *Barnard v. Gantz*, 140 N. Y. 249; 35 N. E. 430. To the same effect see *Coon v. Dennis*, 111 Mich. 450; 69 N. W. 666.

² "Though there was no fraud there was something like fraud; for an undue advantage was taken of his situation." *Evans v. Llewellyn*, 1 Cox Ch. 333, 340; quoted in *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556, 561; and in *Schuttler v. Brandfass*, 41 W. Va. 201; 23 So. 808.

¹ *Woodbury v. Woodbury*, 141 Mass. 329; 55 Am. Rep. 479; 5 N. E. 275; *Bowles v. Wathan*, 54 Mo. 261; *Dailey v. Kastell*, 56 Wis. 444; 14 N. W. 635.

cases it appears as a fact that the mind of the party who seeks relief was overpowered, while in others it appears as a fact that it was not. For this reason, it is often impossible to make any exact statement of what degree of constraint is necessary to cause undue influence: since the existence of undue influence, where it is found to exist, is determined by the court as a question of fact in each particular case.

§207. By whom undue influence may be exerted.

In most of the cases arising under undue influence the influence is exerted by the party who receives the benefit of the transaction. It is not necessary, however, that a personal advantage should be obtained by the person who exercises the undue influence. If the beneficiary either does not part with anything of value under the transaction complained of¹ or has notice of the existence of the undue influence, the transaction may be avoided though the influence exerted was that of a third person not acting for or representing the beneficiary. Thus A deposited money with a corporation as a loan. Subsequently he was induced by undue influence to give an order transferring such money to a fund held by such corporation for religious purposes. It was held that A's executor could recover such fund from the corporation.² A different rule obtains if adversary to the transaction complained of, parts with value thereunder without notice of the existence of undue influence. Undue influence exerted by a husband to induce his wife to sign a mortgage does not avoid the instrument if the mortgagee did not know of such undue influence and gave value for such security.³

II. PRESUMPTIVE INFLUENCE.

§208. Presumptions of undue influence.

Undue influence is said, in most jurisdictions to be presumed in transactions between persons in confidential relations

¹ *Fisher v. Publishing Association*, 85 Mich. 472; 48 N. W. 622.

³ *Walker v. Nicrosi*, 135 Ala.

² *Fisher v. Publishing Association*, 353; 33 So. 161.

whereby an advantage is gained by the person who holds the dominating situation.¹ The confidential relations thus involved are the same as those considered under constructive fraud; and in the same cases as those in which a presumption of constructive fraud is said to arise, a presumption of undue influence is said to exist.² This presumption is *prima facie* only. A transaction between persons in actual relations of trust and confidence, will be upheld if it is the expression of the genuine and untrammelled assent of the parties seeking relief.³ This is especially true if the person in whom the trust is reposed gains no advantage by the transaction. Thus a conveyance by A, in contemplation of marriage to B, her confidential adviser, in trust for A, raises no presumption of undue influence.⁴

¹ Thomas v. Whitney, 186 Ill. 225; 57 N. E. 808; Dunn v. Dunn, 42 N. J. Eq. 431; 7 Atl. 842; Doyle v. Welch, 100 Wis. 24; 75 N. W. 400. "Undue influence, which is a species of fraud, when relied upon to annul a transaction *inter partes*, or a testamentary disposition, must be proved, and cannot be presumed. But the relation in which the parties to a transaction stand to each other is often a material circumstance, and may of itself, in some cases, be sufficient to raise a presumption of its existence. Transactions between guardian and ward, attorney and client, trustee and *cestui que* trust, or persons one of whom is dependent upon and subject to the control of the other, are illustrations of this doctrine. Dealings between parties thus situated, resulting in a benefit conferred upon, or an advantage gained by the one holding the dominating situation, naturally excite suspicion, and when the situation is shown, then there is cast upon the party claiming the benefit or advantage, the burden of relieving himself from the suspicion thus engendered, and of showing, either by direct proof

or by circumstances, that the transaction was free from fraud or undue influence, and that the other party acted without restraint and under no coercion, or any pressure direct or indirect, of the party benefited. This rule does not proceed upon a presumption of the invalidity of the particular transaction, without proof. The proof is made in the first instance when the relation and the personal intervention of the party claiming the benefit is shown. The law is not so impracticable as to refuse to take notice of the influence of greed and selfishness upon human conduct, and in the case supposed it wisely interposes by adjusting the quality and measure of proof to the circumstances, to protect the weaker party and, as far as may be, to make it certain that trust and confidence have not been perverted or abused." *In re Smith*, 95 N. Y. 516, 522; quoted in *Barnard v. Gantz*, 140 N. Y. 249, 257; 35 N. E. 430.

² See §§ 177-194.

³ *Rockey's Estate*, 155 Pa. St. 453; 26 Atl. 656.

⁴ *Falk v. Turner*, 101 Mass. 494.

In transactions between persons in confidential relations, whereby an advantage is acquired by a person who does not hold the dominating relation, as in transfers by a husband to wife,⁵ or by a parent to a child,⁶ the fact that the consideration is inadequate does not, of itself, establish undue influence.

§209. Illustrations of confidential relations.—Parent and child.

A transaction between parent and child, resulting in a benefit to the parent creates a presumption of undue influence.¹ The Supreme Court of the United States has held, contrary to the weight of authority, that no presumption of undue influence arises in such cases,² though circumstances showing compulsion as a fact may establish undue influence.³ No presumption of undue influence arises in case of a gift by the parent to the child, or other transaction resulting in a benefit to the child.⁴ There is even a negative presumption in cases of gifts from parent to child, and undue influence has been held not to exist where, owing to the feeble condition of the parent, undue influence would be held to exist had the transaction existed between persons not so related.⁵ A conveyance by a husband to

⁵ *Fitzgerald v. Fitzgerald*, 168 Mass. 488; 47 N. E. 431. (Under an oral contract to hold in trust.)

⁶ *Davis v. Miller*, 98 Ia. 516; 67 N. W. 387. (Under a contract for support entered into shortly before the death of the grantor.)

¹ *Oliphant v. Liversidge*, 142 Ill. 160; 30 N. E. 334; *Plant v. Plant*, 76 Miss. 560; 25 So. 151; *Worrall's Appeal*, 110 Pa. St. 349; 1 Atl. 380, 765; *Millican v. Millican*, 24 Tex. 426; *Saufley v. Jackson*, 16 Tex. 579; *Todd v. Sykes*, 97 Va. 143; 33 S. E. 517; *Muzzy v. Tompkinson*, 2 Wash. 616; 27 Pac. 456; 28 Pac. 652.

² *Jenkins v. Pye*, 12 Pet. (U. S.) 241.

³ *Taylor v. Taylor*, 8 How. (U. S.) 183.

⁴ *Towson v. Moore*, 173 U. S. 17; *Mackall v. Mackall*, 135 U. S. 167; *Kennedy v. Kennedy*, 194 Ill. 346; 62 N. E. 797; *Slayback v. Witt*, 151 Ind. 376; 50 N. E. 389; *Mallow v. Walker*, 115 Ia. 238; 91 Am. St. Rep. 158; 88 N. W. 452; *Reinerth v. Rhody*, 52 La. Ann. 2029; 28 So. 277; *Ladu v. Ladu*, 84 Mich. 469; 47 N. W. 1101; *Fitzpatrick v. Weber*, 168 Mo. 562; 68 S. W. 913; *Carter v. Dille*, 167 Mo. 564; 67 S. W. 232; *Carney v. Carney*, 196 Pa. St. 34; 46 Atl. 264; *Hummel v. Kistner*, 182 Pa. St. 216; 37 Atl. 815; *Simon v. Simon*, 163 Pa. St. 292; 29 Atl. 657; *Crothers v. Crothers*, 149 Pa. St. 201; 24 Atl. 190; *Marking v. Marking*, 106 Wis. 292; 82 N. W. 133.

⁵ *Slayback v. Witt*, 151 Ind. 376;

his wife, and a reconveyance by her to their children does not beneficiaries.⁶ Somewhat similar principles apply to conveyances to apparent heirs. Thus a conveyance to a nephew will raise a presumption of undue influence on the part of the be upheld, if fair and reasonable,⁷ as where the nephew has, under such contract, come from a different State at considerable expense, and has expended a considerable sum in improving his aunt's house,⁸ or has, under such contract supported such uncle.⁹ So a surrender by a grandmother to her grandsons of notes held by her against them is not *prima facie* caused by undue influence.¹⁰ So a contract of sale by an uncle to his nephew with whom he is in confidential business relations is not presumptively caused by undue influence.¹¹

§210. Guardian and ward.

A presumption of undue influence arises in transactions between guardian and ward, even after the ward has attained legal capacity, resulting in benefit to the guardian,¹ and this presumption may be sufficient to establish undue influence if it does not appear that the ward acts under independent advice.² The fact that the price paid was more than was offered by a third person, and that the ward was determined to sell, does not prevent undue influence from existing if the consideration was grossly inadequate.³ So a son who has in fact been acting as guardian of his parents is guilty of undue influence if he

50 N. E. 389; *Reinerth v. Rhody*, 52 La. Ann. 2029; 28 So. 277; *Hatcher v. Hatcher*, 139 Mo. 614; 39 S. W. 479.

⁶ *Lynch v. Doran*, 15 Mich. 395; 54 N. W. 882.

⁷ *Creswell v. Welchman*, 95 Cal. 359; 30 Pac. 553; *Kuhn's Trustee v. Clay* (Ky.); 55 S. W. 1; *Conner v. Garrard* (Ky.); 19 S. W. 926.

⁸ *Creswell v. Welchman*, 95 Cal. 359; 30 Pac. 553.

⁹ *Cowee v. Cornell*, 75 N. Y. 91; 31 Am. Rep. 428.

¹⁰ *Lodge v. Hulings*, 63 N. J. Eq. 159; 51 Atl. 1015.

¹¹ *Doheny v. Lacy*, 168 N. Y. 213; 61 N. E. 255.

¹ *Earhart v. Holmes*, 97 Ia. 649; 66 N. W. 898; *Tucke v. Buchholz*, 43 Ia. 415; *Smith v. Boyd*, 61 N. J. Eq. 175; 47 Atl. 816; *McRae v. Malloy*, 93 N. C. 154.

² *Smith v. Boyd*, 61 N. J. Eq. 175; 47 Atl. 816; *McRae v. Malloy*, 93 N. C. 154.

³ *Earhart v. Holmes*, 97 Ia. 649; 66 N. W. 898.

induces them to give him a mortgage by making excessive claims for amounts due from them to him. In such a case the son is bound to "deal fairly and frankly and to take no advantage."⁴

§211. Husband and wife.

A transaction between a husband and a wife resulting in a benefit to the husband, creates a presumption of undue influence.¹ In order to create this presumption, the transaction must be intended to benefit the husband. A contract by a wife to convey to a husband, in pursuance of an agreement by him to devise his property to her, so that the survivor should have all the property, does not raise the presumption of undue influence.² The rule that a transaction between husband and wife resulting in a benefit to the husband creates a presumption of undue influence has been put in statutory form,³ and has been so broadened by statute that it includes transactions resulting in an advantage to the wife.⁴

§212. Principal and agent.

A transaction between principal and agent, if advantageous to the agent, will be scrutinized closely.¹ If the transaction, however, concerns a subject-matter which is outside of and unconnected with the agency, no presumption of undue influence arises.²

§213. Attorney and client.

A transaction between attorney and client, resulting in a benefit to the attorney, creates a presumption of undue influence.¹

⁴ *Bowe v. Bowe*, 42 Mich. 195; 3 N. W. 843.

¹ *Hall v. Otterson*, 52 N. J. Eq. 522; 28 Atl. 907.

² *Jones v. Gorham*, 90 Ky. 622; 29 Am. St. Rep. 423; 10 L. R. A. 223; 14 S. W. 599.

³ *White v. Warren*, 120 Cal. 322; 49 Pac. 129; 52 Pac. 723.

⁴ *Jackson v. Jackson*, 94 Cal. 446; 29 Pac. 957.

¹ *Ralston v. Turpin*, 129 U. S. 663; *Burke v. Taylor*, 94 Ala. 530; 10 So. 129; *Darlington's Estate*, 147 Pa. St. 624; 30 Am. St. Rep. 776; 23 Atl. 1046. (Note for services for exorbitant amount.)

² *Brown v. Deposit Co.*, 87 Md. 377; 40 Atl. 256; *Doheny v. Lacy*, 168 N. Y. 213; 61 N. E. 255; *Cowee v. Cornell*, 75 N. Y. 91; 31 Am. Rep. 428.

¹ *Willin v. Burdette*, 172 Ill. 117;

A conveyance by an ignorant and uneducated client to her attorney passing realty received by her as alimony in the divorce suit in which the attorney was employed was set aside, it appearing that the client did not understand her rights and that the attorney had already received reasonable compensation.²

§214. Physician and patient. *

A transaction between physician and patient resulting in benefit to the physician creates a presumption of undue influence.¹ This presumption is peculiarly strong if the patient is in the physician's custody.² Similar principles apply to transactions between nurse and patient advantageous to the nurse.³ However if influence is exerted by the physician for the good of the patient and not for his own advantage, the presumption of undue influence does not arise.⁴ Such presumption is of course not conclusive, and it may be shown that the transaction was fair and honest.⁵

§215. Religious advisers.

A transaction between a religious adviser and a member of his parish or congregation advantageous to such adviser is generally held to be presumptively due to undue influence.¹ A transaction between a spiritualistic medium and a believer in his powers resulting in benefit to the medium creates a presumption of undue influence.²

49 N. E. 1000; *Unruh v. Lukens*, 166 Pa. St. 324; 31 Atl. 110.

² *Willin v. Burdette*, 172 Ill. 117; 49 N. E. 1000.

¹ *Thomas v. Whitney*, 186 Ill. 225; 57 N. E. 808; *Unruh v. Lukens*, 166 Pa. St. 324; 31 Atl. 110. (Influence of physician combined with that of attorney.) *Contra*, *Audenreid's Appeal*, 89 Pa. St. 114; 33 Am. Rep. 731.

² *Thomas v. Whitney*, 186 Ill. 225; 57 N. E. 808.

³ *Dingman v. Romine*, 141 Mo. 466; 42 S. W. 1087.

⁴ *Penn Mutual Life Ins. Co. v. Trust Co.*, 83 Fed. 891.

⁵ *Kellogg v. Peddicord*, 181 Ill. 22; 54 N. E. 623. (Conveyance to the superintendent of a sanitarium of which grantor was an inmate.)

¹ *Huguenin v. Baseley*, 14 Ves. Jr. 273; *White & Tudor's Lead. Cas. Pt. 2*, 597; *Corrigan v. Pironi*, 48 N. J. Eq. 607; 23 Atl. 355.

² *Connor v. Stanley*, 72 Cal. 556; 1 Am. St. Rep. 84; 14 Pac. 306.

§216. Actual confidence without technical relation.

Trust and confidence may in fact exist though the parties occupy no technical relations to each other.¹ Between persons in such relations, and in transactions advantageous to the person occupying the dominant situation, undue influence will be presumed to exist.²

§217. Other relations.

No presumption of undue influence arises where a relation of trust and confidence had once existed between the parties, but such relation had been dissolved for a considerable period of time.¹ A conveyance to a physician who had professional charge of the grantor two months before the transaction and four months afterward, but at no time between, does not raise such presumption.² The mere fact of the relation of master and servant, or landlord and boarder, does not of itself raise any presumption of undue influence, since confidential relations cannot be assumed to exist in such cases.³

III. COMBINATIONS OF CONSTRAINT.

§218. Confidential relationship and weakness of mind.

The question of undue influence between persons in confidential relations is rarely settled by the bare presumption arising out of such relations. Additional facts either strengthen or rebut the presumption of undue influence. If, in addition to the confidential relationship between the parties, a person who reposes trust and confidence in the other is

¹ *Simonton v. Bacon*, 49 Miss. 582; *Stepp v. Frampton*, 179 Pa. St. 284; 36 Atl. 177.

² *Dorsey v. Wolcott*, 173 Ill. 539; 50 N. E. 1015; *Holland v. John*, 60 N. J. Eq. 435; 46 Atl. 172.

¹ *Banner v. Rosser*, 96 Va. 238; 31 S. E. 67.

² *Tichy v. Simecek* (Neb.); 95 N. W. 629.

³ *Doran v. McConlogue*, 150 Pa. St. 98; 24 Atl. 357.

afflicted with weakness,¹ either physical,² or mental,³ such fact greatly strengthens the presumption of undue influence arising out of the confidential relations between the parties. Examples of cases in which undue influence has been held to exist under this combination of facts are given in the note below.⁴ An assignment by a wife, who has recently been released from an insane asylum, of an insurance policy held by her on her husband's life, to their child, at his instance without understanding its effect has been held to be due *prima facie* to undue influence.⁵ Between persons in a confidential relation, the fact that the party seeking relief was aged and infirm, and that he was induced to enter into the transaction by a contract which had not been performed, still further strengthens the presumption of undue influence.⁶ This combination of facts does not necessarily establish the existence of undue influence.

¹ Ashmead v. Reynolds, 134 Ind. 139; 39 Am. St. Rep. 238; 33 N. E. 763; Woodbury v. Woodbury, 141 Mass. 329; 55 Am. Rep. 479; 5 N. E. 275; Jacox v. Jacox, 40 Mich. 473; 29 Am. Rep. 547; Martin v. Baker, 135 Mo. 495; 36 S. W. 369.

² Lewis v. McGrath, 191 Ill. 401; 61 N. E. 135; Disch v. Timm, 101 Wis. 179; 77 N. W. 196.

³ Dorsey v. Wolcott, 173 Ill. 539; 50 N. E. 1015; Gibbons v. Gibbons, 175 Pa. St. 475; 34 Atl. 846.

⁴ Mental weakness due to morphine and intoxicating liquor; conveyance to confidential adviser; German, etc., Society v. De Lashmutter, 83 Fed. 33; Mental weakness; conveyance by parent to child; Smith v. Smith, 90 Mich. 97; 51 N. W. 361; conveyance by child to parent, Lovett v. Taylor, 54 N. J. Eq. 311; 34 Atl. 896; conveyance to one in whose custody grantor was. Dorsey v. Wolcott, 173 Ill. 539; 50 N. E. 1015. Weakness due to sickness and approaching death; con-

veyance by wife to husband. Lewis v. McGrath, 191 Ill. 401; 61 N. E. 135; conveyance by husband to wife. Disch v. Timm, 101 Wis. 179; 77 N. W. 196. Weakness of body and mind due to old age; note and mortgage given to daughter. Spargue v. Hall, 62 Ia. 498; 17 N. W. 743; conveyance at request of physician. Klose v. Hillenbrand, 88 Cal. 473; 26 Pac. 352.

⁵ Gibbons v. Gibbons, 175 Pa. St. 475; 34 Atl. 846.

⁶ Contract to renew a note, deposit money to grantor's credit, and pay for certain personalty made by son-in-law of grantor. Stuyvesant v. Wilcox, 92 Mich. 228; 52 N. W. 617. Contract to pay debts and reconvey, made by brother of grantor. Tomlinson v. Tomlinson, 103 Ia. 740; 72 N. W. 664. Contract to give bond for support made by brother-in-law, the bond having no sureties. James v. Groff, 157 Mo. 402; 57 S. W. 1081.

Many cases exist in which transactions under such facts have been upheld.⁷

§219. Confidential relationship and misrepresentation.

In addition to a confidential relationship between the parties, the further fact of a misstatement, even if not amounting to technical fraud, or the additional fact of circumstances of oppression, not amounting to technical duress, or the combination of both misstatement and oppression, tend greatly to strengthen the presumption of undue influence. Thus a conveyance by a weak, timid woman, who does not understand the legal effect of her deed, to her sister,¹ a conveyance by a woman who does not understand the effect of her deed, to keep her husband, from whom she separated, away from her home, made to her brother, who is her confidential adviser,² a conveyance to a parent made by a young woman about to be married, on her father's representation that her future husband was actuated by mercenary motives and that this would be an excellent test of his affection, the effect of the deed not being explained to her,³ a conveyance by a daughter to her mother, under whose influence she was, made gratuitously in order to obtain the mother's consent to the daughter's marriage to a man with whom the daughter had been criminally intimate, the conveyance being made by reason of her mother's representation that the daughter had only a fourth interest in her grandfather's estate, whereas she had a half interest; and also by her mother's representation that if she did not convey it, it would be taken for her husband's debts,⁴ and a conveyance made by niece to her

⁷ Weakness of mind due to old age; conveyance by parent to child. *Mallow v. Walker*, 115 Ia. 238; 91 Am. St. Rep. 158; 88 N. W. 452; *Wheatley v. Wheatley*, 102 Ia. 737; 70 N. W. 689; *Likins v. Likins*, 122 Mo. 279; 27 S. W. 531. Weakness of mind due to sickness; conveyance by parent to child. *Orr v. Pennington*, 93 Va. 268; 24 S. E. 928. Weakness of mind; convey-

ance by nephew to uncle as trustee. *Neal v. Black*, 177 Pa. St. 83; 34 L. R. A. 707; 35 Atl. 561.

¹ *Watkins v. Brant*, 46 Wis. 419; 1 N. W. 82.

² *Smith v. Cuddy*, 96 Mich. 562; 56 N. W. 89.

³ *Whitridge v. Whitridge*, 76 Md. 54; 24 Atl. 645.

⁴ *Sayles v. Christie*, 187 Ill. 420; 58 N. E. 480.

uncle of her interest in her grandfather's estate for half its value, she knowing nothing of its value and her uncle being advised of all the facts,⁵ have each been set aside on the ground of undue influence.

§220. Confidential relationship and non-disclosure.

In addition to the foregoing facts, the further fact that the party holding the dominating position in the confidential relation has failed to make disclosure of the material facts, still further strengthens the presumption of undue influence.¹ The same result follows if material facts are misstated, even if not in such form as to amount to technical fraud.²

§221. Weakness of mind.

If the party seeking relief is weak mentally, the transaction of which he complains will be scrutinized carefully, and if any ground for believing that undue influence has been acquired over him exists, the transaction will be set aside.¹ The fact of mental distress,² or of solicitation even of a person of weak intellect,³ do not of themselves establish undue influence. The mere fact, moreover, that a party to the transaction is weak mentally, but not so weak as to amount to a legal incapacity to make contracts or conveyances, is not of itself sufficient to justify the court in setting aside the contract or conveyance in the absence of further evidence.⁴ Weakness of mind may, how-

⁵ *Tribou v. Tribou*, 96 Me. 305; 52 Atl. 795.

¹ Conveyance by beneficiary under a will to executor who conceals facts learned by him in that capacity. *Richards v. Pitts*, 124 Mo. 602; 28 S. W. 88.

² Misstatement as to effect of conveyance. *Kyle v. Perdue*, 95 Ala. 579; 10 So. 103. Misstatement by grantee (a grandson of grantor) who has agreed to support grantor, of his financial ability. *Rexford v. Schofield*, 101 Mich. 480; 59 N. W. 837.

¹ *Yount v. Yount*, 144 Ind. 133; 43 N. E. 136; *Bennett v. Bennett*, — Neb. —; 91 N. W. 409.

² *Wilson v. Brown* (Tenn. Ch. App.); 35 S. W. 1098.

³ *Rogers v. Higgins*, 57 Ill. 244.

⁴ *Sawyer v. White*, 122 Fed. 223; *Perry v. Pearson*, 135 Ill. 218; 25 N. E. 636; *Colyer v. Hyden*, 94 Ky. 180; 21 S. W. 868; *Duncan v. Mason* (Ky.); 20 S. W. 252; *Stewart v. Curtis*, 85 Mich. 496; 48 N. W. 872; *Davis v. Phillips*, 85 Mich. 198; 48 N. W. 513; *Arnold v. Whitcomb*, 83 Mich. 19; 46 N. W. 1029;

ever, when combined with inadequacy of consideration, be sufficient to show that the influence exercised over the party was undue.⁵

§222. Weakness of mind and misrepresentation.

Weakness of mind, together with misstatement, even if not amounting to technical fraud,¹ such as a representation by a third person acting in collusion with the grantee that her brother would buy the property taken in exchange at a great advance,² or a false statement that a life-estate was reserved to grantor's wife in the deed,³ or a false statement of the value of property;⁴ or circumstances of oppression, even if not amounting to technical duress,⁵ as where a helpless and bed-ridden grantor is threatened by grantee with desertion,⁶ or the combination of misrepresentation and circumstances of oppression,⁷ may be sufficient to establish the fact of undue influence.

§223. Misrepresentation of law and actual influence.

A misrepresentation of law is not ordinarily treated as technical fraud.¹ However, a misrepresentation of law may be so combined with the exercise of influence over the party seeking relief, as to establish the fact of undue influence.² Thus a mis-

Tichy v. Simecek (Neb.); 95 N. W. 629; *King v. Humphreys*, 138 Pa. St. 310; 22 Atl. 19; *Stringfellow v. Hanson*, 25 Utah 480; 71 Pac. 1052.

⁵ See § 230.

¹ *Ashmead v. Reynolds*, 134 Ind. 139; 39 Am. St. Rep. 238; 33 N. E. 763; *Clough v. Adams*, 71 Ia. 17; 32 N. W. 10; *Bennett v. Bennett*, — Neb. —; 91 N. W. 409; *Mott v. Mott*, 49 N. J. Eq. 192; 22 Atl. 997; *Church of J. C. L. D. S. v. Watson*, 25 Utah, 45; 69 Pac. 531; *Horton v. Lee*, 106 Wis. 439; 82 N. W. 360.

² *Horton v. Lee*, 106 Wis. 439; 82 N. W. 360.

³ *Church of J. C. L. D. S. v. Watson*, 25 Utah, 45; 69 Pac. 531. (Even

if the grantee gives to such wife a lease for years at one dollar a year.)

⁴ *Menz v. Beebe*, 102 Wis. 342; 77 N. W. 913; modified on rehearing, 102 Wis. 350; 78 N. W. 601.

⁵ *Worthington v. Major*, 94 Mich. 325; 54 N. W. 303; *Kroenung v. Goehri*, 112 Mo. 641; 20 S. W. 661; *Konrad v. Zimmermann*, 79 Wis. 306; 48 N. W. 368.

⁶ *Kroenung v. Goehri*, 112 Mo. 641; 20 S. W. 661.

⁷ *Hick v. Thomas*, 90 Cal. 289; 27 Pac. 208, 376.

¹ See ch. vi.

² *Pickering v. Pickering*, 2 Bea. 31; *Wheeler v. Smith*, 9 How. (U. S.) 55; *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556.

representation of law, even if innocent, as that a lease for life to take effect in the future is void, the lessee being thus induced to compromise for a sum far less than her interest in her father's estate,³ may in connection with facts of undue influence make the transaction voidable.

§224. What constitutes inadequacy of consideration.

Whether a consideration is adequate or not depends very largely on the circumstances of each particular case. No arbitrary rule as to the percentage of the actual value that must be paid to constitute an adequate consideration can be laid down. To give some specific examples, keeping in view the fact that often the other circumstances of weakness of mind, confidence and trust, oppression and the like are after all decisive in each particular case: the consideration has been held inadequate where five dollars was paid for realty worth one thousand dollars;¹ where five hundred dollars was paid for realty worth eight thousand dollars;² where fifty dollars was paid for land worth five hundred dollars;³ and where nearly five hundred dollars was charged for the trouble of endorsing an insurance policy.⁴ A conveyance made by a spendthrift, of his life estate in property worth two thousand dollars, for fifty dollars, has been avoided in equity.⁵ So where A borrowed about two thousand five hundred dollars by a transaction whereby in addition to the principal and interest, he was to pay nearly twelve thousand dollars for land not worth six thousand dollars, the consideration was held to be so inadequate that the contract was unconscionable.⁶

A conveyance of all the grantor's property in consideration of a contract for future support cannot be said to be on so in-

³ *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556.

¹ *Stephens v. Ozbourn*, 107 Tenn. 572; 89 Am. St. Rep. 957; 64 S. W. 902.

² *Rothenbarger v. Rothenbarger*, 111 Mo. 1; 19 S. W. 932.

³ *Wright v. Wilson*, 2 Yerg. (Tenn.) 294.

⁴ *Kelley v. Coplice*, 23 Kan. 474; 33 Am. Dec. 179.

⁵ *Ridgeway v. Herbert*, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040.

⁶ *Hough v. Hunt*, 2 Ohio 495; 15 Am. Dec. 569.

adequate a consideration as to be unconscionable.⁷ If an annuity for life is part of the consideration, the question of adequacy depends in part on the expectancy of life of the annuitant if the annuity exceeds the annual income from the property. If the annuity is less than annual income, inadequacy to some extent is there manifest. Hence the expectancy of life of the annuitant may be considered in determining whether the consideration is inadequate.⁸ A conveyance of property worth twenty thousand dollars in return for the assumption of a mortgage for four thousand dollars, giving a note for five thousand dollars and agreeing to pay an annuity of six hundred dollars a year for the life of a woman then over seventy was held to be on inadequate consideration.⁹ So a conveyance of property worth from six to eight thousand dollars in consideration of a cash payment of two hundred and fifty dollars; and an agreement to pay an annuity of five hundred dollars and all doctor's bills for the life of a woman between sixty and seventy, in very poor health, who died in a few weeks, was held to be on inadequate consideration.¹⁰ So conveyance of land worth three thousand dollars on consideration of supporting a feeble grantor of eighty;¹¹ has been held on inadequate consideration. A conveyance to a child in consideration of support for life of a grantor aged eighty-six has been upheld.¹² So inadequacy of consideration and unfairness of a contract for support have been held to exist where the promise to furnish support was unenforceable, as where it was made orally when required to be in writing;¹³ or where the promisor gave no security for performance and had no means of performing outside of the property thus conveyed.¹⁴ So a conveyance upon the grantee's verbal

⁷ *Scolf v. Collin County*, 80 Tex. 514; 16 S. W. 314.

⁸ *Kennedy v. Currie*, 3 Wash. 442; 28 Pac. 1028.

⁹ *Bruguier v. Pepin*, 106 Ia. 432; 76 N. W. 808.

¹⁰ *Allore v. Jewell*, 94 U. S. 506.

¹¹ *Johnson v. Stonestreet (Ky.)*; 66 S. W. 621.

¹² *Davis v. Latta*, 94 Ia. 727; 62 N. W. 17.

¹³ *Odell v. Moss*, 130 Cal. 352; 62 Pac. 555.

¹⁴ *Landfair v. Thompson*, 112 Ga. 487; 37 S. E. 717; *Thomas v. Crawford*, 118 Mich. 253; 76 N. W. 394.

promise to pay a lien on the property which the grantor was under no personal obligation to pay was held to be on inadequate consideration.¹⁵ On the other hand payment of sixteen dollars an acre of land worth twenty-three dollars an acre,¹⁶ is held not to be inadequate.

§225. General effect of inadequacy of consideration.

Inadequacy of consideration is not, by itself, ground for granting equitable relief as by rescission or cancellation.¹ It has been said in obiter that inadequacy may be in equity a ground for setting aside an executory contract, but not for cancelling an executed conveyance.² It has even been held that inadequacy not rendering the contract unconscionable will not prevent the remedy of specific performance from being given;³ but by statute in some jurisdictions, specific performance is refused unless the consideration is adequate.⁴

§226. Inadequacy of consideration in combination with other facts.

Inadequacy of consideration is therefore merely a circumstance among others to be used in determining whether fraud

¹⁵ *Lamb v. Lamb* (N. J. Eq.); 23 Atl. 1009.

¹⁶ *Harrison v. Otley*, 101 Ia. 652; 70 N. W. 724.

¹ *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Hemstreet v. Wheeler*, 100 Ia. 282; 69 N. W. 518. (Property worth six thousand dollars conveyed to a daughter for three thousand dollars and a contract for support of both parents for life.) *Lewis v. Arbuckle*, 85 Ia. 335; 16 L. R. A. 677; 52 N. W. 237; *Beard v. Campbell*, 2 A. K. Mar. (Ky.) 125; 12 Am. Dec. 362; *Davidson v. Little*, 22 Pa. St. 245; 60 Am. Dec. 81; *Johnson v. Franklin*, 58 S. C. 394; 36 S. E. 664; *Briscoe v. Brongaugh*, 1 Tex. 326; 46 Am. Dec. 108; *White v. Johnson*, 4 Wash. 113; 29 Pac. 932; *Cooper v. Reilly*, 90 Wis. 427; 63 N. W. 885.

² *Davidson v. Little*, 22 Pa. St. 245; 60 Am. Dec. 81.

³ *Erwin v. Parham*, 12 How. (U. S.) 197; *South, etc., R. R. v. R. R.*, 98 Ala. 400; 39 Am. St. Rep. 74; 13 So. 682; *Schmidt v. Ry.*, 101 Ky. 441; 38 L. R. A. 809; 41 S. W. 1015; *Chicora Fertilizer Co. v. Duman*, 91 Md. 144; 50 L. R. A. 401; 46 Atl. 347; *Roberts v. Cambridge*, 170 Mass. 199; 49 N. E. 84; *Lee v. Kirby*, 104 Mass. 420; *Madison Athletic Association v. Brittin*, 60 N. J. Eq. 160; 46 Atl. 652; *McCormick v. Stephany*, 57 N. J. Eq. 257; 41 Atl. 840; *Scymour v. Delancy*, 3 Cow. (N. Y.) 445; 15 Am. Dec. 270; *Galloway v. Barr*, 12 Ohio 354; *Conaway v. Sweeney*, 24 W. Va. 643.

⁴ *Prince v. Lamb*, 128 Cal. 120; 60 Pac. 689; *Morrill v. Everson*, 77 Cal. 114; 19 Pac. 190.

or undue influence exist.¹ Among the facts which in combination with inadequacy of consideration establish fraud or undue influence are confidential relations between the parties, weakness of mind of the party receiving the inadequate consideration, misstatement, non-disclosure, mistake of fact or law, and circumstances of oppression and concealment. The effect of combinations of these facts will accordingly next be considered.

§227. Confidential relationship and inadequacy of consideration.

In transactions between persons in confidential relations, where an advantage is taken by the person holding the dominating situation, the fact of inadequacy of consideration, even in the absence of a weakness of mind, greatly strengthens the presumption of undue influence.¹ Thus a conveyance by a child to a parent,² a contract by a ward to convey to the guardian, made soon after the relationship has expired,³ a conveyance by a niece to an uncle in whom she has great confidence,⁴ especially if he has been her guardian,⁵ a conveyance by a wife to her husband,⁶ a conveyance to a spiritual adviser,⁷ a conveyance in trust to a physician and attorney on their advice,⁸ or a releasee by a devisee to an executor,⁹ have all been avoided if on inadequate consideration. So a surrender by a legatee to an executor of legal rights made under a mistake as to their nature and for an inadequate consideration, will be avoided.¹⁰

¹ Lewis v. Arbuckle, 85 Ia. 335; 16 L. R. A. 677; 52 N. W. 237; Stephens v. Ozbourne, 107 Tenn. 572; 89 Am. St. Rep. 957; 64 S. W. 902; Talbott v. Manard, 106 Tenn. 60; 59 S. W. 340; Mann v. Russey, 101 Tenn. 596; 49 S. W. 835.

² Oliphant v. Liversidge, 142 Ill. 160; 30 N. E. 334; Holland v. John, 60 N. J. Eq. 435; 46 Atl. 172; Doyle v. Welch, 100 Wis. 24; 75 N. W. 400.

³ Muzzy v. Tompkinson, 2 Wash. 616; 27 Pac. 456; 28 Pac. 652.

⁴ Tucke v. Buchholz, 43 Ia. 415.

⁵ Tribou v. Tribou, 96 Me. 305; 52 Atl. 795.

⁶ Earhart v. Holmes, 97 Ia. 649; 66 N. W. 898.

⁷ White v. Warren, 120 Cal. 322; 49 Pac. 129; 52 Pac. 723.

⁸ Huguenin v. Baseley, 14 Ves Jr. 273; White and Tudor's Lead. Cas. Pt. 2, 597; Corrigan v. Pironi, 48 N. J. Eq. 607; 23 Atl. 355.

⁹ Unruh v. Lukens, 166 Pa. St. 324; 31 Atl. 110.

¹⁰ Whelen's Appeal, 70 Pa. St. 410.

¹¹ Cowen v. Adams, 78 Fed. 536; 24 C. C. A. 198.

Like principles apply where trust and confidence or actual influence exist, though without technical relations.¹¹ Thus a mortgage,¹² or conveyance,¹³ by a parent to a child, or by a step-mother to her step-son,¹⁴ a note given by an uncle to his nephew who had full management of his business,¹⁵ a sale of a legacy to a legatee's confidential adviser,¹⁶ or a conveyance to a sister who has great influence over the grantor,¹⁷ have all been set aside if on inadequate consideration. However the relation between parent and child is such that a conveyance by a parent to a child on inadequate consideration, or without any consideration,¹⁸ is not on that ground alone regarded as caused by undue influence or constructive fraud.

§228. Inadequacy of consideration and circumstances of oppression.

Inadequacy of consideration may be found in connection with circumstances of oppression which do not amount to technical duress; and the combination may justify a finding of undue influence.¹ Thus a transaction entered into under great mental distress, caused by domestic calamity,² or by threats made by a husband to his wife to take away her children so that she should never see them again,³ or by fear of a contest of her husband's will by his heirs, which could not affect the

¹¹ *Armstrong v. Logan*, 115 Mo. 465; 22 S. W. 384.

¹² *Bowe v. Bowe*, 42 Mich. 195; 3 N. W. 843.

¹³ *Lanfair v. Thompson*, 112 Ga. 487; 37 S. E. 717.

¹⁴ *Lamb v. Lamb* (N. J. Eq.); 23 Atl. 1009.

¹⁵ *Darlington's Estate*, 147 Pa. St. 624; 30 Am. St. Rep. 776; 23 Atl. 1046.

¹⁶ *McCormick v. Malin*, 5 Blackf. (Ind.) 509.

¹⁷ *Odell v. Moss*, 130 Cal. 352; 62 Pac. 555; *Watkins v. Brant*, 46 Wis. 419; 1 N. W. 82.

¹⁸ *Soberanes v. Soberanes*, 97 Cal. 140; 31 Pac. 910; *Hester v. Sample*, 95 Ia. 86; 63 N. W. 463.

¹ *McLean v. Assurance Society*, 100 Ind. 127; 50 Am. Rep. 779; *Bruguier v. Pepin*, 106 Ia. 432; 76 N. W. 808; *Musick v. Fisher*, 96 Ky. 15; 27 S. W. 812; *Hough v. Hunt*, 2 Ohio 495; 15 Am. Dec. 569.

² *McLean v. Assurance Society*, 100 Ind. 127; 50 Am. Rep. 779; *Musick v. Fisher*, 96 Ky. 15; 27 S. W. 812.

³ *Kellogg v. Kellogg*, 21 Colo. 181; 40 Pac. 358.

property in question,⁴ will be relieved against in equity. The propriety of relief is especially clear if under great mental distress due to the death of her husband, the person seeking relief is induced by threats of violence to relinquish a legacy given her by her husband's will for an inadequate and nominal consideration.⁵ So a transaction entered into for an inadequate consideration, by taking advantage of the financial necessities of the party seeking relief, will be relieved against in equity.⁶ "When a person is encumbered with debts and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain equity will relieve upon account of the advantage and hardship."⁷ Thus a pledgor agreed to pay par for certain bonds worth thirty cents on the dollar, in order to induce the pledgee to allow him to redeem certain stocks and bonds which were undoubtedly his, but which the pledgee refused to allow him to redeem on other terms. The pledgor was in such straightened circumstances that a delay for purposes of litigation would have caused his financial ruin. The contract was set aside in equity.⁸ So a quitclaim deed executed because the title deeds were withheld by the adversary party, who threatened to drive the grantors in the quitclaim deed from home, sue them, and ruin them financially, has been canceled in equity.⁹ A was in urgent need of money to take up an overdue mortgage debt. B agreed to lend him the necessary amount, two thousand five hundred dollars; and also to lend him seven thousand five hundred dollars more on good security; in consideration of which A agreed to repay the loans with interest and further agreed to buy for twenty dollars an acre, five hundred ninety-three acres of land worth ten dollars an acre. The court rescinded the con-

⁴ *Bruguier v. Pepin*, 106 Ia. 432; 76 N. W. 808.

⁵ *Stewart v. Stewart*, 7 J. J. Mar. (Ky.) 183; 23 Am. Dec. 396.

⁶ *Macpherson v. McLean*, 34 N. B. 361; *Ritchie v. McMullen*, 79 Fed. 522; 25 C. C. A. 50; *Cobb v. Day*, 106 Mo. 278; 17 S. W. 323; *Hough*

v. Hunt, 2 Ohio 495; 15 Am. Dec. 569.

⁷ *Hough v. Hunt*, 2 Ohio 495; 15 Am. Dec. 569.

⁸ *Ritchie v. McMullen*, 79 Fed. 522; 25 C. C. A. 50.

⁹ *Rothenbarger v. Rothenbarger*, 111 Mo. 1; 19 S. W. 932.

tract of sale and decreed that the mortgage should stand as security for the money loaned with interest.¹⁰ A sale of property, a mortgage on which is about to be foreclosed, for considerably less than its value, but for all that can be obtained for it in open market, has been upheld.¹¹ Thus a contract by a legatee releasing rights given by will, entered into by reason of threats made by her brother and sister to contest the will and exhaust the estate will not be enforced, specifically where the legatee was an ignorant woman and acted without any legal advice as to her rights.¹²

§229. Inadequacy of consideration and unfair dealing.

Inadequacy of consideration, together with circumstances of unfair dealing not amounting to technical fraud may establish undue influence.¹ Thus a deed executed by an aged and illiterate couple who were controlled by their daughter and her husband, for a grossly inadequate consideration in favor of such daughter was set aside.²

§230. Inadequacy of consideration and weakness of mind.

Inadequacy of consideration may be found in connection with weakness of mind and the combination of facts may be such as to sustain a finding of undue influence.¹ Thus a conveyance by a woman of between sixty and seventy, in very poor health, of doubtful mental capacity, made a few weeks before her death, of property worth from six to eight thousand dollars,

¹⁰ *Hough v. Hunt*, 2 Ohio 495; 15 Am. Dec. 569.

¹¹ *Harrison v. Otley*, 101 Ia. 652; 70 N. W. 724. (Sale for two-thirds of its value.) *Doxtater v. Connell*, 93 Wis. 113; 66 N. W. 1135.

¹² *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432; 26 Atl. 857.

¹ *Zink v. Marcue*, 84 Ia. 305; 50 N. W. 984.

² *Brummond v. Krause*, 8 N. D. 573; 80 N. W. 686.

¹ *Turner v. Collins*, L. R. 7; Ch. App. 329; *Gandy v. McCaulay*, L. R. 31; Ch. Div. 1; *Allore v. Jewell*, 94 U. S. 506; *Wilkie v. Sassen*, — Ia. —; 99 N. W. 124; *Bruguier v. Pepin*, 106 Ia. 432; 76 N. W. 808; *Smith v. Cuddy*, 96 Mich. 562; 56 N. W. 89.

in consideration of a payment of two hundred fifty dollars in cash, and an annuity of five hundred dollars for life, together with doctor's bills, was set aside.² So a conveyance by an aged man of weak mind for the purpose of securing a loan will be held to be a mortgage.³

§231. Confidential relationship, weakness of mind and inadequacy of consideration.

If, in addition to confidential relations and weakness of mind on the part of the party reposing trust and confidence, of whom it is alleged that advantage has been taken, it is further shown that the transaction was based on an inadequate consideration, the presumption of undue influence is greatly strengthened.¹ If in addition the party holding the dominating position does not disclose to the other facts which it is his duty to disclose, the presumption of undue influence is still further strengthened,² as an assignment by a beneficiary under a will to an executor who does not disclose facts known to him by virtue of his office.³ Circumstances of oppression and concealment still further strengthen this presumption, as where the conveyance is kept secret from the grantor's other children.⁴

² *Allore v. Jewell*, 94 U. S. 506.

³ *Reilly v. Brown*, 87 Mich. 163; 49 N. W. 557.

¹ Parent conveying to child. *Forrestel v. Forrestel*, 110 Ia. 614; 81 N. W. 797; *Thompson v. Thompson*, (Ky.); 39 S. W. 822; *Talbott v. Bedford* (Ky.); 53 S. W. 294; *Mott v. Mott*, 49 N. J. Eq. 192; 22 Atl. 997; *Parker v. Parker*, 45 N. J. Eq. 224; 16 Atl. 537. Uncle afflicted with mental weakness due to paralysis conveying to nephew. *Dorsey v. Wolcott*, 173 Ill. 539; 50 N. E. 1015. Conveyance to physician in whose custody promisor is. *Thomas v. Whitney*, 186 Ill. 225; 57 N. E. 808. Conveyance to nurse. *Ding-*

man v. Romine, 141 Mo. 466; 42 S. W. 1087. Conveyance to agent. *Burke v. Taylor*, 94 Ala. 530; 10 So. 129; *Darlington's Estate*, 147 Pa. St. 624; 30 Am. St. Rep. 776; 23 Atl. 1046. Conveyance to one who in fact exercises influence. *Simonton v. Bacon*, 49 Miss. 582; *Stepp v. Frampton*, 179 Pa. St. 284; 36 Atl. 177.

² *Gay v. Witherspoon* (Ky.); 16 S. W. 96.

³ *Richards v. Pitts*, 124 Mo. 602; 28 S. W. 88.

⁴ Conveyance to child. *Cole v. Getzinger*, 96 Wis. 559; 71 N. W. 75; see § 232.

§232. Confidential relationship, weakness of mind, inadequacy of consideration and circumstances of oppression.

In a transaction between persons in a confidential relation, where the party seeking relief is physically and mentally weak, and the consideration is inadequate, the addition of circumstances of oppression, such as keeping the party who is alleged to be subject to undue influence in close custody, and preventing the access of other persons in interest, or independent advisers,¹ or keeping him in custody though it does not appear that other persons were actively excluded, if in fact it appears that no independent advice was given,² or a threat by a husband to abandon his wife,³ or using a divorce suit already brought by a husband against his wife as a means of intimidation,⁴ still further tends to establish undue influence. The fact that under such circumstances the beneficiary prepared the conveyance, tends further to establish undue influence.⁵ Similar results follow where advantage is taken of oppression by a third person, even if in no way connected with the beneficiary of the transaction or acting in concert with him.⁶ Thus a conveyance made by an aged and feeble woman while greatly excited by the threat of another to sue her for slander, made to the infant son of her confidential agent, by a conveyance which she understands to be a sham will, to defeat the claims of the plaintiff in the prospective slander suit, has been held to be caused by undue influence.⁷

§233. Inadequacy of consideration, weakness of mind and non-disclosure.

Inadequacy of consideration, when taken in connection with weakness of mind on the part of the person who receives the

¹ Sons. Coffey v. Sullivan, 63 N. J. Eq. 296; 49 Atl. 520; Shawvan v. Shawvan, 110 Wis. 590; 86 N. W. 165. Second wife. Disch v. Timm, 101 Wis. 179; 77 N. W. 196.

² Physician. Thomas v. Whitney, 186 Ill. 225; 57 N. E. 808. Nurse. Dingman v. Romine, 141 Mo. 466; 42 S. W. 1087. Daughter. Keller v. Gill, 92 Md. 190; 48 Atl. 69.

³ Muller v. Buyck, 12 Mont. 354;

30 Pac. 386. (Coupled with fear of maltreatment.)

⁴ Dolliver v. Dolliver, 94 Cal. 642; 30 Pac. 4.

⁵ Elmstedt v. Nicholson, 186 Ill. 580; 58 N. E. 381.

⁶ Ryan v. Price, 106 Ala. 584; 17 So. 734.

⁷ Ryan v. Price, 106 Ala. 584; 17 So. 734.

inadequate consideration, and misleading statements by the adversary party, or omission to make full disclosure when he should do so, may establish the fact of undue influence and avoid the transaction.¹ If the weakness of mind is due to the contrivance of the adversary party, as by causing the party taken advantage of to become intoxicated, the propriety of relief is even clearer, though the doctrine of fraud rather than undue influence is likely to be invoked.² Representations which do not amount to technical fraud may in connection with the facts discussed in this section, constitute a ground for relief; though fraud, rather than undue influence will usually be assigned as a reason for granting relief. Thus under such circumstances, false statements as to value,³ or a pretended partnership arrangement entered into to defraud the grantor, who is thus induced to convey his interest in valuable mining property while intoxicated, for an inadequate consideration,⁴ may be regarded as fraud. So a sale of property worth a thousand dollars for five dollars, made by an aged and ignorant negro who did not know what his rights were, to a vendee whose agent told him that the property was "worth some money if the right parties could be found" was set aside.⁵

§234. Unconscionable contracts in equity.

The discussion of the facts which in combination with inadequacy of consideration, avoid a contract has carried us well into the subject of the unconscionable contract. An unconscionable contract is said to be one "such as no man in his senses and not under a delusion would make on the one hand,

¹ Hardy v. Dyas, 203 Ill. 211; 67 N. E. 852; Stephens v. Ozbourne, 107 Tenn. 572; 89 Am. St. Rep. 957; 64 S. W. 902; Mann v. Russey, 101 Tenn. 596; 49 S. W. 835.

² Maloy v. Berkin, 11 Mont. 138; 27 Pac. 442; Baird v. Howard, 51 O. S. 57; 46 Am. St. Rep. 550; 22 L. R. A. 846; 36 N. E. 732; Cope-land v. Long (Tenn. Ch. App.);

41 S. W. 866; Knott v. Tidyman, 86 Wis. 164; 56 N. W. 632.

³ Mays v. Prewett, 98 Tenn. 474; 40 S. W. 483.

⁴ Maloy v. Berkin, 11 Mont. 138; 27 Pac. 442.

⁵ Stephens v. Ozbourne, 107 Tenn. 572; 89 Am. St. Rep. 957; 64 S. W. 902.

and as no honest and fair man would accept on the other.”¹ To what extent inadequacy of consideration must go to make a contract unconscionable is difficult to state except in abstract terms, which give but little practical help. It has been said that there must be “An inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.”² Another form of stating the rule is that “Where the inadequacy of price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract.”³ The fact that the contract is a foolish one for one of the parties, and a very advantageous one for the other, does not of itself establish the fact that it was unconscionable.⁴ Whether a consideration is so inadequate, as to render the contract unconscionable, is to be determined by the facts as they existed at the time that the contract was entered into, and not by subsequent developments over which neither party had control.⁵ Hence a conveyance of property which is the subject of pending and uncertain litigation,⁶ or the title to which is imperfect and which is heavily encumbered,⁷ cannot be said to be for so inadequate a consideration as to justify rescission, even though for a price far less than the property ultimately proves to be worth. A common type of unconscionable contracts exists where a borrower, in

¹ *Chesterfield v. Janssen*, 2 Ves. Sr. 125, 155; quoted in *Hume v. United States*, 132 U. S. 406; and in *Howells v. Building Co.*, 21 Utah, 45, 56; 81 Am. St. Rep. 659, 662; 60 Pac. 1025.

² *Gwynne v. Heaton*, 1 Brown Ch. 1, 9; quoted in *Stephens v. Osborne*, 107 Tenn. 572, 577; 89 Am. St. Rep. 957, 960; 64 S. W. 902.

³ *Hough v. Hunt*, 2 Ohio 495, 502; 15 Am. Dec. 569, 571.

⁴ *Equitable, etc., Co. v. Waring*, 117 Ga. 599; 97 Am. St. Rep. 177; 62 L. R. A. 93; 44 S. E. 320; *Clarke v. Shirk*, 170 Ill. 143; 48 N. E.

182; *McDole v. Kingsley*, 163 Ill. 433; 45 N. E. 281; *Smiley v. Gallagher*, 164 Pa. St. 498; 30 Atl. 713; *Chesapeake, etc., Ry. v. Mosby*, 93 Va. 93; 24 S. E. 916.

⁵ *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Willard v. Tayloe*, 8 Wall. (U. S.) 557; *South, etc., Ry. v. Ry.*, 117 Ala. 395; 23 So. 973; *Whittaker v. Improvement Co.*, 34 W. Va. 217; 12 S. E. 507.

⁶ *Dakin v. Rumsey*, 104 Mich. 636; 62 N. W. 990.

⁷ *Brown v. Brown*, 154 Ill. 35; 39 N. E. 983.

order to obtain the loan, enters into a collateral agreement to buy property at an exorbitant price.⁸ A borrowing member of a building and loan association secured a loan of one thousand five hundred dollars, which was to be repaid by his purchasing and paying for thirty shares of stock at one hundred dollars a share, and surrendering it to the company in payment of the loan, and also paying six per cent. interest on the loan. The payments for the stock were to extend over a period of nearly seven years. The result of the transaction was that the debtor was paying interest at the rate of twenty-six per cent. per annum. This was held to be "simply a cunning device to obscure the real transaction, and to induce the respondent to believe that by subscribing for the stock he would derive a benefit other than the advancement of the sum loaned." The contract was set aside as unconscionable, on payment by the debtor of the amount borrowed with six per cent. interest.⁹ A similar, though less disguised form of unconscionable contract, exists where the borrowers agree to pay money greatly in excess of amounts borrowed by them.¹⁰ Where usury laws are in force, the rate of interest that can be exacted can be determined by such laws. If no usury laws exist, the doctrine of the unconscionable contract is often invoked to protect the borrower from agreements entered into by him under financial necessity. A loan to one in financial necessity, with interest at the rate of five per cent. a month, payable monthly in advance, was held to be an unconscionable contract. The debtor was relieved on his paying the amount borrowed with reasonable interest.¹¹ A contract to pay interest at the rate of four per cent. a month has been held to be unconscionable.¹² A contract to pay interest at the rate of ten per cent. on a loan of

⁸ *Butler v. Duncan*, 47 Mich. 94; 41 Am. Rep. 711; 10 N. W. 123; *Hough v. Hunt*, 2 Ohio 495; 15 Am. Dec. 569.

⁹ *Howells v. Building Co.*, 21 Utah 45; 81 Am. St. Rep. 659; 60 Pac. 1025.

¹⁰ *Slater's Trust*, L. R. 11 Ch.

Div. 227; *Miller v. Cook*, L. R. 10 Eq. Cas. 641; *Aylesford (Earl of) v. Morris*, L. R. 8 Ch. App. 484.

¹¹ *Brown v. Hall*, 14 R. I. 249; 51 Am. Rep. 375.

¹² *Boyce v. Fisk*, 110 Cal. 107; 42 Pac. 473.

twenty-five dollars for one month,¹³ has been held not to be so unconscionable as to be unenforceable. Where usury laws are in force, some courts seem to hold that the doctrine of the unconscionable contract as such is practically abrogated, and that the only question for discussion is whether the contract is illegal.¹⁴ So an agreement by illiterate persons who are heirs to an estate, to give to one who informs them of the existence of the property and their title to it, facts which they did not know, one half the net amount thereof, will be set aside as an improvident bargain obtained by taking an unfair advantage, where the property is in the hands of a public trustee, their title is clear, and no litigation is contemplated.¹⁵ An agreement between members of a communistic society, that if any member withdraws, or dies, neither he nor his representatives shall be entitled to an account of his property, is not unconscionable.¹⁶ An agreement for gratuitous services, such as the gratuitous storage of goods,¹⁷ though unenforceable as far as executory, is not so unconscionable that the party rendering such services can recover compensation in spite of the agreement. Land was laid out in city lots, and certain lots were sold out of said tract with the expectation of establishing a city thereon. Subsequently, after the project had failed, the vendor agreed to take a reconveyance of part of such property in payment of an unpaid part of the purchase price. The land at that time was useful only for farming and grazing purposes; and the fact that the lots already sold, amounting to nearly a third of the entire tract, were located at various places on such tract, made the portion reconveyed of but slight value for grazing

¹³ Means v. Anderson, 19 R. I. 118; 32 Atl. 82.

¹⁴ "The former claim, (i. e., that the whole contract is unconscionable) we suppose, must stand on the question whether or not it is illegal." Union Central Life Ins. Co. v. Hillard, 63 O. S. 478, 494; 81 Am. St. Rep. 644, 650; 59 N. E. 230.

¹⁵ Rees v. DeBernardy (1896), 2 Ch. 437.

¹⁶ Schwartz v. Duss, 187 U. S. 8; Schwartz v. Duss, 93 Fed. 528; Speidel v. Henrici, 120 U. S. 377; Baker v. Nachtrieb, 19 How. (U. S.) 126; Gaselys v. Separatists' Society, 13 O. S. 144; Schriber v. Rapp, 5 Watts (Pa.) 351; 30 Am. Dec. 327.

¹⁷ Knight v. Commercial Co., 6 Wyom. 500; 46 Pac. 1094.

purposes. However the price already paid by the vendee exceeded the reasonable value of the entire tract. It was held that the vendor could not avoid the contract for reconveyance as unconscionable.¹⁸ A compromise agreement, by which thirty-three thousand dollars was to be advanced for an issue of forty thousand dollars, par value, of first mortgage bonds of a corporation, is not unconscionable.¹⁹ A provision in a contract of loan, that the debtor is not to be permitted to discharge his debt by borrowing money unless it is borrowed from the creditor, is unconscionable.²⁰ Such contracts are said to be void as against public policy. So a provision for payment of attorney's fee by the debtor in case of suit is held to be void,²¹ whether in a note,²² or mortgage,²³ or trust deed.²⁴ If invalid in a note it is said that "for a stronger reason the stipulation would be invalid in a mortgage or deed of trust where the opportunity for oppression is greater."²⁵ In other jurisdictions, however, such a contract is held to be valid. The latter view, as will appear from the cases cited, has the support of the majority of the courts.²⁶ Since such a contract is said in some states to be void, the courts using the term correctly must regard the subject-matter as defective; and this we find to be the case in

¹⁸ *Banner v. Rosser*, 96 Va. 238; 31 S. E. 67.

¹⁹ *Franklin Trust Co. v. Electric Co.*, 57 N. J. Eq. 42; 41 Atl. 488; affirmed, 58 N. J. Eq. 579; 43 Atl. 1098.

²⁰ *Union Central Life Ins. Co. v. Champlin*, 11 Okla. 184; 55 L. R. A. 109; 65 Pac. 836. *Contra*, under a similar contract with the same insurance company. *Sheneberger v. Ins. Co.*, 114 Ia. 578; 55 L. R. A. 269; 87 N. W. 493.

²¹ *Bendey v. Townsend*, 109 U. S. 665.

²² *Witherspoon v. Musselman*, 14 Bush. (Ky.) 214; 29 Am. Rep. 404; *Bullock v. Taylor*, 39 Mich. 137; 33 Am. Rep. 356; *Brisco v. Norris*, 112 N. C. 671; 16 S. E. 850; *Tinsley*

v. Hoskins, 111 N. C. 340; 32 Am. St. Rep. 801; 16 S. E. 325.

²³ *Kittermaster v. Brossard*, 105 Mich. 219; 55 Am. St. Rep. 437; 63 N. W. 75; *Myer v. Hart*, 40 Mich. 517; 29 Am. Rep. 553; *Balfour v. Davis*, 14 Or. 47; 12 Pac. 89.

²⁴ *Turner v. Boger*, 126 N. C. 300; 49 L. R. A. 590; 35 S. E. 592; *Williams v. Rich*, 117 N. C. 235; 23 S. E. 257.

²⁵ *Turner v. Boger*, 126 N. C. 300, 302; 49 L. R. A. 590; 35 S. E. 592.

²⁶ *Luddy v. Pavkovich*, 137 Cal. 284; 70 Pac. 177; *Woodward v. Brown*, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2, 542; *Uedelhofen v. Mason*, 201 Ill. 465; 66 N. E. 364; affirming, 102 Ill. App. 116; *Sweeney v. Kaufmann*, 168 Ill. 233;

some jurisdictions. Such a contract is said to be usurious,²⁷ and to be a contract for a penalty,²⁸ as well as to encourage litigation,²⁹ and be in violation of statutory provisions concerning costs.³⁰ So a provision in a bond and mortgage that the mortgagor shall pay "expenses included in procuring and continuing abstracts of title for the purposes of the foreclosure suit" is invalid.³¹ So a clause in a lease that the landlord should not be liable in damages for future distraint is invalid.³² A provision in a lease that if the tenant attempts to remove his property from the premises, makes an assignment for the benefit of his creditors and the like the rent for the entire term shall become due at once is not invalid.³³ A provision in a contract for the sale of property on the installment plan, the title passing and a chattel mortgage being given, to the effect that if the purchaser fails to pay any installment when due the vendor is authorized to take possession of the property sold, is not invalid in the absence of statute.³⁴ A contract to sell land for fifty dollars down and payments of twenty-five dollars a month for twenty-eight months, with a provision for forfeiture of payments made if the vendee should allow payments to be in default for a specified time, or if the vendee should change his residence without notice to the vendor is not unconscionable so as to be unenforceable if the vendor sues for the unpaid installments.³⁵ So a purchase by one partner of the share of the

48 N. E. 144; *Johnson v. Hosford*, 110 Ind. 572; 10 N. E. 407; *Schmidt v. Potter*, 35 Ia. 426; *Bowie v. Hall*, 69 Md. 433; 9 Am. St. Rep. 433; 1 L. R. A. 546; 16 Atl. 64; *Murray v. Chamberlain*, 67 Minn. 12; 69 N. W. 474; *Walter v. Dickson*, 175 Pa. St. 204; 34 Atl. 646; *Gordon v. Decker*, 19 Wash. 188; 52 Pac. 856; *Mosher v. Chapin*, 12 Wis. 453; ²⁷ *Toole v. Stephen*, 4 Leigh (Va.) 581; see § 488.

²⁸ *Witherspoon v. Musselman*, 14 Bush. (Ky.) 214; 29 Am. Rep. 404.

²⁹ *Witherspoon v. Musselman*, 14 Bush. (Ky.) 214; 29 Am. Rep. 404; *Myer v. Hart*, 40 Mich. 517; 29 Am.

Rep. 553; *Bullock v. Taylor*, 39 Mich. 137; 33 Am. Rep. 356.

³⁰ *Bullock v. Taylor*, 39 Mich. 137; 33 Am. Rep. 356.

³¹ *Northwestern, etc., Ins. Co. v. Butler*, 57 Neb. 198; 77 N. W. 667.

³² *Watson v. Boswell*, 25 Tex. Civ. App. 379; 61 S. W. 407.

³³ *Platt v. Johnson*, 168 Pa. St. 47; 47 Am. St. Rep. 877; 31 Atl. 935.

³⁴ *Singer Mfg. Co. v. Rios*, 96 Tex. 174; 97 Am. St. Rep. 901; 60 L. R. A. 143; 71 S. W. 275.

³⁵ *Meagher v. Hall*, 173 Mass. 577; 54 N. E. 347.

other at such a price that the investment will yield an annual income of from twelve to twenty-two per cent., cannot be set aside at the instance of the vendee as unconscionable.³⁶ Contracts of the classes discussed in this section and those following are on the border line between those open to attack for want of a valid offer and acceptance, and those open to attack for want of a valid subject-matter.

§235. Inadequacy rendering contract unconscionable, at law.

The unconscionable contract has already been discussed from the standpoint of constructive fraud and undue influence, in equity.¹ It may be noted here that the same doctrine has been applied by some courts of law;² namely that one class of fraud is "apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law has taken notice;"³ and that "if a contract be unreasonable and unconscionable but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to."⁴ Some of the earlier cases have become classic. Thus in *James v. Morgan*,⁵ the contract was to pay for a horse at the rate of "a Barley-corn a nail, doubling it every nail," which came to five hundred quarters of barley. The judge, Sir Robert Hyde, directed the jury to give the value of the horse as damages. In *Thornborough v. Whiteacre*,⁶ the contract sued on was that in consideration of two shillings and

³⁶ *Loftus v. Maloney*, 89 Va. 576; 16 S. E. 749.

¹ See § 234.

² *Thornborough v. Whiteacre*, 6 Mod. 305; s. c., *sub nomine*, *Thornborow v. Whitacre*, 2 Ld. Raym. 1164; *James v. Morgan*, 1 Lev. 111; *Hume v. United States*, 132 U. S. 406; *Leland v. Stone*, 10 Mass. 459; *Waterbury v. Laredo*, 68 Tex. 565; 5 S. W. 81.

³ *Chesterfield v. Janssen*, 2 Ves. Sr. 125, 155. (An opinion in equity consisting chiefly of much quoted obiters, citing as to the common law, *James v. Morgan*, 1 Lev. 111.)

⁴ *Scott v. United States*, 12 Wall. (U. S.) 443; 445.

⁵ 1 Lev. 111.

⁶ 6 Mod. 305; s. c., *sub nomine*, *Thornborow v. Whitacre*, 2 Ld. Raym. 1164.

sixpence paid down, and four pounds, seventeen shillings and sixpence to be paid when the contract was performed, the defendant promised to give to the plaintiff two grains of rye corn on a certain Monday and double it successively on each Monday for a year. The total amount to be delivered was five hundred twenty-four million, two hundred eighty-eight thousand quarters of rye. Instead of pleading fraud the defendant demurred to the declaration. The court said that though the contract was a foolish one the defendant ought to pay something for his folly; and so defendant's counsel "perceiving the opinion of the court to be against his client, offered the plaintiff his half crown and his cost, which was accepted of, and so no judgment was given in the case." To turn to more modern examples, in *Hume v. United States*,⁷ the government prepared specifications for bids in which shucks were to be bid at so much per pound instead of per hundredweight, as was customary and intended. A inserted sixty cents opposite this item, and thus bid sixty cents a pound for shucks that were then worth thirty-five dollars a ton. The contract was awarded to him; but the officers refused to pay the contract price. He sued in the Court of Claims, and was allowed only the market price;⁸ and this judgment was affirmed by the Supreme Court, with the remark that "there may be contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception, or at least to require but slight additional evidence to justify such presumption. In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defense at law as to sustain an application for affirmative relief in equity."⁹ The ground on which most of the cases here cited are based is fraud or mistake. Similar results have been reached on the theory of public policy. Contracts made by municipal corporations have been explained on this theory. Thus a contract to give an attorney one third of

⁷ 132 U. S. 406.

⁸ *Hume v. United States*, 21 Ct. Cl. 328.

⁹ *Hume v. United States*, 132 U. S. 406, 414. The facts strongly sug-

gest that it was a case of mistake in expression by one party known to the other, as in *Moses v. Butler*, 43 O. S. 166. See § 86.

the revenue of a ferry for twenty years, amounting to about three thousand dollars a year, for perfecting the city's title to lots worth about one hundred fifty dollars, was held void as being unreasonable and contrary to public policy.¹⁰ So a contract employing attorneys to acquire a town-site patent, under an agreement to pay them ten dollars for each lot or parcel sold and conveyed under the patent has been held invalid, as indefinite in that there was no limitation as to the size or number of the lots, and because the lots might be made so small and so numerous that the contract might be unreasonable and unconscionable."¹¹ Other cases are decided upon grounds akin to duress and undue influence. If a promise is supported by a consideration so inadequate that "the mind revolts at the enforcement of such a promise," the courts will "seize upon the slightest act of oppression or advantage to set at naught a promise thus obtained."¹² A married woman A and her husband B had assigned an insurance policy on B's life to X for value. At maturity the insurers refused to pay the policy unless A's name were indorsed thereon; and A refused so to indorse it until X agreed in writing to pay A five hundred dollars. A subsequently brought suit on this contract. It was held that she could not recover.¹³

IV. CONTRACTS WITH EXPECTANT HEIRS, REMAINDER-MEN AND REVERSIONERS.

§236. Nature, scope and effect of such contracts.

Expectant heirs, remainder-men and reversioners were looked upon by the English Courts of Equity as being in a state of chronic distress.¹ The actual existence of financial embarrassment was not necessary to induce the courts to apply to contracts

¹⁰ Waterbury v. Laredo, 68 Tex. 565; 5 S. W. 81.

¹¹ Hayward v. Red Cliff, 20 Colo. 33; 36 Pac. 795.

¹² Kelley v. Caplice, 23 Kan. 474, 477; 33 Am. Rep. 179.

¹³ Kelley v. Caplice, 23 Kan. 474; 33 Am. Rep. 179.

¹ King v. Hamlet, 2 Myl. & K. 456.

of persons of this class concerning their interests in expectancy the same rules that apply to persons in circumstances of distress.² A contract of this sort is known as a 'catching bargain.'³ In speaking of expectant heirs, it has been said: "To that class of persons this court (i. e. chancery) seems to have extended a degree of protection approaching nearly to an incapacity to bind themselves by contract."⁴ Upon the effect of such contracts made upon inadequate consideration there is a conflict of authority. The English rule,⁵ which is followed in some American states,⁶ is that inadequacy of consideration in such contracts amounts *per se* to undue influence or constructive fraud. The rule adopted by other American states is that inadequacy of consideration is a circumstance tending to show undue influence or constructive fraud, but not of itself conclusive.⁷ These principles apply to all sales of expectant interests,⁸ including alike the interests of expectant heirs,⁹ of expectant devisees and legatees,¹⁰ and of remainder-men and reversioners,¹¹ but not of legatees whose legacy is deferred.¹² The principles apply to contracts for the sale,¹³ or mortgage,¹⁴ of

² Davis v. Marlborough, 2 Swanst. 113, 147. For the principles applicable see § 228.

³ Chesterfield v. Janssen, 2 Ves. Sr. 125, 157; Aylesford v. Morris, L. R. 8 Ch. 484, 491.

⁴ Peacock v. Evans, 16 Ves. Jr. 512a, 514.

⁵ O'Rourke v. Bolingbroke, L. R. 2 App. 814; Jones v. Ricketts, 31 Beav. 130; Peacock v. Evans, 16 Ves. Jr. 512a.

⁶ Chambers v. Chambers, 139 Ind. 111; 38 N. E. 334; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1; 7 Am. Dec. 513.

⁷ Parsons v. Ely, 45 Ill. 232; Mastin v. Marlow, 65 N. C. 695; Whelen v. Phillips, 151 Pa. St. 312; 25 Atl. 44; Cribbins v. Markwood, 13 Gratt. (Va.) 495; 67 Am. Dec. 775.

⁸ Beynon v. Cook, 389; L. R.

10 Ch. 389; Whelen v. Phillips, 151 Pa. St. 312; 25 Atl. 44.

⁹ Chesterfield v. Janssen, 2 Ves. Sr. 125.

¹⁰ Bacon v. Bonham, 33 N. J. Eq. 614.

¹¹ Aylesford v. Morris, L. R. 8 Ch. 484; Chambers v. Chambers, 139 Ind. 111; 38 N. E. 334; M'Kinney v. Pinckard, 2 Leigh (Va.) 149; 21 Am. Dec. 601. A remainderman or reversioner is for such purposes "considered as an expectant heir." Gowland v. De Faria, 17 Ves. Jr. 20.

¹² "Such a sale is not within the equity rule, which enables the court to relieve expectant heirs." Parmelee v. Cameron, 41 N. Y. 392.

¹³ Foster v. Roberts, 29 Beav. 467; Chambers v. Chambers, 139 Ind. 111; 38 N. E. 334.

¹⁴ Beynon v. Cook, L. R. 10 Ch.

the expectant interest: and to contracts for the payment of money on the death of the person on whose death the expectancy will vest in possession, or it is hoped will so vest.¹⁵

§237. What constitutes inadequacy of consideration in contracts with expectant heirs.

Inadequacy of consideration has a peculiar and special meaning in this connection. Though at one time it was held that the value of the reversionary interest was to be determined for the purposes of applying these principles as in other cases, by determining the value of the life estate from tables of mortality and deducting this value from the full value of an estate in fee in possession in the property in question,¹ this rule seems to have been generally abandoned on the ground that it is "gambling upon the lives of the ancestors and life tenants and so against public policy."² The rule now in force is that the incumbrance of the life estate is not to be considered in determining the adequacy of the consideration for the remainderman's conveyance of the fee.³ In some of the cases in which this rule is laid down, other circumstances than mere inadequacy are found. Thus a conveyance of a remainder in property the value of the entire fee of which was three thousand dollars, was made by one who had just come of age, to relatives with whom he had lived, who had great influence over him, and who prevented him from learning the value of his interest, in pursuance of a contract made by him during minority, in consideration of five hundred sixty-two dollars. The conveyance was set aside.⁴ One of the leading cases on the subject of inadequacy of consideration in loans to expectant heirs,⁵ has had the fortune to furnish an opinion which has formed the text of

389; *Butler v. Duncan*, 47 Mich. 94;
41 Am. Rep. 711; 10 N. E. 123.

¹⁵ *Chesterfield v. Janssen*, 2 Ves.
Sr. 125.

¹ *Gowland v. De Faria*, 17 Ves. Jr.
20.

² *Chambers v. Chambers*, 139 Ind.
111, 120; 38 N. E. 334.

³ *Aldbrough v. Trye*, 7 Cl. & F.
436; *Chambers v. Chambers*, 139
Ind. 111; 38 N. E. 334.

⁴ *Chambers v. Chambers*, 139 Ind.
111; 38 N. E. 334.

⁵ *Chesterfield v. Janssen*, 2 Ves.
125.

most of what has since been written on the subject, while the actual ground of decision has been often either ignored or misunderstood. In that case, A an expectant heir, aged thirty-five and not in very good health, borrowed five thousand pounds of B; and gave therefor his single bond to pay ten thousand pounds on the death of his ancestress, the Duchess of Marlborough, if he survived her. He then gave a penal bond in the sum of twenty thousand pounds conditioned on the payment of the first bond. After his death which followed that of his ancestress, his executors resisted payment of the bonds. Equity gave relief against the penal bond but enforced the single bond. So where three hundred and fifty pounds was borrowed and a bond for seven hundred pounds payable when a reversion should vest in possession was given the transaction was upheld.⁶ A bargain much like that in *Chesterfield v. Janssen*, except that judgments were entered into instead of bonds was avoided on payment of the amount borrowed with interest.⁷

§238. Effect of knowledge or consent of ancestor.

One complicating principle remains for notice. While the interests of remainder-men and reversioners cannot be affected by the life-tenant, and are therefore not within the principle to be referred to, the interests of expectant heirs and devisees are dependent on the will and caprice of the ancestor or testator. A contract therefore, whereby such expectant heir or devisee transfers to another, in whole or in part, the bounty which his benefactor intends for him, operates as a fraud upon such ancestor or testator if the existence of the contract is not disclosed to him. The opinions of some courts express the view that this reason is the true basis of the doctrine of the "catching bargain," or at least an essential element thereof. Where this view is entertained it is held on the one hand that if the ancestor does not know of such contract and assent thereto, the contract is voidable.¹ The effect, on the other hand, of the knowledge and assent of the ancestor, is a question upon which there is a

⁶ *Batty v. Lloyd*, 1 Vern. 141.

¹ *McClure v. Raben*, 133 Ind. 507;

⁷ *Berny v. Pitt*, 2 Vern. 14.

36 Am. St. Rep. 558; 33 N. E. 275.

conflict of authority. Most American states seem to hold that if "the transaction has been fully made known, at the time, to the parent or other person standing *in loco parentis* and is not objected to by him, the extraordinary protection generally afforded in cases of this sort by courts of equity will be withdrawn. *A fortiori* will it be withdrawn if the transaction is expressly sanctioned and adopted by such parent or person *in loco parentis*.² The English courts seem to discard the first of the alternatives, and hold that the special protection of equity will be withdrawn only if the ancestor adopts the transaction³ The doctrine of the effect of ancestral interference seems to be well settled; yet, were the question open, both the grounds for applying such principle at all and the logic of the manner of applying it as it is done would be open to very serious objections. (1) The real reason for the doctrine of the catching bargain is the protection of the improvident heir. The doctrine of ancestral sanction is irreconcilable with this principle except on the theory of independent advice. If this is the real ground, it would follow that if such advice is given and in accordance therewith, the adequacy of the consideration received therefor is immaterial: and it has been so held.⁴ The interest of the heir, then seems to be completely ignored. In *Jenkins v. Pye*⁵ the Supreme Court of the United States carried this principle to a logical conclusion by holding that a conveyance by a young woman of an interest in remainder upon the advice of her father, the life-tenant, was valid though upon an inadequate consideration, and though he advised its conveyance to himself. Other jurisdictions have, however, declined to follow this case.⁶ (2) A ground for the doctrine of ancestral approval is alleged to be that the "catching bargain" is a fraud upon him and is contrary to public policy. This ground is clearly untenable, since it is assumed that such contracts may

² *Curtis v. Curtis*, 40 Me. 24, 27; 63 Am. Dec. 651. See to the same effect, *Trull v. Eastman*, 3 Met. (Mass.) 121; 37 Am. Dec. 126.

³ *O'Rorke v. Bolingbroke*, L. R. 2 App. 814.

⁴ *Williams v. Williams*, L. R. 2 Ch. 294.

⁵ 12 Pet. (U. S.) 241.

⁶ See § 209.

be ratified by the expectant heir after the special circumstances have ceased to operate.⁷ This is plainly inconsistent with the theory of the contract's being illegal or void on the ground of public policy.

V. EFFECT OF UNDUE INFLUENCE.

§239. Undue influence makes transaction voidable.

The person subjected to undue influence, or his legal representative, may avoid the transaction and recover what he has parted with.¹ Thus a guardian² may avoid for his ward. If the property transferred is personal property, he may sue to recover the same at law.³ If a conveyance of real property has been made, a suit in equity for a rescission will lie⁴ and is necessary.⁵ Ordinarily a conveyance or contract executed under undue influence must be avoided *in toto* if at all. If, however, the grantor wishes a life estate reserved to him and the remainder to pass to the grantee the grantee will be required to execute a declaration of trust.⁶

§240. Terms on which transaction may be avoided.

A contract or conveyance induced by undue influence is voidable, and not void.¹ Accordingly, if the party of whom advantage is taken wishes to avoid the transaction, he must return what he has received thereunder.² Thus if the grantor has reserved a life estate and the grantee has furnished money to

⁷ *Cole v. Gibbons*, 3 P. Wms. 290.

¹ *Tucker v. Roach*, 139 Ind. 275; 38 N. E. 822.

² *Somes v. Skinner*, 16 Mass. 348.

³ *Fisher v. Publishing Association*, 85 Mich. 472; 48 N. W. 622.

⁴ *Looby v. Redmond*, 66 Conn. 444; 34 Atl. 102; *Somes v. Skinner*, 16 Mass. 348; *Humphrey v. Ringler*, 94 Ia. 182; 62 N. W. 685. Mortgage rescinded, *Tucker v. Roach*, 139 Ind. 275; 38 N. E. 822.

⁵ (Commercial) *National Bank v. Wheelock*, 52 O. S. 534; 49 Am. St. Rep. 738; 40 N. E. 636.

⁶ *Looby v. Redmond*, 66 Conn. 444; 34 Atl. 102. (The grantees do not seem to have insisted on total rescission.)

¹ *Bancroft v. Bancroft*, 110 Cal. 374; 42 Pac. 896.

² *Corrigan v. Pironi*, 48 N. J. Eq. 607; 23 Atl. 355; *Costen v. McDowell*, 107 N. C. 546; 12 S. E. 432.

the grantor to make improvements thereon, the grantor must refund such amount.³ The party seeking relief may tender the value of the property received by him if he has parted with it under the continuance of such undue influence.⁴ If the thing which he has received under such transaction is not of any value, he is not obliged to return it. Thus in a suit of an administrator to set aside a transfer of personal property, on the ground of undue influence, the administrator need not tender back the contract entered into by the adversary party, to support such person, which has been discharged by the death of the person making such transfer.⁵

§241. Ratification.

The person subjected to undue influence may, if he chooses, after such influence is removed, ratify the transaction and make it as valid as it would have been if there had been no undue influence.¹ Conduct while the influence exists does not constitute ratification.² It has been held that payment of interest on negotiable notes before maturity is not ratification; since if payment is refused, there is danger that the notes may be transferred to *bona fide* holders.³

§242. Illegal contract caused by undue influence.

No relief can be given to a person who voluntarily enters into an illegal transaction. If, however, a person is by undue influence induced to enter into an illegal transaction, he may when such influence is removed, avoid the transaction and re-

³ *Corrigan v. Pironi*, 48 N. J. Eq. 607; 23 Atl. 355. (No actual fraud was here proved to exist.)

⁴ *Meyer v. Fishburn*, — Neb.—; 91 N. W. 534.

⁵ *Muir v. Miller*, 82 Ia. 700; 47 N. W. 1011; 48 N. W. 1032.

¹ *More v. More*, 133 Cal. 489; 65 Pac. 1044; *Albrecht v. Hunecke*, 196 Ill. 127; 63 N. E. 616; *Roby v. Colehour*, 135 Ill. 300;

25 N.E. 777; *Sanderson v. Adams*, — Mich.—; 94 N. W. 1063; *Keller v. Lamb*, 202 Pa. St. 412; 51 Atl. 982; *Talbott v. Manard*, 106 Tenn. 60; 59 S. W. 340; *Ellis v. Ellis*, 5 Tex. Civ. App. 46; 23 S. W. 996.

² *Bell v. Campbell*, 123 Mo. 1; 45 Am. St. Rep. 505; 25 S. W. 359.

³ *Buck v. Bank*, 27 Mich. 293; 15 Am. Rep. 189.

cover what he has parted with.¹ Thus payment to the judge of a Probate Court for services in settling the contest of a will, made at the judge's suggestion and in ignorance of the illegality of his practising law while judge may be recovered.² Conveyances to defraud creditors, made under the undue influence of the grantee may be avoided.³ A conveyance by a grantor to the wife of his attorney to defraud his creditors will not be set aside where it appears that the grantor was a shrewd and unscrupulous business man and not under his attorney's control.⁴

§243. Remedies in case of undue influence.

Ordinarily the only remedy in a case of contract or conveyance made by undue influence is a rescission, either informally at law, or formally in equity. An action for damages will not lie.¹ If, however, the person who has received property by means of undue influence exerted by him upon the adversary party has transferred it to a purchaser in good faith without notice, the person subjected to such undue influence may recover the value thereof from the original wrong-doer.² If the party guilty of undue influence retains the property received by such means he must account for the reasonable value thereof. Thus in case of a sale of a legacy induced by undue influence, it has been held that the vendor may recover the difference between the actual value of the legacy and what he received for it under such contract.³

¹ Baehr v. Wolf, 59 Ill. 470; Harper v. Harper, 85 Ky. 160; 7 Am. St. Rep. 583; 3 S. W. 5; Bell v. Campbell, 123 Mo. 1; 45 Am. St. Rep. 505; 25 S. W. 359.

² Evans v. Funk, 151 Ill. 650; 38 N. E. 230; affirming, 38 Ill. App. 441.

³ Melbye v. Melbye, 15 Wash. 648; 47 Pac. 16; Rutell v. Vansyckle, 11 Wash. 79; 39 Pac. 270.

⁴ Briggs v. Coffin, 91 Ia. 329; 59 N. W. 259.

¹ "It is admitted that no case can be found in all the books where a general action for damages has been maintained upon the ground of undue influence in procuring a sale or other contract." Bancroft v. Bancroft, 110 Cal. 374, 378; 42 Pac. 896.

² Valentine v. Richardt, 126 N. Y. 272; 27 N. E. 255.

³ McCormick v. Malin, 5 Blackf. (Ind.) 509.

CHAPTER XIII.

DURESS.

I. NATURE OF DURESS.

§244. Nature and classes of duress.

Duress according to the earlier view, consists of such violence, threats or other wrongful conduct as can, in contemplation of the law, overpower the mind of the party against whom they are directed, and does in fact, so overpower it as to compel him to assent apparently to a contract to which in the absence of such duress he would not have assented.¹ The modern definition of duress is rather that of a state of mind, induced by fear, in which it is impossible for the party subjected thereto to exercise his own free will.² While the nature and effect of duress have been before the courts for a long time, the law is to-day in a transition stage.³ This is due to two causes. First, the old

¹United States v. Huckabee, 16 Wall (U. S.) 414; McClair v. Wilson, 18 Colo. 82; 31 Pac. 502; Cribbs v. Sowle, 87 Mich. 340; 24 Am. St. Rep. 166; 49 N. W. 587; Hackley v. Headley, 45 Mich. 569; 8 N. W. 511; Feller v. Green, 26 Mich. 70; Nebraska Mutual Bond Association v. Klee, — Neb. —; 97 N. W. 476; Earle v. Hosiery Co., 36 N. J. Eq. 188; Parmenter v. Pater, 13 Or. 121; Galusha v. Sherman, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495.

²Duress is "the deprivation by one person of the will power of another by putting that other in fear for the purpose of obtaining, by that means, some valuable advantage of him." Galusha v. Sherman, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495. "Duress of a person is that

condition of his mind caused by the wrongful conduct of another, rendering him incompetent to contract by the exercise of his own free will." Batavian Bank v. North, 114 Wis. 637; 90 N. W. 1016; citing, Galusha v. Sherman, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495. "Duress exists when one, by the unlawful act of another, is induced to make a contract or perform some other act under circumstances which deprives him of the exercise of free will." Hackley v. Headley, 45 Mich. 569; 8 N. W. 511; quoted in First National Bank v. Sargent, — Neb. —; 91 N. W. 595.

³For a good history of the development of this topic see Galusha v. Sherman, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495.

point of view looked to the nature of the threats or violence as the primary test of duress; the modern point of view looks to the effect of whatever threats or violence are used, on the mind of the person subjected thereto.⁴ Second: the union of legal and equitable actions in many jurisdictions has tended to swallow up the definite but limited Common-Law notion of duress in the broader but vaguer doctrine of undue influence which finds its operation chiefly in equity.⁵

Duress as to the method whereby it is caused may be divided into two classes (1) duress of the person, as by (a) violence or (b) imprisonment; and (2) duress of property. Each of these again may be (1) actual or (2) threatened. Further the person subject to duress may be either (1) the very person against whom violence threats and the like are directed or (2) one standing in certain relations to such person. Each of these classes must be considered separately.

§245. Standard for determining existence of duress.

The original Common-Law rule was that there could be no duress unless the threats or violence were of such sort as to overcome the mind of a courageous man.¹ The first step in

⁴ "The ancient law of duress applied only to duress of the person, such as amounted to a reasonable apprehension of imminent danger to life, limb or liberty, which was in law deemed sufficient to avoid a contract or enable the injured party to recover back money when so paid. The law, however, has progressed and gradually extended the doctrine so as to recognize duress of property as a species of moral duress which might equally with duress of the person constitute a defense to a contract induced thereby, or entitle a party to recover money paid under its influence." *First National Bank v. Sargent*, — Neb.—; 91 N. W. 595.

⁵ "Independent of other authori-

ty we are of the opinion that the Civil Code which authorizes equitable defenses in common-law actions necessarily carries with it the rules of equity applicable to the disposition of such issues." *Buford v. R. R.*, 82 Ky. 286.

¹ "*Qui cadere possit in virum constantem.*" Bracton 1. 2 c. 5; quoted 1 Black. Com. 131. "Not a vain fear but such as may befall a constant man." Co. Litt. 253b. But Coke is speaking here of such duress as will excuse actual entry on land and will allow a claim made by him "as near to the tenements as he dare," to be equivalent to an entry for purposes of seisin. See the discussion in *Galusha v. Sherman*, 105 Wis. 263; 47 L. R. A. 417; 81

putting this rule on a more rational basis was to hold that duress might consist of any conduct which could overpower the mind of an ordinarily firm man. This rule is repeated by many courts, in obiter at least; for few decisions seem really to rest on this principle.² Thus where duress is caused by threats, it has been said that there must be a reasonable ground for belief that the party making the threat has the power to carry it into execution.³ Where the question has come squarely at issue the great majority of the courts have taken the second step necessary to put the doctrine of duress on a rational basis, and have held that duress exists where the threats or violence used were such as to overpower the mind of the person subjected thereto.⁴

N. W. 495. "Such a threat is not of a nature to overcome a firm and prudent man." Chitty on Con. 1, p. 271, 272 (eleventh edition.)

²United States v. Huckabee, 16 Wall (U. S.) 414; Brown v. Pierce, 7 Wall (U. S.) 205; Bosley v. Shan-ner, 26 Ark. 280; Hines v. Hamilton Co., 93 Ind. 266; Harmon v. Harmon, 61 Me. 227; 14 Am. Rep. 556; Higgins v. Brown, 78 Me. 473; 5 Atl. 269; Morse v. Woodworth, 155 Mass. 233, 248; 27 N. E. 1010; 29 N. E. 525; Robinson v. Gould, 11 Cush. (Mass.) 55; Bank v. Blodgett, 115 Mich. 160; 73 N. W. 120, 885; Flanigan v. Minneapolis, 36 Minn. 406; 31 N. W. 359; Wolf v. Marshall, 52 Mo. 167; Wilkerson v. Hood, 65 Mo. App. 491; Horton v. Bloodorn, 37 Neb. 666; 56 N. W. 321; Simmons v. Obert, 9 W. Va. 358; Wolff v. Bluhm, 95 Wis. 257; 60 Am. St. Rep. 115; 70 N. W. 73; Barrett v. Mahnken, 6 Wyom. 541; 71 Am. St. Rep. 953; 48 Pac. 202.

³United States v. Huckabee, 16 Wall (U. S.) 414; Bosley v. Shan-ner, 26 Ark. 280; Burr v. Burton, 18 Ark. 214; Barrett v. French, 1 Conn. 354; 6 Am. Dec. 241; Youngs v. Simm, 41 Ill. App. 28; Higgins

v. Brown, 78 Me. 473; 5 Atl. 269; Harmon v. Harmon, 61 Me. 231; 14 Am. Rep. 556; Seymour v. Prescott, 69 Me. 376; Morse v. Woodworth, 155 Mass. 233, 248; 27 N. E. 1010; 29 N. E. 525; Wolf v. Marshall, 52 Mo. 167; Buchanan v. Sahlein, 9 Mo. App. 552; Landa v. Obert, 45 Tex. 539.

⁴Hartford, etc., Insurance Co. v. Kirkpatrick, 111 Ala. 456; 20 So. 651; Burr v. Burton, 18 Ark. 214; Overstreet v. Dunlap, 56 Ill. App. 486; Youngs v. Simm, 41 Ill. App. 28; Stanley v. Dunn, 143 Ind. 495; 42 N. E. 908; Baldwin v. Hutchison, 8 Ind. App. 454; 35 N. E. 711; Sils-bee v. Webber, 171 Mass. 378; 50 N. E. 555; Meech v. Lee, 82 Mich. 274; 46 N. W. 383; Cribbs v. Sowle, 87 Mich. 340; 24 Am. St. Rep. 166; 49 N. W. 587; Miller v. Lumber Co., 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101; Rossiter v. Loeber, 18 Mont. 372; 45 Pac. 560; Nebraska Mutual Bond Association v. Klee, — Neb. —; 97 N. W. 476; Earle v. Hosiery Co., 36 N. J. Eq. 188; Eadie v. Slimmon, 26 N. Y. 9; 82 Am. Dec. 395; James v. Roberts, 18 Ohio 548; Parmentier v. Pater,

The difference between the old rule and the new amounts in fact to less than appears at first because in the absence of affirmative evidence the person subjected to duress must be assumed to be ordinarily firm and prudent. In discussing duress, accordingly, we must consider (1) what acts or words may in contemplation of law amount to duress: (2) whether such conduct did in the particular case cause duress: and (3) the effect of duress if it exists.

II. WHAT MAY AMOUNT TO DURESS.

§246. Forms of duress.—Violence.

Actual violence may undoubtedly constitute duress.¹ Thus where a husband compelled his wife to sign articles of separation by knocking her down and kicking her, such articles were decreed void.² So where one is compelled to execute an instrument or make a contract by mob violence,³ or by violence of

13 Or. 121; 9 Pac. 59; *Galusha v. Sherman*, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495. "The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage; and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him." *Galusha v. Sherman*, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495. "Nor in my opinion is it the true policy of the law to make an arbitrary and unyielding rule in such cases to apply to all

alike without regard to age, sex, or condition of mind. Weak and cowardly people, and old and ignorant persons, are the ones that need the protection of the courts, and they are the ones usually operated upon and influenced by threats." *Cribbs v. Sowle*, 57 Mich. 340; 24 Am. St. Rep. 166; 49 N. W. 557; quoted in *Baldwin v. Hutchinson*, 8 Ind. App. 454; 35 N. E. 711.

¹ *Stewart v. Stewart*, 7 J. J. Mar. (Ky.) 183; 23 Am. Dec. 396; *Rossiter v. Loeber*, 18 Mont. 372; 45 Pac. 560; *Bueter v. Bueter*, 1 S. D. 94; 8 L. R. A. 562; 45 N. W. 208; *Dimmitt v. Robbins*, 74 Tex. 441; 12 S. W. 94; *Magoon v. Reber*, 76 Wis. 392; 45 N. W. 112.

² *Bueter v. Bueter*, 1 S. D. 94; 8 L. R. A. 562; 45 N. W. 208.

³ *Rossiter v. Loeber*, 18 Mont. 372; 45 Pac. 560; *Doolittle v. McCullough*, 7 O. S. 299; *Brown v. Peck*, 2 Wis. 261.

robbers⁴ or by reason of an assault with a deadly weapon⁵ duress exists. In some of these cases, however, the actual violence is ignored in the pleadings of the parties and the opinion of the court and the ground for the decisions is said to be duress *per minas*.⁶

§247. Imprisonment.

Unlawful imprisonment may undoubtedly amount to duress¹ as where a father is arrested on an illegal warrant charging him with kidnaping his own minor child, and is thereby coerced into signing a release of his authority over the child.² If the imprisonment is lawful and is used as a means of extortion, duress exists,³ as where the arrest was made without any intention of prosecuting, but solely to obtain the instrument signed.⁴ If the imprisonment is lawful and made in good faith, without the intention of extorting the instrument in question, some courts hold that duress does not exist.⁵ Thus a note given by the father of a bastard to the mother while the father is under arrest is not given under duress.⁶ But the better view seems to be that duress exists if the prisoner is actually coerced into signing an instrument that he otherwise would not have signed but for such imprisonment, whether it is lawful or un-

⁴ *Dimmitt v. Robbins*, 74 Tex. 441; 12 S. W. 94.

⁵ *Stewart v. Stewart*, 7 J. J. Mar. (Ky.) 183; 23 Am. Dec. 396; *Magoon v. Reber*, 76 Wis. 392; 45 N. W. 112.

⁶ See *Brown v. Peck*, 2 Wis. 261.

¹ *Brown v. Pierce*, 7 Wall (U. S.) 205; *Hunt v. Hunt*, 94 Ga. 257; 31 S. E. 515; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Wheeler v. Pettyjohn*, — Okl. —; 76 Pac. 117; *Willard v. Willard*, 6 Baxt. (Tenn.) 297; 32 Am. Rep. 529.

² *Hunt v. Hunt*, 94 Ga. 257; 31 S. E. 515.

³ *Mayer v. Oldham*, 32 Ill. App. 233; *Sweet v. Kimball*, 166 Mass.

332; 55 Am. St. Rep. 406; 44 N. E. 243; *Morse v. Woodworth*, 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525; *Reinhard v. Columbus*, 49 O. S. 257; 31 N. E. 35; *Fillman v. Ryon*, 168 Pa. St. 484; 32 Atl. 89; *Heckman v. Swartz*, 64 Wis. 48; 24 N. W. 473.

⁴ *Mayer v. Oldham*, 32 Ill. App. 233.

⁵ *Mascolo v. Montesanto*, 61 Conn. 50; 29 Am. St. Rep. 170; 23 Atl. 714; *Watkins v. Baird*, 6 Mass. 506; 4 Am. Dec. 170; *Clark v. Turnbull*, 47 N. J. L. 265; 54 Am. Rep. 157.

⁶ *Jones v. Peterson*, 117 Ga. 58; 43 S. E. 417.

lawful,⁷ as an agreement to relinquish wages signed by a cook on a ship on being released from irons.⁸

§248. Duress of property.

The original English rule was that neither seizure nor destruction of property, actual or threatened, could be treated as duress for the purpose of avoiding a contract thereby induced.¹ Thus duress could not be interposed as a defense to a note for an amount of rent greatly in excess of that due, given to obtain the release of an excessive distress.² By some process of reasoning the English courts reached the conclusion that a payment of money induced by duress of property could be recovered but an executory contract induced thereby could not be avoided.³ The American courts in early cases first followed the English courts⁴ then began to distinguish the more extreme cases,⁵ and finally repudiated the English rule as an entirety. "The two rules recognized by the courts of England, it seems to us, lead to an obvious absurdity; that is to say, that when one pays money in order to obtain possession of his goods when unlawfully detained by another he may recover it back, but if he gives his note under the same circumstances and for the same purpose, he cannot successfully resist its payment."⁶ "If

⁷ Feller v. Green, 26 Mich. 70; Adams v. Bank, 116 N. Y. 606; 15 Am. St. Rep. 447; 6 L. R. A. 491; 23 N. E. 7; Pflaum v. McClintock, 130 Pa. St. 369; 18 Atl. 734. "Where there is an arrest for improper purposes without a just cause, or where there is an arrest for a just cause but without lawful authority, or when there is an arrest for a just cause and under lawful authority for unlawful purposes, it may be construed a duress." Richardson v. Duncan, 3 N. H. 508.

⁸ The Fred E. Sander, 95 Fed. 829.

¹ Coke, 2 Inst. 483; 1 Black. Com. 131; Sumner v. Ferryman, 11 Mod.

201; Skeate v. Beale, 11 Ad. & El. 983.

² Skeate v. Beale, 11 Ad. & El. 983.

³ Atlee v. Backhouse, 3 M. & W. 633.

⁴ Edwards v. Handley, Hard. (Ky.) 602; 3 Am. Dec. 745. (In obiter, as in this case, fear of loss of property by process of law was invoked.)

⁵ Foshay v. Ferguson, 5 Hill (N. Y.) 154. (A case in which in *obiter* the court said that an illegal distress of property would not be duress, but a threatened destruction of property would be.)

⁶ Oliphant v. Markham, 79 Tex. 543; 23 Am. St. Rep. 363; 15 S. W. 569.

therefore such be the case where money has been paid, *a fortiori* is such a defense available in an action upon a promissory note extorted in the manner alleged."⁷ The English rule was based upon two reasons: (1) that duress of property could not affect the firm and courageous man whom the law assumed as the test for the influence of duress;⁸ (2) that the party threatened with loss of property had an adequate remedy in *tróver*, *replevin* and the like.⁹ It will be seen that battery and duress of property are treated by Blackstone as equally inoperative. The first reason is now very generally discarded in the United States.¹⁰ The second reason is still recognized in some jurisdictions where no circumstances of especial hardship exist. Some courts hold that if under the facts *replevin* is an adequate remedy, duress of property cannot exist;¹¹ others that such duress may exist even if the property could be recovered by *replevin*.¹² Under the first of these views, a seizure of A's property by an officer having a writ of execution against B, is not such duress as will avoid a receipt and contract to return such property given by A to such officer.¹³ The influence of the English rule is thus marked even in some jurisdictions which have discarded it as an entirety. An accurate statement of the modern American rule is therefore difficult on account of a lack of harmony in the decisions of the courts. Further while many courts

⁷ *White v. Heylman*, 34 Pa. St. 142; quoted in *Oliphant v. Markham*, 79 Tex. 543; 23 Am. St. Rep. 363; 15 S. W. 569.

⁸ See § 245.

⁹ "A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages." 1 Black. Com. 131.

¹⁰ See § 245.

¹¹ *Edwards v. Handley*, Hard. (Ky.) 602; 3 Am. Dec. 745; *Kings-*

bury v. Sargent, 83 Me. 230; 22 Atl. 105; *Bingham v. Sessions*, 6 Sm. & M. (Miss.) 13; *Hibbard v. Mills*, 46 Vt. 243.

¹² *Carson, etc., Co. v. Patterson*, 33 Cal. 334; *Wilkerson v. Hood*, 65 Mo. App. 491.

¹³ *Kingsbury v. Sargent*, 83 Me. 230; 22 Atl. 105. (A was a woman recently confined. The disturbance caused by seizing and driving away the cattle levied on was dangerous to a person in her condition and she receipted for the cattle in reliance on a statement by the officer that such receipt would not affect her rights. Nevertheless she was held bound thereby.)

term detention of goods duress, others refer to it as merely analogous to duress.¹⁴

The following classes of cases should be distinguished: (1) If circumstances of especial hardship exist, American courts are practically unanimous in holding that a promise made to obtain property unlawfully detained may be avoided for duress.¹⁵ Thus a promise made to obtain a release of perishable property, such as oysters, from an unlawful attachment was held to be induced by duress.¹⁶ So where an officer A had taken B's banknotes on attachment and after such attachment was released A refused to redeliver such notes to B unless B would agree to pay A and would pay A some of this money as a reward for A's alleged finding of such notes after they had been lost, and B did so because as A knew, X another officer was about to attach such notes, B's promise and payment were held to have been made under duress.¹⁷ So where A an officer had levied a sequestration on B's property which he refused to release unless B would give a bond conditioned to do acts other and further than required by law, duress was held to invalidate the bond as a Common-Law bond.¹⁸ So where B was indebted to A, and B owned a horse by whose labor B made his living and supported his family which horse was exempt from execution, and A obtained possession of such horse by fraudulently representing that it was to be sold for cash, and then refused to redeliver it until B gave a note secured by mortgage on such horse for a sum in excess of B's debt to A, it was held that B could avoid such mortgage.¹⁹ (2) Even if no circumstances of especial hardship exist, the decided preponderance of authority

¹⁴ *Buford v. R. R.*, 82 Ky. 286. The detention of goods is "a kind of moral duress." *Dustin v. Farrelly*, 81 Mo. App. 380. It is sometimes referred to as "practical compulsion which is nearly related to duress." *Fitzgerald v. Construction Co.*, 44 Neb. 463; 62 N. W. 899.

¹⁵ *Spaids v. Barrett*, 57 Ill. 289; 11 Am. Rep. 10; *Fitzgerald v. Construction Co.*, 44 Neb. 463; 62 N.

W. 899; *Collins v. Westbury*, 2 Bay (S. C.) 211; 1 Am. Dec. 643; *Wooters v. Smith*, 56 Tex. 198; *Lovejoy v. Lee*, 35 Vt. 430.

¹⁶ *Spaid v. Barrett*, 57 Ill. 289; 11 Am. Rep. 10.

¹⁷ *Lovejoy v. Lee*, 35 Vt. 430.

¹⁸ *Wooters v. Smith*, 56 Tex. 198.

¹⁹ *Lightfoot v. Wallis*, 12 Bush (Ky.) 498. (The court spoke of such mortgage as void.)

seems to be in favor of the rule that wrongful seizure or detention of property may be such duress as to invalidate contracts induced thereby,²⁰ and may be a ground for avoiding such liability.²¹ Thus X, A's clerk pledged notes owned by A, to B, to secure X's gambling debt. B refused to surrender them till A gave his note for X's debt. To secure the release of such notes A did so. Such note was held voidable as given under duress.²² (3) If the party who is alleged to have exercised duress has done only what he had a legal right to do, duress cannot exist.²³ (4) The foregoing cases concern personalty. The doctrine of duress of property may apply to realty as well as to personalty, though ordinarily circumstances of especial hardship must exist to constitute duress.²⁴

§249. Threats as duress.—Original rule.

The original Common-Law rule seems to have been that duress *per minas* could exist only when the threat was of loss of life, limb or liberty.¹ This was part of the old theory that duress was to be tested by the nature of the act or threat, without reference to the effect thereof on the mind of the person subjected thereto,² and that to be duress the act in question must be such as could affect a brave, or at least a reasonably firm man.³ The modern tendency being to discard such tests, the

²⁰ Carson, etc., Co. v. Patterson, 33 Cal. 334; Joannin v. Ogilvie, 49 Minn. 564; 32 Am. St. Rep. 581; 16 L. R. A. 376; 52 N. W. 217; Wilkerson v. Hood, 65 Mo. App. 491; Fitzgerald v. Construction Co., 44 Neb. 463; 62 N. W. 899; Riggs v. Wilson, 30 S. C. 172; 8 S. E. 848; Oliphant v. Markham, 79 Tex. 543; 23 Am. St. Rep. 363; 15 S. W. 569. "The weight of American authority is in favor of the doctrine that detention of goods under certain circumstances may constitute duress." Oliphant v. Markham, 79 Tex. 543; 23 Am. St. Rep. 363; 15 S. W. 569.

²¹ Adams v. Schiffer, 11 Colo. 15; 7 Am. St. Rep. 202; 17 Pac. 21.

²² Oliphant v. Markham, 79 Tex. 543; 23 Am. St. Rep. 363; 15 S. W. 569.

²³ York v. Hinkle, 80 Wis. 624; 27 Am. St. Rep. 73; 50 N. W. 895.

²⁴ Joannin v. Ogilvie, 49 Minn. 564; 32 Am. St. Rep. 581; 16 L. R. A. 376; 52 N. W. 217; First National Bank v. Sargent, — Neb. —; 91 N. W. 595.

¹ Co. Litt. 253b; 1 Black. Com. 131.

² See § 245.

³ See § 245.

modern rule as to what threats may amount to duress includes much more than the original rule did.⁴

§250. Threats of violence.

Threats of violence may constitute duress,¹ as threats of violence by a mob² or fear of bodily harm and abandonment by a husband.³ But a threat of a woman to kill one in a distant state is not duress of another, as too unreasonable to amount to duress.⁴

§251. Threats of criminal prosecution and imprisonment.

By the weight of modern authority threats of criminal prosecution which will eventually result in imprisonment may constitute duress.¹ Duress most clearly exists where the imprison-

⁴ See § 245.

¹ *Brown v. Pierce*, 7 Wall. (U. S.) 205; *Berry v. Berry*, 57 Kan. 691; 57 Am. St. Rep. 351; 47 Pac. 837; *Rossiter v. Loeber*, 18 Mont. 372; 45 Pac. 560; *Doolittle v. McCullough*, 7 O. S. 299.

² *Baker v. Morton*, 12 Wall (U. S.) 150; *Brown v. Pierce*, 7 Wall (U. S.) 205; *Doolittle v. McCullough*, 7 O. S. 299.

³ *Berry v. Berry*, 57 Kan. 691; 57 Am. St. Rep. 351; 47 Pac. 837.

⁴ *Barrett v. Mahnken*, 6 Wyom. 541; 71 Am. St. Rep. 953; 48 Pac. 202.

¹ *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207; 28 Pac. 1068; *Walbridge v. Arnold*, 21 Conn. 424; *Baldwin v. Hutchinson*, 8 Ind. App. 454; 35 N. E. 711; *Gohegan v. Leach*, 24 Ia. 509; *Thompson v. Niggley*, 53 Kan. 664; 26 L. R. A. 803; 35 Pac. 290; *Winfield National Bank v. Croco*, 46 Kan. 620; 26 Pac. 939; *Morse v. Woodworth*, 155 Mass. 233. 248; 27 N. E. 1010; 29 N. E. 525; *Bryant v.*

Peck, 154 Mass. 460; 28 N. E. 678; *Bentley v. Robson*, 117 Mich. 691; 76 N. W. 146; *Weiser v. Welch*, 112 Mich. 134; 70 N. W. 438; *Benedict v. Roome*, 106 Mich. 378; 64 N. W. 193; *Cribbs v. Sowle*, 87 Mich. 340; 24 Am. St. Rep. 166; 49 N. W. 587; *Meech v. Lee*, 82 Mich. 274; 46 N. W. 383; *Hensinger v. Dyer*, 147 Mo. 219; 48 S. W. 912; *Hargreaves v. Korcek*, 44 Neb. 660; 62 N. W. 1086; *Beindorf v. Kaufman*, 41 Neb. 824; 60 N. W. 101; *Horton v. Bloedorn*, 37 Neb. 666; 56 N. W. 321; *Ins. Co. v. Hull*, 51 O. S. 270; 46 Am. St. Rep. 571; 25 L. R. A. 37; 37 N. E. 1116; *James v. Roberts*, 18 Ohio 548; *Western Avenue Bldg. Association v. Walters*, 7 Ohio C. C. 202; *Morrison v. Faulkner*, 80 Tex. 128; 15 S. W. 797; *Galusha v. Sherman*, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495; *Mack v. Prang*, 104 Wis. 1; 76 Am. St. Rep. 848; 45 L. R. A. 407; 79 N. W. 770; *McCormick Harvesting Machine Co. v. Hamilton*, 73 Wis. 486; 41 N. W. 727.

ment threatened, appears to be imminent,² as where it is believed that a warrant has issued³ or where the husband of the person subjected to duress is in custody though not under arrest.⁴ Some courts limit duress by threat of criminal prosecution to cases where the imprisonment threatened is immediate, and not merely the result of a successful prosecution.⁵ So a threat to institute criminal prosecution against one who is in another state,⁶ or country⁷ has been held not to be duress. It has even been said that a threat of criminal prosecution is not duress as long as no warrant has issued.⁸ This rule is based on the old theory that only such acts as can be supposed to overcome the mind of an ordinary person can amount to duress. But inasmuch as the institution of criminal proceedings usually involves the arrest of the alleged criminal the weight of modern authority seems to be that such imprisonment is sufficiently immediate to constitute duress;⁹ although it is natural that, other things being equal, a possible but distant imprisonment should have less effect on the mind than immediate imprisonment.

² *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207; 28 Pac. 1068; *Green v. Moss*, 65 Ill. App. 594; *Bradley v. Irish*, 42 Ill. App. 85; *Winfield National Bank v. Croco*, 46 Kan. 620; 26 Pac. 939; *Miller v. Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101; *Wilkerson v. Hood*, 65 Mo. App. 491; *Horton v. Bloedorn*, 37 Neb. 666; 56 N. W. 321.

³ *Bradley v. Irish*, 42 Ill. App. 85.

⁴ *Miller v. Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101.

⁵ *Rendleman v. Rendleman*, 156 Ill. 568; 41 N. E. 223; *Youngs v. Simm*, 41 Ill. App. 28; *Harmon v. Harmon*, 61 Me. 227; 14 Am. Rep. 556; *Taylor v. Jacques*, 106 Mass. 291; *Beath v. Chapoton*, 115 Mich. 506; 69 Am. St. Rep. 589; 73 N. W. 806; *Flanigan v. Minneapolis*, 36

Minn. 406; 31 N. W. 359; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Dunham v. Griswold*, 100 N. Y. 224; 3 N. E. 76; *Phillips v. Henry*, 160 Pa. St. 24; 40 Am. St. Rep. 706; 28 Atl. 477. "Threats of criminal prosecution unaccompanied by threats of immediate imprisonment do not constitute duress." *Beath v. Chapoton*, 115 Mich. 506; 69 Am. St. Rep. 589; 73 N. W. 806.

⁶ *Phillips v. Henry*, 160 Pa. St. 24; 40 Am. St. Rep. 706; 28 Atl. 477.

⁷ *Miller v. Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101.

⁸ *Higgins v. Brown*, 78 Me. 473; 5 Atl. 269; *Harmon v. Harmon*, 61 Me. 227; 14 Am. Rep. 556; *Buchanan v. Sahlein*, 9 Mo. App. 552.

⁹ See cases cited in the first note of this section.

A threat of imprisonment may operate as duress though it is not for a technical crime. Thus a statement by the court that a boy will be sent to the reformatory unless a bond is given for his support at an industrial home¹⁰ or a threat of arrest for non-payment of a license fee¹¹ may cause duress. Some states confuse nomenclature by calling a threatened arrest a "menace" but not duress.¹²

§252. Effect of legality of threatened arrest.

On the question of whether to constitute duress the threatened imprisonment must be unlawful, the courts differ. If the threatened imprisonment is unlawful, duress exists.¹ If the threat is of lawful imprisonment but it is unlawfully used to obtain the contract, duress exists.² Abuse of criminal process, whereby one is coerced into giving a note³ is clearly duress. If the threat is of lawful imprisonment and it is not intended to make unlawful use thereof in coercing the prisoner, the courts are divided as to whether duress exists. The majority hold that if the threat of imprisonment overpowers the mind of the prisoner, duress exists.⁴ A minority hold that a threat of lawful imprisonment made in good faith without the intent of ex-

¹⁰ *St. Thomas v. Yearsley*, 22 Ont. App. 340.

¹¹ *Chicago v. Sperbeck*, 69 Ill. App. 562; *Neumann v. La Crosse*, 94 Wis. 103; 68 N. W. 654.

¹² *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207; 28 Pac. 1068.

¹ *Bane v. Detrick*, 52 Ill. 19; *Landa v. Obert*, 78 Tex. 33; 14 S. W. 297.

² *Hartford, etc., Ins. Co. v. Kirkpatrick*, 111 Ala. 456; 20 So. 651; *Richardson v. Duncan*, 3 N. H. 508; *Adams v. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447; 6 L. R. A. 491; 23 N. E. 7.

³ *Behl v. Schuett*, 104 Wis. 76; 80 N. W. 73.

⁴ *Williams v. Bayley*, L. R. 1 H. L. 200; *Hartford, etc., Ins. Co. v.*

Kirkpatrick, 111 Ala. 456; 20 So. 651; *Sharon v. Gager*, 46 Conn. 189; *Bane v. Detrick*, 52 Ill. 19; *Heaton v. Bank*, 59 Kan. 281; 52 Pac. 876; *Thompson v. Niggley*, 53 Kan. 664; 26 L. R. A. 803; 35 Pac. 290; *Morse v. Woodworth*, 155 Mass. 233, 248; 27 N. E. 1010; 29 N. E. 525; *Bryant v. Peck, etc., Co.*, 154 Mass. 460; 28 N. E. 678; *Harris v. Carmody*, 131 Mass. 51; *Taylor v. Jacques*, 106 Mass. 291; *Miller v. Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101; *Davis v. Luster*, 64 Mo. 43; *Adams v. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447; 6 L. R. A. 491; 23 N. E. 7; *Schoener v. Lissauer*, 107 N. Y. 111; 13 N. E. 741; *Eadie v. Slimmon*, 26 N. Y. 9; 82 Am. Rep. 395; *Springfield, etc., Ins. Co. v. Hull*, 51

torting the contract in question thereby, is not duress.⁵ The effect of the guilt or innocence of the person whose arrest and criminal prosecution is threatened is another question on which the courts do not agree. If the charge is a false and trumped up one, duress exists,⁶ though some courts which adhere to the old test that the threats must be such as to overpower a reasonably firm man seem to hold that under ordinary circumstances a false criminal charge against an innocent man cannot be duress.⁷ If the warrant for arrest is issued not *bona fide* but for purposes of intimidation, duress exists and the question of the guilt or innocence of the accused is immaterial.⁸ If it is a *bona fide* charge some courts hold that duress does not exist even though the accused may prove to be innocent;⁹ others hold that duress may exist, if the mind of the promisor is in fact overpowered.¹⁰ Again, if the party accused is guilty, some courts hold that a threat of criminal prosecution cannot be duress;¹¹ while other courts hold that it can be duress.¹² The cases which

O. S. 270; 46 Am. St. Rep. 571; 25 L. R. A. 37; 37 N. E. 1116; *Foley v. Greene*, 14 R. I. 618; 51 Am. Rep. 419; *Phelps v. Zuschlag*, 34 Tex. 371; *Fay v. Oatley*, 6 Wis. 42.

⁵ *Gregor v. Hyde*, 62 Fed. 107; *Compton v. Bank*, 96 Ill. 301; 36 Am. Rep. 147; *Harmon v. Harmon*, 61 Me. 227; 14 Am. Rep. 556; *Eddy v. Herrin*, 17 Me. 338; 35 Am. Dec. 261; *Machine Co. v. Miller*, 54 Neb. 644; 74 N. W. 1061; *Sanford v. Sornborger*, 26 Neb. 295; 41 N. W. 1102; *Mundy v. Whittemore*, 15 Neb. 647; 19 N. W. 694; *Nealley v. Greenough*, 25 N. H. 325; *Clark v. Turnbull*, 47 N. J. L. 265; 54 Am. Rep. 157; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Barrett v. Weber*, 125 N. Y. 18; 25 N. E. 1068; *Knapp v. Hyde*, 60 Barb. (N. Y.) 80; *Landa v. Obert*, 45 Tex. 539.

⁶ *Lighthall v. Moore*, 2 Colo. App. 554; 31 Pac. 511; *Springfield, etc., Ins. Co. v. Hull*, 51 O. S. 270; 46

Am. St. Rep. 571; 25 L. R. A. 37; 37 N. E. 1116; *James v. Roberts*, 18 Ohio 548.

⁷ *Horton v. Bloedorn*, 37 Neb. 666; 56 N. W. 321.

⁸ *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207; 28 Pac. 1068.

⁹ *Thorn v. Pinkham*, 84 Me. 101; 30 Am. St. Rep. 335; 24 Atl. 718; *Bodine v. Morgan*, 37 N. J. Eq. 426.

¹⁰ *Lighthall v. Moore*, 2 Colo. App. 554; 31 Pac. 511; *Giddings v. Bank*, 104 Ia. 676; 74 N. W. 21.

¹¹ *Shattuck v. Watson*, 53 Ark. 147; 7 L. R. A. 551; 13 S. W. 516.

¹² *Gregor v. Hyde*, 62 Fed. 107; 10 C. C. A. 290; *Giddings v. Bank*, 104 Ia. 676; 74 N. W. 21; *Heaton v. Bank*, 5 Kan. App. 498; 47 Pac. 576; *Morse v. Woodworth*, 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525; *Taylor v. Jacques*, 106 Mass. 291; *Miller v. Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101;

take this last mentioned view, however, are mainly cases in which a threat to arrest and prosecuting one person forms the means of intimidating another.¹³ In Illinois the view has been expressed that if the accused is innocent, and knows that there is no legal ground for his arrest, and no warrant has issued and no proceedings commenced, a threat of arrest is not duress.¹⁴

§253. Threat of civil action.

A threat of enforcing a *bona fide* claim by a civil action is not duress, so as to avoid a contract for the payment or compromise of such claim,¹ even though made in a period of business depression.² Thus a threat to foreclose a mortgage³ as a chattel mortgage,⁴ or to institute proceedings in attachment⁵ as

Beindorff v. Kaufman, 41 Neb. 824; 60 N. W. 101; Sanford v. Sornborger, 26 Neb. 295; 41 N. W. 1102; Building Association v. Walters, 7 Ohio C. C. 202.

¹³ See § 259.

¹⁴ Rendleman v. Rendleman, 156 Ill. 568; 41 N. E. 223. (In this case, however, the threats did not influence the mind of the person to whom they were made.)

¹ Manigault v. Ward, 123 Fed. 707; Holt v. Thomas, 105 Cal. 273; 38 Pac. 891; McClair v. Wilson, 18 Colo. 82; 31 Pac. 502; Bestor v. Hickey, 71 Conn. 181; 41 Atl. 555; Kreider v. Fanning, 74 Ill. App. 230; Peckham v. Hendren, 76 Ind. 47; Darling v. Hines, 5 Ind. App. 319; 32 N. E. 109; James v. Dalbey, 107 Ia. 463; 78 N. W. 51; Edwards v. Handley, Hard. (Ky.) 602; 3 Am. Dec. 745; Wilson, etc., Co. v. Curry, 126 Ind. 161; 25 N. E. 896; Buck v. Axt, 85 Ind. 512; Snyder v. Bradew, 58 Ind. 143; Morse v. Woodworth, 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525; Pryor v. Hunter, 31 Neb. 678; 48 N. W. 736; Dunham v. Griswold, 100 N. Y.

224; 3 N. E. 76; Jackson v. Siglin, 10 Or. 93; Barrow v. Loan Association (Tenn. Ch. App.), 48 S. W. 736; Flack v. Bank, 8 Utah, 193; 17 L. R. A. 583; 30 Pac. 746; Schuttler v. Brandfass, 41 W. Va. 201; 23 S. E. 808; Whittaker v. Improvement Co., 34 W. Va. 217; 12 S. E. 507; York v. Hinkle, 80 Wis. 624; 27 Am. St. Rep. 73; 50 N. W. 895.

² Morton v. Norris, 72 Fed. 392; 18 C. C. A. 611.

³ Burke v. Gould, 105 Cal. 277; 38 Pac. 733; Rodgers v. Wittenmyer, 88 Cal. 553; 26 Pac. 369; Savannah Savings Bank v. Logan, 99 Ga. 291; 25 S. E. 692; Hart v. Strong, 183 Ill. 349; 55 N. E. 629; Buck v. Axt, 85 Ind. 512; Stout v. Judd, 10 Kan. App. 579; 63 Pac. 662; Vereycken v. VandenBrooks, 102 Mich. 119; 60 N. W. 687; Wessel v. Mtge. Co., 3 N. D. 160; 44 Am. St. Rep. 529; 54 N. W. 922.

⁴ Pease v. Francis, 25 R. I. 226; 55 Atl. 686.

⁵ Post v. Bank, 38 Ill. App. 259; W. W. Kimball Co. v. Raw (Kan.); 51 Pac. 789; Weber v.

threatening civil suit in admiralty, with attachment of a ship,⁶ or to re-take a piano sold on the installment plan,⁷ even if the parties who are threatened believe that criminal proceedings also will be instituted;⁸ or to issue a *capias* in a civil proceeding,⁹ or to have a receiver appointed,¹⁰ or to sue a stockholder of a bank on behalf of its creditors to enforce a stock liability,¹¹ or to drive a debtor into bankruptcy,¹² are none of them duress. Some courts have carried the doctrine of duress by threats farther than is indicated here. Some courts which take advanced position as to what constitutes duress have held that a threat to institute a civil action may constitute duress. Thus threatening suit against a person of rather inferior intelligence, in such sum as would exhaust his property may act as duress in coercing him into giving a note and mortgage for such claim.¹³ Under circumstances of especial hardship, a threat of civil litigation may amount to duress. Thus threatening an insured with litigation while he is ill and thereby forcing him to surrender his policy may amount to duress.¹⁴ Thus duress existed where A had given to a bank a mortgage in the form of a deed, and the bank threatened a sale of such realty unless A paid a larger sum of money than that due, and A being necessitous made a payment to the bank and entered into a new contract with bank on its terms,¹⁵ or where A is necessitous and wishes to obtain a loan on certain property as collateral security, on which property B wrongfully claims a mechanic's lien, thus, taking advantage of A's necessities to force A to pay an unjust claim.¹⁶

Kirkendall, 44 Neb. 766; 63 N. W. 35; same case, 39 Neb. 193; 57 N. W. 1026; Flack v. Bank, 8 Utah 193; 17 L. R. A. 583; 30 Pac. 746.

⁶ The Quevilly, 95 Fed. 182.

⁷ W. W. Kimball Co. v. Raw (Kan.); 51 Pac. 789.

⁸ Post v. Bank, 38 Ill. App. 259.

⁹ Beer v. McLeod, 22 N. S. 535.

¹⁰ Fuller v. Roberts, 35 Fla. 110; 17 So. 359.

¹¹ Holt v. Thomas, 105 Cal. 273; 38 Pac. 891.

¹² Wilson, etc., Co. v. Curry, 126 Ind. 161; 25 N. E. 896.

¹³ Galusha v. Sherman, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495. The claim in question was an alleged cause of action for illness caused by a meal at defendant's hotel.

¹⁴ Heinlein v. Ins. Co., 101 Mich. 250; 45 Am. St. Rep. 409; 25 L. R. A. 627; 59 N. W. 615.

¹⁵ First National Bank v. Sargent, — Neb. —; 91 N. W. 595.

¹⁶ Joannin v. Ogilvie, 49 Minn.

So a threat to attach the store of one not liable on a debt has been held to amount to duress if a payment of such debt was caused by such threats.¹⁷

§254. Breach of contract.

Breach of contract is usually not duress.¹ Thus refusal to perform a contract for delivering ice unless a higher rate were paid, where the party who promised such higher rate did so because he would be subjected to great loss unless he got the ice,² or to perform a contract for work and labor,³ or to sell out an interest in a partnership contrary to the partnership agreement,⁴ or mere refusal to pay a debt when due,⁵ is not ordinarily duress, as where A refuses to pay B for work unless B will gratuitously repair injuries to such work done by C, and B does such work agreeing not to charge therefor,⁶ or where a creditor takes eight thousand five hundred dollars for a claim of ten thousand dollars and assigns the latter to his debtor's executor, fearing that such executor would defeat payment of such claim or would put the creditor to expense to collect it,⁷ or where the debtor has transferred his property and has become insolvent,⁸ or where government officers withhold money due for the use of a barge to compel the owner to charter it at a lower rate.⁹

564; 32 Am. St. Rep. 581; 16 L. R. A. 376; 52 N. W. 217.

¹⁷ Weber v. Kirkendahl, 39 Neb. 193; 57 N. W. 1026.

¹ Silliman v. United States, 101 U. S. 465; Domenico v. Packer's Association, 112 Fed. 554; Taylor v. Ford, 131 Cal. 440; 63 Pac. 770; Doyle v. Rector, 133 N. Y. 372; 31 N. E. 221; Secor v. Clark, 117 N. Y. 350; 22 N. E. 754, 1133; Alexander v. Commission Co., (Tex. Civ. App.); 34 S. W. 182.

² Goebel v. Linn, 47 Mich. 489; 41 Am. Rep. 723; 11 N. W. 284.

³ Domenico v. Packer's Association, 112 Fed. 554.

⁴ Taylor v. Ford, 131 Cal. 440; 63 Pac. 770.

⁵ Silliman v. United States, 101 U. S. 465; Hackley v. Headley, 45 Mich. 569; 8 N. W. 511; Cable v. Foley, 45 Minn. 421; 47 N. W. 1135; Doyle v. Rector, 133 N. Y. 372; 31 N. E. 221.

⁶ Doyle v. Rector, 133 N. Y. 372; 31 N. E. 221.

⁷ Secor v. Clark, 117 N. Y. 350; 22 N. E. 754, 1133.

⁸ Shelton v. Jackson, 20 Tex. Civ. App. 443; 49 S. W. 415.

⁹ Silliman v. United States, 101 U. S. 465.

§255. Advantage taken of financial necessities.

Taking advantage of a creditor's financial necessities if not caused by the debtor otherwise than by withholding payment of the debt in question and thereby compelling him to make some concession to the debtor in consideration of payment by the latter is not duress.¹ Still less is a refusal to act as one's surety for his future liability to his workmen duress, though he is thereby forced to give up a contract for grading a section of a railroad.²

Under circumstances of especial hardship and oppression an actual or threatened breach of contract may amount to duress.³ Thus a threat of cutting off the supply of water⁴ or gas,⁵ may amount to duress where such conduct will cause great damage. Where A by his wrongful conduct reduces B to financial straits and then takes advantage of his position to extort a contract that B would not otherwise have made, duress exists.⁶ So duress exists where A, a debtor of B's, induces other debtors of B's to stop payments to B, and takes advantage of the financial necessity thus produced to compel B to sign the contract demanded by A.⁷ Where A a depositor in B's bank deeded land

¹ French v. Shoemaker, 14 Wall (U. S.) 314; Hackley v. Headley, 45 Mich. 569; 8 N. W. 511. In cases like this there is often no consideration for the new promise. See § 313. So in Adams v. Schiffer, 11 Colo. 15; 7 Am. St. Rep. 202; 17 Pac. 21; is an obiter that A's merely taking advantage of B's financial needs to withhold A's debt to B and thereby force B to make a settlement favorable to A is not duress.

² McCormick v. Dalton, 53 Kan. 146; 35 Pac. 1113.

³ Pingree v. Gas Co., 107 Mich. 156; 65 N. W. 6; Panton v. Duluth, etc., Co., 50 Minn. 175; 36 Am. St. Rep. 635; 52 N. W. 527.

⁴ Panton v. Duluth, etc., Co., 50 Minn. 175; 36 Am. St. Rep. 635; 52 N. W. 527; St. Louis Brewing As-

sociation v. St. Louis, 140 Mo. 419; 37 S. W. 525; 41 S. W. 911.

⁵ Indiana, etc., Co. v. Anthony, 26 Ind. App. 307; 58 N. E. 868. So a refusal to furnish gas as required by law unless the owner of the house will agree to pay a gas bill incurred by a former owner is duress. Such promise also lacks consideration. New Orleans, etc., Co. v. Paulding, 12 Rob. (La.) 378.

⁶ Adams v. Schiffer, 11 Colo. 15; 7 Am. St. Rep. 202; 17 Pac. 21; Brueggestradt v. Ludwig, 184 Ill. 24; 56 N. E. 419; affirming, 82 Ill. App. 435; Vyne v. Glenn, 41 Mich. 112; 1 N. W. 997; Fitzgerald v. Construction Co., 44 Neb. 463; 62 N. W. 899.

⁷ Vyne v. Glenn, 41 Mich. 112; 1 N. W. 997.

to B and was paid therefor, and B afterwards bought up C's unfounded claim to such land and refused to honor B's checks unless A paid B a part of what B had paid C, duress was held to exist, since B's wrongful act is the direct cause of A's necessities.⁸ So it is duress where a railroad company forces a construction company into practical insolvency by withholding payments due and thus compels it to accept a thousand dollars per mile less than the contract price.⁹ So it is duress where an insured after a fire pays to his lessor an amount which he does not owe to induce him to join in executing proofs of loss and in indorsing drafts, the insurance being payable to lessor and lessee as their interest should appear.¹⁰ So where A was badly injured in an accident caused by the negligence of a railroad company, and had no money and the company refused him transportation or compensation for his injuries unless he would accept it as performance of an invalid contract of release, A was allowed to avoid such contract.¹¹

§256. Duress causing performance of legal duty.—Restitution.

If the person subjected to duress is thereby compelled to perform or agree to perform what he could have been compelled to do legally, such transaction or contract cannot be avoided for duress. Thus if one who has injured another is compelled by duress to compensate to no greater extent than the law would have compelled him for such injury,¹ as by giving to the person from whom he has embezzled a note to cover such embezzlement,² no duress exists. So an assignee for the benefit of creditors cannot plead duress of his assignor to avoid a convey-

⁸ *Adams v. Schiffer*, 11 Colo. 15; 7 Am. St. Rep. 202; 17 Pac. 21. Where a similar promise was made because the bank threatened to attach A's deposit, it was held that duress did not exist. *Flack v. Bank*, 8 Utah 193; 17 L. R. A. 583; 30 Pac. 746.

⁹ *Fitzgerald v. Construction Co.*, 44 Neb. 463; 62 N. W. 899.

¹⁰ *Guetzkow, etc., Co. v. Breese*,

96 Wis. 591; 65 Am. St. Rep. 83; 72 N. W. 45.

¹¹ *Buford v. R. R.*, 82 Ky. 286.

¹ *Thorn v. Pinkham*, 84 Me. 101; 30 Am. St. Rep. 335; 24 Atl. 718; *Hilborn v. Bucknam*, 78 Me. 482; 57 Am. Rep. 816; 7 Atl. 272; *Clark v. Turnbull*, 47 N. J. L. 265; 54 Am. Rep. 157.

² *Thorn v. Pinkham*, 84 Me. 101;

ance to pay an honest debt.³ Some courts, however, take the opposite view.⁴ But if the contract caused by threats of prosecution is not one of restitution but is on some different subject matter duress exists though the promisor is guilty.⁵ Thus a threat to prosecute for selling liquor unlawfully,⁶ or for giving testimony alleged to be perjured,⁷ may be duress, and notes induced thereby may be avoided.

§257. Other threats as duress.

Threats or conduct which do not involve violence, imprisonment and the like cannot usually constitute duress. If the conduct apprehended will cause merely vexation and annoyance,¹ as a threat to convey or lease property unless the grantor will accept a reconveyance and assume a mortgage thereon,² or mere importunity by a creditor to obtain security for his debt, though causing worry and excitement thereby,³ or a fear that one's

30 Am. St. Rep. 335; 24 Atl. 718; *Miller v. Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101; *Beath v. Chapoton*, 115 Mich. 506; 69 Am. St. Rep. 589; 73 N. W. 806; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Phillips v. Henry*, 160 Pa. St. 24; 40 Am. St. Rep. 706; 28 Atl. 477; *Largent v. Beard*, (Tex. Civ. App.); 53 S. W. 90. "The law does not permit a criminal who has stolen property, to defend against the debt or its written acknowledgment on the ground of threatened prosecution or imprisonment." *Beath v. Chapoton*, 115 Mich. 506; 69 Am. St. Rep. 589; 73 N. W. 806. Some courts qualify this doctrine by saying that while duress may exist, the presumption that the criminal was making compensation from honest motives and not because of threats should be a very strong one. *Meredith v. Meredith*, 79 Mo. App. 636.

³ *Phillips v. Henry*, 160 Pa. St. 24; 40 Am. St. Rep. 706; 28 Atl. 477.

⁴ *Taylor v. Jacques*, 106 Mass. 291. In many of the cases generally cited on this proposition the person subjected to duress was not the criminal but some near relative such as his wife or parent.

⁵ *Baldwin v. Hutchinson*, 8 Ind. App. 454; 35 N. E. 711; *Thompson v. Niggley*, 53 Kan. 664; 26 L. R. A. 803; 35 Pac. 290.

⁶ *Thompson v. Niggley*, 53 Kan. 664; 26 L. R. A. 803; 35 Pac. 290.

⁷ *Baldwin v. Hutchinson*, 8 Ind. App. 454; 35 N. E. 711; *James v. Roberts*, 18 Ohio 548.

¹ *Hagan v. Waldo*, 168 Ill. 646; 48 N. E. 89; *Batavian Bank v. North*, 114 Wis. 637; 90 N. W. 1016.

² *Goos v. Goos*, 57 Neb. 294; 77 N. W. 687.

³ *Zuccarello v. Randolph* (Tenn. Ch. App.), 58 S. W. 453.

father will be angry and will refuse to support him,⁴ a fear that control of a corporation will be lost unless stock is bought at an excessive price,⁵ or merely demanding settlement of a claim in a rough manner and insisting on prompt action,⁶ a threat to manage a corporation in an improper manner,⁷ or the fact that a chattel mortgage already given to secure rent prevents the mortgagor from moving his goods out of the township to the farm that he has rented,⁸ none of them constitute duress. The doctrine of duress is carried farther by some courts than is here indicated. Thus where A charged his employe B, with appropriating A's money, and told B's mother C, and threatened to inform his father D, it was held that on these facts alone duress might exist if D was in such physical condition that C feared that such information might cause him to become insane and to prevent such worry and trouble, she gave a mortgage for B's debt, A being informed of D's condition and C's motives.⁹

III. RELATION OF PARTIES.

§258. By whom duress may be committed.

Where a contract is induced by duress, the question of the relation of the party guilty of duress to the contract thus induced is often decisive of the rights of the party subjected to such duress. (1) If the adversary party to the contract is guilty of such duress, the party subjected thereto may of course avoid the contract induced thereby.¹ (2) If the party guilty of duress is the agent of the adversary party to the contract, the part subjected to duress may avoid such contract, even if the

⁴ *Detroit National Bank v. Blodgett*, 115 Mich. 160; 73 N. W. 120.

⁵ *Gage v. Fisher*, 5 N. D. 297; 31 L. R. A. 557; 65 N. W. 809.

⁶ *Dausch v. Crane*, 109 Mo. 323; 19 S. W. 61.

⁷ *York v. Hinkle*, 80 Wis. 624; 27 Am. St. Rep. 73; 50 N. W. 895.

⁸ *Lamb v. Rathburn*, 118 Mich. 666; 77 N. W. 268.

⁹ *Silsbee v. Webber*, 171 Mass.

378; 50 N. E. 555. (Further, C was advised in this case by A's attorney. The court divided on the question.)

¹ *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207; 28 Pac. 1068; *James v. Roberts*, 18 Ohio 548; *Bueter v. Bueter*, 1 S. D. 94; 8 L. R. A. 562; 45 N. W. 208; *Galusha v. Sherman*, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495.

agent had no authority to commit such duress.² This rule rests on the principle that if the principal accepts the benefit of the contract made by the agent on his behalf, he takes it subject to all defenses. (3) If the person guilty of duress acts in collusion with the adversary party to the contract, the party subjected to duress may avoid such contract.³ (4) If the person who is guilty of duress is acting on behalf of the adversary party⁴ duress may be interposed as a defense against such adversary party. (5) If the person guilty of duress is not the adversary party or his agent, and is acting neither in collusion with such adversary party nor on behalf of him, but is acting entirely for his own benefit, a different question arises as to the right of the party subject to such duress to avoid the contract as against an adversary party who took no part in such duress.

(a) If the facts constituting duress, and inducing the contract are known to the adversary party to the contract, the party subjected thereto may avoid the contract.⁵ Thus where A is coerced by threats of violence from a mob of his employees to execute a deed of assignment to B for the benefit of A's creditors, and B through his agent C, who knows the facts accepts the deed, duress exists whereby the contract and deed may be avoided.⁶ So where defendant had been arrested with his sons on a charge of murder, and he had been released and his sons remanded, and strong popular feeling and excitement existed, it was held that duress existed where by reason of such facts the

² Winfield National Bank v. Croco, 46 Kan. 620; 26 Pac. 939; Miller v. Lumber Co., 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101; Springfield, etc., Ins. Co. v. Hull, 51 O. S. 270; 46 Am. St. Rep. 571; 25 L. R. A. 37; 37 N. E. 1116; Neumann v. La Crosse, 94 Wis. 103; 68 N. W. 654; McCormick Harvesting Machine Co. v. Hamilton, 73 Wis. 486; 41 N. W. 727.

³ Dimmitt v. Robbins, 74 Tex. 441; 12 S. W. 94.

⁴ Even if collusion in advance is

not shown. Magoon v. Reber, 76 Wis. 392; 45 N. W. 112; Brown v. Peck, 2 Wis. 261. (In these last two cases the consideration was grossly inadequate or wanting.)

⁵ Goodrich v. Cushman, 34 Neb. 460; 51 N. W. 1041; Line v. Blizard, 70 Ind. 23; Helm v. Helm, 11 Kan. 19; Doolittle v. McCullough, 7 O. S. 299; *Contra*: Talley v. Robinson, 22 Gratt. (Va.) 888.

⁶ Doolittle v. McCullough, 7 O. S. 299. For similar facts see Brown v. Peck, 2 Wis. 261.

attorney for the accused sons compelled defendant to give a note and mortgage for three thousand dollars as an attorney's fee.⁷ (b) If the facts constituting duress and inducing the contract are not known to the adversary party the weight of authority is that the party subject to the duress cannot avoid such contract.⁸ Thus duress exercised by a husband to compel his wife to sign a mortgage⁹ or note¹⁰ does not avoid such instrument as to an adversary party who did not know of such duress, nor is it duress when the wife's fear of criminal prosecution of her husband is induced by information received from him and not by the threats of his creditor.¹¹ An exception to this general rule exists in some states by whose laws a homestead can be conveyed only by the free and unconstrained act of husband and wife acting together. In such states if the husband by duress compels the wife to mortgage the homestead, such mortgage is void even though the mortgagee is ignorant of such duress.¹²

Some courts, however, hold the general rule to be that the party subject to duress may avoid the contract even if the adversary party is ignorant of such duress.¹³ Thus where A compelled his wife B, by threats to assign to C a policy on A's life, payable to B, C who took it as collateral to secure A's debt

⁷ *Shirk v. Neible*, 156 Ind. 66; 59 N. E. 281.

⁸ *Mutual, etc., Life Association v. Mills*, 82 Fed. 508; 27 C. C. A. 212; *Beals v. Neddo*, 2 Fed. 41; 1 McCrary 206; *Moog v. Strang*, 69 Ala. 98; *Compton v. Bank*, 96 Ill. 301; 36 Am. Rep. 147; *Frasure v. McGuire*, (Ky.); 66 S. W. 1015; *Springfield, etc., Co. v. Donovan*, 147 Mo. 622; 49 S. W. 500.

⁹ *Rogers v. Adams*, 66 Ala. 600; *Line v. Blizzard*, 70 Ind. 23; *Green v. Scavage*, 19 Ia. 461; 87 Am. Dec. 447; *Springfield, etc., Co. v. Donovan*, 147 Mo. 622; 49 S. W. 500.

¹⁰ *Fairbanks v. Snow*, 145 Mass. 153; 1 Am. St. Rep. 446; 13 N. E. 596.

¹¹ *Life Association v. Mills*, 82 Fed. 508; 27 C. C. A. 212; *Crompton v. Bank*, 96 Ill. 301; 36 Am. Rep. 147.

¹² *First National Bank v. Bryan*, 62 Ia. 42; 17 N. W. 165; *Berry v. Berry*, 57 Kan. 691; 57 Am. St. Rep. 351; 47 Pac. 837. (In the latter case the court said that such mortgage is "absolutely void and not even binding on the one who does consent.")

¹³ *Bryant v. Levy*, 52 La. Ann. 1649; 28 So. 197; *Central Bank v. Copeland* 18 Md. 305; 81 Am. Dec. 597; *Barry v. Assurance Society*, 59 N. Y. 587; *Magoon v. Reber*, 76 Wis. 392; 45 N. W. 112.

was not allowed to hold the policy as against B.¹⁴ So where a husband by threats compelled his wife to sign a mortgage, she was allowed to avoid such mortgage even though the mortgagee was ignorant of such duress.¹⁵

If the transaction induced by duress is collateral to that in litigation and to which duress is pleaded as a defense, such defense is insufficient.¹⁶ Thus where A was attacked by robbers who threatened to kill him unless he paid them a large amount of money, and A borrowed such amount from B and paid the robbers under duress, it was held that B could recover such loan from A if free from collusion with the robbers.¹⁷

§259. Relation of party subjected to duress to party against whom violence or threats are directed.

Where the promisor himself is subjected to duress of imprisonment,¹ or to threats which can cause duress,² such as threats of violence³ or of imprisonment,⁴ duress of course may exist.

¹⁴ *Barry v. Assurance Society*, 59 N. Y. 587. The court said it was "analogous to a parting with property through robbery," and in substance held the assignment void, not voidable.

While *Gillespie v. Simpson*, (Ark.); 18 S. W. 1050, seems to recognize this doctrine, the case was in fact decided on the theory that no duress in fact existed, and that the contract was, furthermore, ratified.

¹⁵ *Central Bank v. Copeland*, 18 Md. 305; 81 Am. Dec. 597. (The court called such mortgage "void" saying: "Its execution was procured by the husband acting in their interest and for their benefit;" . . . "their acceptance of the mortgage implies an adoption of his agency.")

¹⁶ *Dimmitt v. Robbins*, 74 Tex. 441; 12 S. W. 94.

¹⁷ *Dimmitt v. Robbins*, 74 Tex.

441; 12 S. W. 94. (This proposition was laid down as the law of the case. The record showed (1) that it was doubtful what amount B loaned to A; and (2) that B was in collusion with the robbers. For these reasons it was held that B could not recover.)

¹ *Hunt v. Hunt*, 94 Ga. 257; 21 S. E. 515.

² *Overstreet v. Dunlap*, 56 Ill. App. 486; *Rossiter v. Loeber*, 18 Mont. 372; 45 Pac. 560; *Galusha v. Sherman*, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495.

³ *Rossiter v. Loeber*, 18 Mont. 372; 45 Pac. 560; *Doolittle v. McCullough*, 7 O. S. 299.

⁴ *Hartford Ins. Co. v. Kirkpatrick*, 111 Ala. 456; 20 So. 651; *Winfield National Bank v. Croco*, 46 Kan. 620; 26 Pac. 939; *Cribbs v. Sowle*, 87 Mich. 340; 24 Am. St. Rep. 166; 49 N. W. 587; *Horton v. Bloedorn*.

Where the person against whom such threats and the like are directed is not the promisor, the general rule is that the promisor cannot in law be said to be subject to duress.⁵ Exceptions to this last rule exist where the promisor occupies certain relations to the person against whom the threats, violence and the like are directed. Thus imprisonment⁶ or threatened criminal prosecution and imprisonment⁷ of a husband may cause duress of the wife. The same rule was applied where a woman was induced by threats of arresting her intended husband, made just before the marriage was to occur, to sign a promise to pay his debt.⁸ A threat of criminal prosecution and imprisonment of a child may amount to duress of his parents.⁹ So may actual

37 Neb. 666; 56 N. W. 321; (Springfield, etc.), *Ins. Co. v. Hull*, 51 O. S. 270; 46 Am. St. Rep. 571; 25 L. R. A. 37; 37 N. E. 1116; *James v. Roberts*, 18 Ohio 548; *Morrison v. Faulkner*, 80 Tex. 128; 15 S. W. 797; *Landa v. Obert*, 78 Tex. 33; 14 S. W. 297.

⁵ *Bowman v. Hiller*, 130 Mass. 153; 39 Am. Rep. 442.

⁶ *Mayer v. Oldham*, 32 Ill. App. 233.

⁷ *Holt v. Agnew*, 67 Ala. 360; *McMahon v. Smith*, 47 Conn. 221; 36 Am. Rep. 67; *Line v. Blizzard*, 70 Ind. 23; *Brooks v. Berryhill*, 20 Ind. 97; *Giddings v. Bank*, 104 Ia. 676; 74 N. W. 21; *First National Bank v. Bryan*, 62 Ia. 42; 17 N. W. 165; *Singer Mfg. Co. v. Rawson*, 50 Ia. 634; *Green v. Seranage*, 19 Ia. 461; 87 Am. Dec. 447; *Heaton v. Bank*, 59 Kan. 281; 52 Pac. 876; same case, 5 Kan. App. 498; 47 Pac. 576; *Winfield National Bank v. Croco*, 46 Kan. 620; 26 Pac. 939; *Rau v. Zedlitz*, 132 Mass. 164; *Bentley v. Robson*, 117 Mich. 691; 76 N. W. 146; *Benedict v. Roome*, 106 Mich. 378; 64 N. W. 193; *Miller v. Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101; *Hen-*

singer v. Dyer, 147 Mo. 219; 48 S. W. 912; *Hargreaves v. Korcek*, 44 Neb. 660; 62 N. W. 1086; *Davis v. Smith*, 68 N. H. 253; 73 Am. St. Rep. 584; 44 Atl. 384; *Barrett v. Weber*, 125 N. Y. 18; 25 N. E. 1068; *Adams v. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447; 6 L. R. A. 491; 23 N. E. 7; *Eadie v. Slimmon*, 26 N. Y. 9; 82 Am. Dec. 395; *Williams v. Walker*, 18 S. C. 577; *Mack v. Prang*, 104 Wis. 1; 76 Am. St. Rep. 848; 45 L. R. A. 407; 79 N. W. 770; *City National Bank v. Kusworm*, 88 Wis. 188; 43 Am. St. Rep. 880; 26 L. R. A. 48; 59 N. W. 564.

⁸ *Rau v. Von Zedlitz*, 132 Mass. 164.

⁹ *Shattuck v. Watson*, 53 Ark. 147; 7 L. R. A. 551; 13 S. W. 516; (*obiter*); *Southern Express Co. v. Duffey*, 48 Ga. 358; *Youngs v. Simm*, 41 Ill. App. 28; *Peed v. McKee*, 42 Iowa 689; 20 Am. Rep. 631; *Seymour v. Prescott*, 69 Me. 376; *Bryant v. Peck, etc., Co.*, 154 Mass. 460; 28 N. E. 678; *Harris v. Cormodity*, 131 Mass. 51; 41 Am. Rep. 188; *Weiser v. Welch*, 112 Mich. 134; 70 N. W. 438; *Meech v. Lee*, 82 Mich. 274; 46 N. W. 383; *Beindorff v. Kaufman*, 41 Neb. 824; 60

imprisonment and danger of promisor's children,¹⁰ so threats of imprisoning a grandson may amount to duress of his grandmother.¹¹ Threatened prosecution and imprisonment of a son-in-law has been held to be ground in equity for avoiding notes and a deed of trust given by reason thereof to secure his debt.¹²

§260. To whom threats may be made.

A threat causing duress may as well be made to A to be communicated to B,¹ as be communicated to B in person. It will be equally operative as duress affecting B.

§261. Who can take advantage of duress.

The party to the contract who enters into by reason of duress may take advantage of such duress to avoid liability under the contract.¹ As a general rule this privilege is personal to him and his legal representatives. The adversary party who is guilty of duress cannot avoid the contract by reason thereof.² A third person cannot set up such duress.³ A creditor of the party subjected to duress, who has attached property sold by the latter under duress, cannot avoid the contract for such duress.⁴

N. W. 101; *Schroener v. Lissauer*, 107 N. Y. 111; 13 N. E. 741; affirming, 36 Hun 100; *Haynes v. Rudd*, 102 N. Y. 372; 55 Am. Rep. 815; 7 N. E. 287; *Roll v. Raguett*, 4 Ohio 400; 22 Am. Dec. 759; *Western Avenue Building Association v. Walters*, 7 Ohio C. C. 202; *Avery v. Layton*, 119 Pa. St. 604; 13 Atl. 528; *Swope v. Ins. Co.*, 93 Pa. 251; *National Bank of Oxford v. Kirk*, 90 Pa. 49; *Foley v. Greene*, 14 R. I. 618; 51 Am. Rep. 419; *Coffman v. Lookout Bank*, 5 Lea (Tenn.) 232; 40 Am. Rep. 31; *McCormick Harvesting Machine Co. v. Hamilton*, 73 Wis. 486; 41 N. W. 727; *Schultz v. Culbertson*, 49 Wis. 122; 4 N. W.

1070; *Catlin v. Henton*, 9 Wis. 476.

¹⁰ *Shirk v. Neible*, 156 Ind. 66; 59 N. E. 281.

¹¹ *Bradley v. Irish*, 42 Ill. App. 85.

¹² *Bell v. Campbell*, 123 Mo. 1; 45 Am. St. Rep. 505; 25 S. W. 359. (This is possibly a case of undue influence.)

¹ *Giddings v. Bank*, 104 Ia. 676; 74 N. W. 21; *Bank v. Hutchinson*, 62 Kan. 9; 61 Pac. 443.

¹ See § 266.

² See § 269.

³ *Oak v. Dustin*, 79 Me. 23; 1 Am. St. Rep. 281; 7 Atl. 815.

⁴ *Lewis v. Banning*, 16 Gray (Mass.) 500.

§262. Effect of duress of principal on liability of surety.

Whether duress exercised against the principal gives the surety an opportunity of avoiding the contract is a question upon which there is some conflict of authority. The view held by a majority of the courts is that the surety is bound though his principal executes the contract under duress, if the surety knows of such duress and is himself not under duress,¹ while if the surety does not know of such duress he is not bound,² since on suit by the creditor the principal could avoid the contract, leaving the surety bound and without recourse against the principal.³ Some courts hold in general terms that a surety is not bound if the principal signs under duress.⁴ It has also been held that a surety on a bond given without legal authority or in case of false imprisonment to obtain the principal's release, may plead such duress.⁵

IV. EXISTENCE OF DURESS AS A FACT.

§263. Conduct not inducing action not duress.

Conduct which might amount to duress if the mind of the person against whom it is directed were affected thereby is not duress if it does not affect the mind of such person. Thus threats which might amount to duress, if they were effective will not constitute duress if they do not influence the conduct of the person against whom they are directed,¹ as where he

¹ *Graham v. Marks*, 98 Ga. 67; 25 S. E. 931; *Tucker v. State*, 72 Ind. 242; *Oak v. Dustin*, 79 Me. 23; 1 Am. St. Rep. 281; 7 Atl. 815; *Bowman v. Hiller*, 130 Mass. 153; 39 Am. Rep. 442; *Robinson v. Gould*, 11 Cush. (Mass.) 55.

² *Patterson v. Gibson*, 81 Ga. 802; 12 Am. St. Rep. 356; 10 S. E. 9; *Griffith v. Sitgreaves*, 90 Pa. St. 161.

³ This is the reason usually given, though why the surety could not have recourse over in such case is not clear, since one in whose favor a liability is created is usually not

chargeable with duress exercised by a third person of which he is not informed.

See § 258.

⁴ *Singer Mfg. Co. v. Ferrell*, (Ky.); 48 S. W. 1078. (Where an unlawful promise to stifle prosecution was a consideration for the surety's signing.) *Wilkerson v. Hood*, 65 Mo. App. 491; *Hyatt v. Robinson*, 15 Ohio 372.

⁵ *United States v. Tingey*, 5 Pet. (U. S.) 115; *Jones v. Turner*, 5 Litt. (Ky.) 147.

¹ *Phelan v. De Martin*, 85 Cal. 365; 24 Pac. 725; *Paige v. Hiercny-*

executes such instrument deliberately on advice of counsel² or of friends,³ or enters into the contract for other reasons than the threats, acting on the advice of his friends,⁴ or after such delay as gives full time to decide with deliberation,⁵ as where a father-in-law gave notes and a deed to settle a claim of embezzlement against his son-in-law after trying to obtain a compromise, and after an agreement with his daughter that the amount thus paid should be considered an advancement to her.⁶

Accordingly whatever may be the effect of mere persuasion as undue influence, it cannot amount to duress.⁷ It has been held that the violence or threat relied on must be the sole cause of the conduct sought to be avoided to constitute duress. If fraud is shown to have caused such conduct in part, duress does not exist.⁸

§264. Absence of threats.

If the only duress claimed to exist is duress of threats, the fact that no threats were in fact made shows that no duress exists,¹ even though the party executing the instrument did so because of facts rendering him, or some other person whose danger could in law influence him,² liable to criminal prosecution,³

mus, 192 Ill. 546; 61 N. E. 832; Randleman v. Randleman, 156 Ill. 568; 41 N. E. 223; Baldwin v. Murphy, 82 Ill. 485; Hamilton v. Smith, 57 Ia. 15; 42 Am. Rep. 39; 10 N. W. 276; Barger v. Farnham, 130 Mich. 487; 90 N. W. 281; Meredith v. Meredith, 79 Mo. App. 636; Loud v. Hamilton (Tenn. Ch. App.), 45 L. R. A. 400; 51 S. W. 140; Wolff v. Bluhm, 95 Wis. 257; 60 Am. St. Rep. 115; 70 N. W. 73.

² Phelan v. De Martin, 85 Cal. 365; 24 Pac. 725.

³ Randleman v. Randleman, 156 Ill. 568; 41 N. E. 223.

⁴ Wolff v. Bluhm, 95 Wis. 257; 60 Am. St. Rep. 115; 70 N. W. 73.

⁵ Barger v. Farnham, 130 Mich. 487; 90 N. W. 281.

⁶ Loud v. Hamilton, (Tenn. Ch. App.); 45 L. R. A. 400; 51 S. W. 140.

⁷ Batavian Bank v. North, 114 Wis. 637; 90 N. W. 1016.

⁸ Pratt, etc., Co. v. McClain, 135 Ala. 452; 93 Am. St. Rep. 35; 33 So. 185.

¹ Phelan v. De Martin, 85 Cal. 365; 24 Pac. 725; Galt v. Provan, 108 Ia. 561; 79 N. W. 357.

² See § 259.

³ Mascolo v. Montesanto, 61 Conn. 50; 29 Am. St. Rep. 170; 23 Atl. 714; Francis v. Hurd, 113 Mich. 250; 71 N. W. 582; Hargreaves v. Menken, 45 Neb. 668; 63 N. W. 951; Roth v. Holmes, (Tenn. Ch. App.); 52 S. W. 699.

as where a mother pays for goods taken by her daughter,⁴ or where a father pays a claim against his son for assault and battery⁵ if no threats are made. Where a criminal action has been in fact instituted, a mortgage given in settlement of the fund embezzled is not given under duress where it is expressly stated that such payment cannot affect the civil action.⁶ Abusive and insulting language not expressing or implying a threat cannot constitute duress.⁷ However an implied threat of criminal prosecution of one's husband⁸ may be as effective duress as an express threat.

V. EFFECT OF DURESS.

§265. Effect of duress in the execution.

Duress like fraud, misrepresentation, mistake and non-disclosure, may affect the execution or the inducement. Duress in the execution is rare. It exists where the party subjected thereto is coerced into permitting a contract, written and signed by himself to be taken from him without intending to deliver it.¹ In cases like this, duress is operative only to rebut the inference of voluntary delivery that otherwise would exist. Such form of duress makes the contract void. Many text-writers suggest that duress in the formation may exist in oral contracts where the party subjected to duress is compelled to repeat words which of themselves would constitute a contract, without any intention of being bound thereby. While adjudicated cases on this point are uncommon, the view seems probable, in analogy to contracts made in jest.²

⁴ Francis v. Hurd, 113 Mich. 250; 71 N. W. 582.

⁵ Mascolo v. Montesanto, 61 Conn. 50; 29 Am. St. Rep. 170; 23 Atl. 714; (even where the son has been arrested in the civil action.)

⁶ Hargreaves v. Menken, 45 Neb. 668; 63 N. W. 951.

⁷ Kester v. Kester, 38 Or. 10; 62

Pac. 635. (A threat by a husband to "heap coals of fire on his wife's head as long as she lived" if she did not destroy a certain note.)

⁸ Benedict v. Roome, 106 Mich. 378; 64 N. W. 193.

¹ Palmer v. Poor, 121 Ind. 135; 6 L. R. A. 469; 22 N. E. 984.

² See § 25.

§266. Effect of duress in the inducement.

Duress in the inducement exists where the party subject to the duress knows the terms of the contract into which he is entering and intends such contract to take effect, but such intention is caused by duress. Duress of this sort makes contracts and conveyances executed thereunder voidable and not void.¹ On the one hand they may be made void at the election of the party subjected to duress. Thus deeds² or mortgages³ may be avoided for duress; but such formal conveyances cannot be avoided informally by acts *in pais*. A formal decree of rescission must be obtained from a court of equity.⁴ An executory contract⁵ such as a promissory note,⁶ a contract to surrender a child,⁷ or a contract to ship cattle⁸ may be avoided for duress *in pais* without formal rescission in equity. A re-

¹ Eberstein v. Willets, 134 Ill. 101; 24 N. E. 967; Galusha v. Sherman, 105 Wis. 263; 47 L. R. A. 417; 81 N. W. 495.

² Carter v. Couch, 84 Fed. 735; 28 C. C. A. 520; Eberstein v. Willets, 134 Ill. 101; 24 N. E. 967; Miller v. Lumber Co., 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101; Commercial National Bank v. Wheelock, 52 O. S. 534; 49 Am. St. Rep. 738; 40 N. E. 636; Hardin v. Hardin, 38 Tex. 616.

³ Bradley v. Irish, 42 Ill. App. 85; Mayer v. Oldham, 32 Ill. App. 233; Bentley v. Robson, 117 Mich. 691; 76 N. W. 146; Beindorff v. Kaufman, 41 Neb. 824; 25 L. R. A. 679; 60 N. W. 101; Western Ave. Bldg. Association v. Walters, 7 Ohio C. C. 202.

⁴ Nordholt v. Nordholt, 87 Cal. 552; 22 Am. St. Rep. 268; 26 Pac. 599; Bradley v. Irish, 42 Ill. App. 85; (Commercial National) Bank v. Wheelock, 52 O. S. 534; 49 Am. St. Rep. 738; 40 N. E. 636; Western Ave. Bldg. Association v. Walters, 7 Ohio C. C. 202.

⁵ Heaton v. Bank, 59 Kan. 281; 52 Pac. 876; Thompson v. Niggley, 53 Kan. 664; 26 L. R. A. 803; 35 Pac. 290; Bryant v. Levy, 52 La. Ann. 1649; 28 So. 191; Fairbanks v. Snow, 145 Mass. 153; 1 Am. St. Rep. 446; 13 N. E. 596; Hensinger v. Dyer, 147 Mo. 219; 48 S. W. 912; Morrison v. Faulkner, 80 Tex. 128; 15 S. W. 797; Landa v. Obert, 78 Tex. 33; 14 S. W. 297; Texas, etc., Ry. Co. v. Avery, (Tex. Civ. App.); 33 S. W. 704; Mack v. Prang, 104 Wis. 1; 76 Am. St. Rep. 848; 45 L. R. A. 407; 79 N. W. 770.

⁶ Overstreet v. Dunlap, 56 Ill. App. 486; Heaton v. Bank, 59 Kan. 281; 52 Pac. 876; Hensinger v. Dyer, 147 Mo. 219; 48 S. W. 912; James v. Roberts, 18 Ohio 548; Mack v. Prang, 104 Wis. 1; 76 Am. St. Rep. 848; 45 L. R. A. 407; 79 N. W. 770; City National Bank v. Kusworm, 88 Wis. 188; 43 Am. St. Rep. 880; 26 L. R. A. 48; 59 N. W. 564.

⁷ Hunt v. Hunt, 94 Ga. 257; 31 S. E. 515.

⁸ Texas, etc., Ry. Co. v. Avery, (Tex. Civ. App.); 33 S. W. 704.

lease given under duress may be avoided informally and suit may be brought on the original cause of action.⁹ If the instrument is negotiable¹⁰ equity may grant a formal rescission. An executed contract whereby the title to personal property has passed may be avoided informally, such as an assignment of a policy of life insurance.¹¹ A specific existing chattel parted with by sale under duress may on informal rescission be seized by the vendor, and such recaption is not larceny.¹² In case of certain formal transfers of personal property such as stocks¹³ formal rescission may be had in equity. An executed conveyance of realty cannot be avoided by acts *in pais* followed by an ejectment suit. A suit in equity is necessary.¹⁴

§267. Duty of placing adversary party in statu quo.

On avoiding a contract for duress, it is necessary to return what was received under the contract thus avoided.¹ But where a wife gave a note and mortgage under duress to prevent the prosecution of her husband for forging collateral to a note given by him, and such note and collateral are returned to the wife to be delivered to her husband, which is done, she may avoid her note and mortgage without returning his notes and collateral; her husband being dead and the notes and collateral missing.² If the thing received by the party subjected to duress is worthless, it is not necessary to restore it before bringing action. It is sufficient to restore it at the trial.³ If the party subjected to duress has on his own theory of the case a right to all that he has received under the contract and more: while

⁹ Weiser v. Welch, 112 Mich. 134; 70 N. W. 438; (Springfield, etc.,) Ins. Co. v. Hull, 51 O. S. 270; 46 Am. St. Rep. 571; 25 L. R. A. 37; 37 N. E. 1116.

¹⁰ James v. Roberts, 18 Ohio 548.

¹¹ Eadie v. Slimmon, 26 N. Y. 9; 82 Am. Dec. 395.

¹² Love v. State, 78 Ga. 66; 6 Am. St. Rep. 234; 3 S. E. 893.

¹³ Bryant v. Peck, etc., Co., 154 Mass. 460; 28 N. E. 678.

¹⁴ (Commercial National) Bank v. Wheelock, 52 O. S. 534; 49 Am. St. Rep. 738; 40 N. E. 636.

¹ The Ernest M. Munn, 66 Fed. 356; 13 C. C. A. 510.

² City National Bank v. Kusworm, 88 Wis. 188; 43 Am. St. Rep. 880; 26 L. R. A. 48; 59 N. W. 564.

³ A release given to one compelled to compromise by duress. Morse v. Woodworth, 155 Mass. 233, 248; 27 N. E. 1010; 29 N. E. 525.

under the adversary party's theory of the case, he has a right to what he has received he is not obliged to tender it on disaffirming. Thus A had a claim against an insurance company which under threat of criminal prosecution she settled for a much smaller sum. It was held that she could disaffirm and sue for the difference between the amount due and the amount received; and that she need not return the amount received before bringing suit.⁴

§268. Rights of bona fide purchasers.

If duress in the execution exists, even a negotiable contract in the hands of *bona fide* holders is void.¹

If duress in the inducement exists, a contract made thereunder is voidable only. It follows that it cannot be avoided if negotiable and in the hands of a *bona fide* purchaser for value before maturity.² If the purchaser takes with notice of the duress, the promisor may avoid the contract.³

If the contract is executed and passes title to realty a conveyance made under duress cannot be avoided as against a *bona fide* grantee for value, without notice.⁴ A subsequent judgment creditor of the grantee who has exercised duress, is not a *bona fide* purchaser within the meaning of this rule even if he acquires his lien without notice.⁵

§269. Ratification.

On the other hand the person subjected to duress may see fit to ratify the transaction, and may do so after having become

⁴ (Springfield, etc.) Ins. Co. v. Hull, 51 O. S. 270; 46 Am. St. Rep. 571; 25 L. R. A. 37; 37 N. E. 1116.

¹ Palmer v. Poor, 121 Ind. 135; 6 L. R. A. 469; 22 N. E. 984.

² Beals v. Neddo, 2 Fed. 41; 1 McCrary 206; Hart v. Church, 126 Cal. 471; 77 Am. St. Rep. 195; 58 Pac. 910; Veach v. Thompson, 15 Ia. 380; Fairbanks v. Snow, 145 Mass. 153; 1 Am. St. Rep. 446; 13 N. E. 596; Farmers', etc., Bank v.

Butler, 48 Mich. 192; 12 N. W. 36; Clark v. Pease, 41 N. H. 414; Mack v. Prang, 104 Wis. 1; 76 Am. St. Rep. 848; 45 L. R. A. 407; 79 N. W. 770.

³ Rossiter v. Loeber, 18 Mont. 372; 45 Pac. 560.

⁴ Bazemore v. Freeman, 58 Ga. 276; Hall v. Patterson, 51 Pa. St. 289.

⁵ Brown v. Pierce, 7 Wall. (U. S.) 205.

competent to contract.¹ Thus a deed given under duress may be ratified, as by a quitclaim,² or by acquiescence for an unreasonable time after an opportunity to avoid the contract,³ or by suing in tort to recover damages for the false imprisonment under which the deed was executed.⁴ An executory promise made under duress may be ratified after the duress has ceased to operate,⁵ as by express agreement to perform the contract⁶ or by voluntary performance,⁷ or by acquiescence therein.⁸ To constitute ratification the acts done must be done by a party competent to contract. Ratification under duress, by making payments does not validate an instrument given under duress.⁹ Thus a part payment made while the duress still is operating does not amount to a ratification.¹⁰

¹ Carver v. United States, 111 U. S. 609; Gillespie v. Simpson, (Ark.); 18 S. W. 1050; Craig v. Ginn, 3 Penn. (Del.) 117; 53 L. R. A. 715; Ferrari v. Board of Health, 24 Fla. 390; 5 So. 1; Walker v. Larkin, 48 Atl. 192; 127 Ind. 100; 26 N. E. 684; Bodine v. Morgan, 37 N. J. Eq. 426.

² Miller v. Lumber Co., 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101.

³ Eberstein v. Willets, 134 Ill. 101; 24 N. E. 967; Schee v. McQuilken, 59 Ind. 269.

⁴ Carter v. Couch, 84 Fed. 735; 28 C. C. A. 520.

⁵ Oregon Pacific Ry. Co. v. Forrest, 128 N. Y. 83; 28 N. E. 137; Belote v. Henderson, 5 Cold. (Tenn.) 471; 98 Am. Dec. 432.

⁶ Gillespie v. Simpson, (Ark.); 18 S. W. 1050.

⁷ Teem v. Ellijay, 89 Ga. 154; 15 S. E. 33; Sanford v. Sornborger, 26 Neb. 295; 41 N. W. 1102; s. c., 34 Neb. 498; 52 N. W. 368.

⁸ Lyon v. Waldo, 36 Mich. 345.

⁹ Bentley v. Robson, 117 Mich. 691; 76 N. W. 146.

¹⁰ Rau v. Von Zedlitz, 132 Mass. 164.

CHAPTER XIV.

CONSIDERATION.

I. HISTORY OF CONSIDERATION.

§270. History of the doctrine of consideration.

The doctrine of consideration is in its present form and extent a late arrival in the law administered in England by the King's Courts. The reason for this, like so much history of English Law, is to be found in the forms of action by which relief had to be sought in the King's Courts.

The action of debt was always based upon a claim for something of value received by the defendant from the plaintiff, for which the plaintiff sought compensation.¹ Consideration was therefore necessarily present in every such action, as the foundation and basis thereof. Its inevitable appearance prevented discussion of its nature and necessity.

When the action of covenant finally took definite form² consideration was unnecessary and immaterial, because the courts enforced the contract under seal as a formal contract.³

With the development of the action of assumpsit, the doctrine of consideration became of the highest practical importance. If the courts were to enforce promises not under seal, and not based on antecedent debts, the question was what promises should be enforced? Should actions for non-performance of

¹ "Both parties being present in court, the plaintiff may found his demand on a variety of causes. His debt may arise either upon a lending, or a letting out, or a deposit, or from some other just cause inducing a debt." Glanville Book X., Ch. III. ("*Ex causa mutui, aut ex causa venditionis, aut ex commodato, aut ex locato, aut ex deposito, aut ex alia justa deliendi causa.*")

² "Perhaps we may doubt whether in the thirteenth century a purely gratuitous promise, though made in a sealed instrument, would have been enforced if its gratuitous character had stood openly revealed." Pollock and Maitland History of English Law, Vol. II., 213, 214 (second edition).

³ See § 561.

all promises, even gratuitous ones, be maintained? If some promises were to be selected as enforceable, which were they? These questions were complicated by the form of action necessary in case of breach of executory simple contracts. We have already seen that this form of action was trespass on the case,⁴ and that it was long before assumpsit was differentiated from trespass on the case.⁵ Now as long as assumpsit was, by reason of the form of action used, confused with tort—a confusion most natural since trespass on the case was originally an action *ex delicto*⁶ it was difficult to state, in abstract general language, why consideration should be necessary in trespass on the case when brought on a promise, while it was not necessary in trespass on the case when brought on a tort.⁷ Still the practice of the courts was more in conformity to the views of Modern Law than their theories. In the leading case in which it was held that an executory simple contract was enforceable, irrespective of partial performance,⁸ it seems to have been felt that the declaration would be defective charging defendant with breach of contract to build a mill, if it did not declare clearly what the promisee was to give for doing it.⁹ In the same reign we find consideration under the name of *quid pro quo*, assumed to be essential to an enforceable simple contract.¹⁰ It is, however, hard to build up an affirmative proposition from negative precedents. Was a consideration essential to every simple executory contract, or were there some types of such contract enforceable without consideration? The question remained open so long that Blackstone could say¹¹ and Lord Mansfield could

⁴ See §§ 8, 9.

⁵ See § 9.

⁶ See § 9.

⁷ Holmes's Common Law, 284, 285.

⁸ Y. B. 3 Hen. VI., 36 pl. 33.

See § 8.

⁹ "*Quant il duist av pur le fessance.*" Y. B. 3 Hen. VI., 36 pl. 33.

¹⁰ Y. B. 37 Hen. VI., 8 pl. 18.

¹¹ "And as this rule (requiring consideration) was principally established to avoid the inconvenience that would arise from setting up

mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument and every note from the subscription of the drawer, carries

hold in *obiter*,¹² that the rule requiring consideration applied to "mere verbal promises." It was soon decided, however, that consideration was necessary in all executory simple contracts whether oral or written,¹³ a decision which has been followed so often as to have become an elementary proposition.¹⁴ It is interesting, however, to note the narrow escape of this doctrine in the middle of the eighteenth century, and to observe that the courts long felt it necessary to emphasize the need of consideration in unsealed written contracts,¹⁵ or on the other hand, they excepted mercantile paper from the general rule requiring consideration.¹⁶

II. GENERAL THEORY OF CONSIDERATION.

§271. Consideration and subject-matter.

Every contract must have consideration and subject-matter.¹ This oft-repeated proposition is elementary; but often as it has been used, little distinction has been made between subject-matter and consideration. Some authorities regard subject-matter as including everything bargained for on both sides; but it is more common to say or to assume that the subject-matter must exist on one side, and the consideration on the other. Where this view is entertained, there can be logically no distinction between the subject-matter and the consideration, for the right acquired by one may be regarded as either subject-matter or consideration, as we please, leaving the right acquired on the other side to be classed under the alternative. This is best illustrated where the contract consists of reciprocal

with it an internal evidence of a good consideration." Bl. Com. II., 445, 446.

¹² Pillans v. Van Mierop, 3 Burr. 1663 (decided A. D. 1765).

¹³ Rann v. Hughes, 7 T. R. 350 (overruling Mansfield's dicta in Pillans v. Van Mierop, *supra*.)

¹⁴ See § 273.

¹⁵ Crawford's Appeal, 61 Pa. St. 52; 100 Am. Dec. 609.

¹⁶ Whitehill v. Wilson, 3 Pen. & W. (Pa.) 405; 24 Am. Dec. 326.

The rule protecting *bona fide* holders of commercial paper from defenses based on want of consideration was probably responsible for such dicta.

See § 1295.

¹ See § 273 and § 325.

promises, where it is a matter of arbitrary choice which we class as consideration and which as subject-matter. When a contract reaches litigation there is always a promise made by one party which the other party claims is valid and unperformed in whole or in part. If the question of a want of consideration is raised, the claim of the promisor is that no consideration exists for his promise. Whatever difficulty, therefore, may exist at the outset in determining which the consideration is, there is generally no difficulty in determining what constitutes the alleged consideration in a contract in litigation as, if any exists, it is the thing of value given in return for the promise which it is sought to enforce.

It is customary in treating the subject to discuss question of the existence and reality of the right or forbearance in question under the head of consideration; while questions of legality, impossibility and the like are classed under subject-matter. To avoid a reduplication of topics, and to avoid departing unnecessarily from the customary arrangement of contract law, this order will be followed substantially; observing, however, that except for mere convenience, there seems no reason why subject-matter and consideration should not be treated together as one topic.

§272. Good and valuable considerations.

Considerations are of two kinds, good and valuable. A good consideration consists of natural love and affection, which in law is equivalent to ties of blood or marriage, as between husband and wife,¹ or between one and his lineal descendants as children,² or grandchildren,³ but not

¹ *Brown v. Brown*, 44 S. Car. 378; 22 S. E. 412.

² *Oliphant v. Liversidge*, 142 Ill. 160; 30 N. E. 334; *Hutsell v. Crewse*, 138 Mo. 1; 39 S. W. 449; *Carney v. Carney*, 196 Pa. St. 34; 46 Atl. 264; *Ferguson's Appeal*, 117 Pa. St. 426; 11 Atl. 885 (including step-children); *Schneitter v. Carman*, 98 Ia. 276; 67 N. W. 249

(and including the spouses of such children); *Bell v. Scammon*, 15 N. H. 381; 41 Am. Dec. 706. A conveyance by a child to a parent may be based on love and affection and past support. *Carney v. Carney*, 196 Pa. St. 34; 46 Atl. 264.

³ *Hanson v. Buckner*, 4 Dana (Ky.) 251; 29 Am. Dec. 401. *Contra*, *Borum v. King*, 37 Ala. 606.

including collateral relationship by consanguinity⁴ or affinity.⁵

A good consideration is sufficient in equity to support an executed conveyance,⁶ but is not sufficient in law or equity to support an executory promise. For most practical purposes it has no place in the law of contract.⁷

But in equity it is recognized to a very limited extent. Thus where a father gave notes under seal in escrow to each of his daughters, and by inadvertence omitted the seal from one, it was held that equity would recognize the note as on consideration so as to reform it by adding the seal and enforcing the note against his estate.⁸ Where an administratrix gave her own mortgage to her father for a debt of her deceased husband's in consideration of certain assets of his in her hands, it was held that in the particular case the assets were too small to afford any substantial consideration; but that the mortgage would be upheld in equity as an executed conveyance, and on consideration of blood.⁹

If the contract is on a valuable consideration, the fact that affection is an additional consideration will not invalidate the contract.¹⁰ As a general rule, however, it may be said that the valuable consideration hereafter defined¹¹ is the only consideration known to the law of contract.

⁴ *Buford v. McKee*, 1 Dana (Ky.) 107; conveyances to a niece, *Studybaker v. Cofield*, 159 Mo. 596; 61 S. W. 246; or to a nephew, *Coombe v. Carthew*, 59 N. J. Eq. 638; 43 Atl. 1057, have been upheld; though in the last cases there were apparently other considerations than mere love and affection.

⁵ *Cotton v. Graham*, 84 Ky. 672; 2 S. W. 647.

⁶ *Oliphant v. Liversidge*, 142 Ill. 160; 30 N. E. 334; *Nicholas v. Shiplett*, (Ky.); 43 S. W. 248.

⁷ *Peek v. Peek*, 77 Cal. 106; 11 Am. St. Rep. 244; 1 L. R. A. 185; 19 Pac. 227; *Geer v. Goudy*, 174 Ill. 514; 51 N. E. 623; *Conrad v. Manning*, 125 Mich. 77; 83 N. W. 1038;

Kennedy v. Ware, 1 Pa. St. 445; 44 Am. Dec. 145; *Wilbur v. Wilbur*, 17 R. I. 295; 21 Atl. 497; *Priester v. Priester*, Rich. Eq. Cas. (S. Car.) 26; 23 Am. Dec. 191; *Shugart v. Shugart*, — Tenn. —; 76 S. W. 821; *Keffer v. Grayson*, 76 Va. 517; 44 Am. Rep. 171; *Pennypacker v. Maupin*, 96 Va. 461; 31 S. E. 607.

⁸ *Conover v. Brown*, 49 N. J. Eq. 156; 23 Atl. 507.

⁹ *Ray v. Hallenbeck*, 42 Fed. 381.

¹⁰ *Puterbaugh v. Puterbaugh*, 131 Ind. 288; 15 L. R. A. 341; 30 N. E. 519; *Brown v. Whaley*, 58 O. S. 604; 65 Am. St. Rep. 793; 49 N. E. 479.

¹¹ See § 274.

§273. Effect of lack of valuable consideration.

A simple executory promise not supported by a valuable consideration is void as between the parties thereto¹ and as to third

- ¹ *Patton v. Wells*, 121 Fed. 337; *Arnold v. Scharbauer*, 116 Fed. 492; *Mobile, etc., Co. v. Owen*, 121 Ala. 505; 25 So. 612; *Maness v. Henry*, 96 Ala. 454; 11 So. 410; *Johnson v. Washburn*, 98 Ala. 258; 13 So. 48; *Peek v. Peek*, 77 Cal. 106; 11 Am. St. Rep. 244; 1 L. R. A. 185; 19 Pac. 227; *Currier v. Clark*, 15 Colo. App. 6; 60 Pac. 958; *Howe v. Raymond*, 74 Conn. 68; 49 Atl. 854; *Bramblet v. Lumsden*, 80 Ga. 707; 6 S. E. 470; *Fowler v. Coker*, 107 Ga. 817; 33 S. E. 661; *Russell v. Smith*, 97 Ga. 287; 23 S. E. 5; *Gross v. Steinle*, 9 Mackey (D. C.) 339; *Gaffield v. Scott*, 33 Ill. App. 317; *Nelson v. Pickwick Associated Co.*, 30 Ill. App. 333; *First National Bank v. Henry*, 156 Ind. 1; 58 N. E. 1057; *Mader v. Coal*, 14 Ind. App. 299; 56 Am. St. Rep. 304; 42 N. E. 945; *East Omaha Land Co. v. Hansen*, 117 Ia. 96; 90 N. W. 705; *First National Bank v. Felt*, 100 Ia. 680; 69 N. W. 1057; *Smith v. Knight*, 88 Ia. 257; 55 N. W. 189; *Mills County Bank v. Perry*, 72 Ia. 15; 2 Am. St. Rep. 228; 38 N. W. 341; *Litz v. Goosling*, 93 Ky. 185; 21 L. R. A. 127; 19 S. W. 527; *Howe v. Klein*, 89 Me. 376; 36 Atl. 620; *Coleman v. Applegarth*, 68 Md. 21; 11 Atl. 284; *Houghton v. Granite Co.*, 171 Mass. 354; 50 N. E. 646; *Hendrick v. Ry.*, 170 Mass. 44; 48 N. E. 835; *Dickinson v. Hall*, 14 Pick. (Mass.) 217; 25 Am. Dec. 390; *Damon v. De Bar*, 83 Mich. 262; 47 N. W. 216; *Stewart v. Jerome*, 71 Mich. 201; 15 Am. St. Rep. 252; 38 N. W. 895; *Harris v. Creveling*, 80 Mich. 249; 45 N. W. 85; *Bardwell v. Witt*, 42 Minn. 468; 44 N. W. 983; *Kelly v. Thuey*, 143 Mo. 422; 45 S. W. 300; *Hicks v. Hamilton*, 144 Mo. 495; 66 Am. St. Rep. 431; 46 S. W. 432; *Portsmouth Brewing Co. v. Mudge*, 68 N. H. 462; 44 Atl. 600; *Tulane v. Clifton*, 47 N. J. E. 351; 20 Atl. 1086; affirmed, 48 N. J. E. 310; 24 Atl. 131; *Drake v. Lanning*, 49 N. J. Eq. 452; 24 Atl. 378; *Hollins v. Hubbard*, 165 N. Y. 534; 59 N. E. 317; *Arend v. Smith*, 151 N. Y. 502; 45 N. E. 872; *Olmstead v. Latimer*, 158 N. Y. 313; 43 L. R. A. 685; 53 N. E. 5; *Gardner v. Ry.*, 127 N. C. 293; 37 S. E. 328; *Sugg v. Farrar*, 107 N. Car. 123; 12 S. E. 236; *Peckham v. Van Bergen*, 10 N. D. 43; 84 N. W. 566; *Dodson v. Dodson*, 26 Or. 349; 37 Pac. 542; *Lennig's Estate*, 182 Pa. St. 485; 61 Am. St. Rep. 725; 38 L. R. A. 378; 38 Atl. 466; *Cleaver v. Lenhart*, 182 Pa. St. 285; 37 Atl. 811; *Martin's Estate*, 131 Pa. St. 638; 18 Atl. 987; *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609; *Gourdin v. Trenholm*, 25 S. Car. 362; *Bradford v. Foster*, 87 Tenn. 4; 9 S. W. 195; *Walker v. Bamberger*, 17 Utah, 239; 54 Pac. 108; *Washington Mill Co. v. Lumber Co.*, 19 Wash. 165; 52 Pac. 1067; *Weaver v. Burr*, 31 W. Va. 736; 3 L. R. A. 94; 8 S. E. 743; *Templeton v. Butler*, 117 Wis. 455; 94 N. W. 306. "Price is as essential as any other of the terms of a contract and without this agreed upon no contract exists." *State v. Associated Press*, 159 Mo. 410; 81 Am. St. Rep. 368; 51 L. R. A. 151; 60 S. W. 91.

persons apart from questions of negotiability² and estoppel.³

This proposition is so thoroughly settled in most jurisdictions that it has become an elementary principle rarely presented to the courts except when the absence of consideration is in some way disguised.⁴ Thus a promise to extend the time of payment of a debt due is unenforceable if made without consideration.⁵ So a promise to extend the time of an option is unenforceable.⁶ So a promise to release salary already due,⁷ a promise by an embezzling treasurer to repay in addition to his own shortage that made by his predecessor,⁸ a promise to make a testamentary disposition of property,⁹ a promise by A to divide certain property with his father,¹⁰ a promise to release one from a contract,¹¹ a promise to lend money,¹² a promise not to sue,¹³ a promise to assign a mortgage,¹⁴ a promise to waive a lien,¹⁵ a promise to pay premiums on a life insurance policy payable to another,¹⁶ a promise to deal with a certain firm exclusively,¹⁷ a promise to pay an annuity,¹⁸ a promise to pay

² See § 1294.

³ See § 1269.

⁴ See § 301 et seq.

⁵ *Peachy v. Witter*, 131 Cal. 316; 63 Pac. 468; *Tatum v. Morgan*, 108 Ga. 336; 33 S. E. 940; *Conklin v. Lorimer*, 10 Kan. App. 550; 63 Pac. 23; *Ott v. Anderson*, 9 Kan. App. 320; 61 Pac. 330; *Burton v. Kipp*, — Mont. —; 76 Pac. 563. Thus a promise for an extension of time, "subject to the same terms and conditions, including tax insurance and interest clauses as at present," is void. *Olmstead v. Latimer*, 158 N. Y. 313; 43 L. R. A. 685; 53 N. E. 5; compare, *Angel v. Miller*, 16 Tex. Civ. App. 679; 39 S. W. 1092; *Buffington v. Bronson*, 61 O. S. 231; 56 N. E. 762.

⁶ *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417; 11 Atl. 284.

⁷ *Mobile etc., Co. v. Owen*, 121 Ala. 505; 25 So. 612.

⁸ *Portsmouth Brewing Co. v. Mudge*, 68 N. H. 462; 44 Atl. 600.

⁹ *Caylor v. Caylor*, 22 Ind. App. 666; 72 Am. St. Rep. 331; 52 N. E. 465; *Drake v. Lanning*, 49 N. J. Eq. 452; 24 Atl. 378.

¹⁰ *Dodson v. Dodson*, 26 Or. 349; 37 Pac. 542.

¹¹ *Oullahan v. Baldwin*, 100 Cal. 648; 35 Pac. 310; *Templeton v. Butler*, 117 Wis. 455; 94 N. W. 306.

¹² *Gutheil v. Schmidt*, 8 Colo. App. 71; 44 Pac. 853; *Rice v. Rice*, 46 La. Ann. 711; 15 So. 538.

¹³ *Grunwald v. Freese*, (Cal.); 34 Pac. 73.

¹⁴ *Isham v. Therasson*, 53 N. J. Eq. 10; 30 Atl. 969 (where no promise to pay therefor has been made.)

¹⁵ *Sugg v. Farrar*, 107 N. Car. 123; 12 S. E. 236.

¹⁶ *Kessler v. Kuhn*, 1 Ind. App. 511; 27 N. E. 980.

¹⁷ *Chapin v. Brown*, 83 Ia. 156; 32 Am. St. Rep. 297; 12 L. R. A. 428; 48 N. W. 1074.

¹⁸ *Tulane v. Clifton*, 47 N. J. Eq.

commissions without service in return,¹⁹ a promise to give to another a share of profits in an enterprise to which such other contributes nothing,²⁰ or to cancel notes,²¹ or to surrender a bill of lading,²² are none of them enforceable where nothing was given or promised in return. The practical experience of a new stockholder is no consideration for the corporation's pledging its property to secure his note given for the stock.²³ So in a renewal of a contract, void for want of consideration, the original contract is no consideration for the new one.²⁴ Such a contract cannot be made valid by ratification unless a valuable consideration for such ratification exists.²⁵ Consideration does not seem to be necessary at the Civil Law.²⁶ Thus the existence of A's debt to B is a consideration for C's promise to pay it.²⁷

§274. Nature of valuable consideration.

A valuable consideration is some legal right acquired by the promisor in consideration of his promise, or foreborne by the promisee in consideration of such promise.¹ A common form of stating the same principle is that a valuable considera-

351; 20 Atl. 1086; affirmed, 48 N. J. Eq. 310; 24 Atl. 131.

¹⁹ Myers v. Dean, 132 N. Y. 65; 30 N. E. 259. (A promise to pay a broker for securing a lease which could only be obtained at public auction.)

²⁰ Traves v. Johns, 11 Colo. App. 219; 52 Pac. 1113; citing, Mitchell v. O'Neal, 4 Nev. 504.

²¹ Templeton v. Butler, 117 Wis. 455; 94 N. W. 306.

²² Hollins v. Hubbard, 165 N. Y. 534; 59 N. E. 317.

²³ Washington Mill Co. v. Lumber Co., 19 Wash. 165; 52 Pac. 1067.

²⁴ Heimann v. Hainz, 65 Ill. App. 316.

²⁵ Beland v. Brewing Association, 157 Mo. 593; 58 S. W. 1.

²⁶ Mouton v. Noble, 1 La. Ann. 192.

²⁷ New Orleans, etc., Ry. v. Chapman, 8 La. Ann. 97.

¹ Mascolo v. Montesanto, 61 Conn. 50; 29 Am. St. Rep. 170; 23 Atl. 714; Riegel v. Ormsby, 111 Ia. 10; 82 N. W. 432; Cooper v. Hayward, 71 Minn. 374; 70 Am. St. Rep. 330; 74 N. W. 152; Brownlow v. Wollard, 66 Mo. App. 636; Faulkner v. Gilbert, 57 Neb. 544; 77 N. W. 1072; Morse v. Bellows, 7 N. H. 549; 28 Am. Dec. 372; Corle v. Monkhouse, 50 N. J. Eq. 537; 25 Atl. 157; Dallymple v. Wyker, 60 O. S. 108; 53 N. E. 713; Rector v. Wood, 24 Or. 396; 41 Am. St. Rep. 860; 34 Pac. 18.

tion for a promise may consist of a benefit to the promisor,² or a detriment to the promisee.³

The use of "benefit" and "detriment" in this connection needs explanation. While correct if properly understood, it is liable to misconstruction. "Benefit" does not refer to any pecuniary gain arising out of the transaction, nor "detriment" to any pecuniary loss.⁴ It is not possible to wait till the transaction is concluded and the books balanced, to see whether a consideration existed originally. "Benefit" as used in this rule means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled; "detriment" means that the promisee has, in return for the promise forborne some legal right which he would otherwise have been entitled to exercise. The question of the ultimate financial loss or gain is foreign to the doctrine of consideration, if the parties each have received what they have agreed upon. This proposition, though found in what

² Robinson v. Hyer, 35 Fla. 544; 17 So. 745; Sanders v. Carter, 91 Ga. 450; 17 S. E. 345; Terre Haute, etc., R. Co. v. R. Co., 81 Ill. App. 435; Joseph v. Smith, 39 Neb. 259; 42 Am. St. Rep. 571; 57 N. W. 1012; Tulane v. Clifton, 47 N. J. Eq. 351; 20 Atl. 1086; affirmed, 47 N. J. Eq. 310; 24 Atl. 131; Carle v. Monkhouse, 50 N. J. Eq. 537; 25 Atl. 157; Texas, etc., Co. v. Fire Co., 54 Tex. 319; 38 Am. Rep. 627.

³ Rucker v. Bolles, 80 Fed. 504; Holt v. Robinson, 21 Ala. 106; 56 Am. Dec. 240; Mascolo v. Montesanto, 61 Conn. 50; 29 Am. St. Rep. 170; 23 Atl. 714; Riegel v. Ormsby, 111 Ia. 10; 82 N. W. 432; Hilton v. Southwick, 17 Me. 303; 35 Am. Dec. 253; Chick v. Trevett, 20 Me. 462; 37 Am. Dec. 68; Fisher v. Bartlett, 8 Greenl. (Me.) 122; 22 Am. Dec. 225; Doyle v. Dixon, 97 Mass. 208; 93 Am. Dec. 80; Adams v. Wilson, 12 Met. (Mass.) 138; 45 Am. Dec. 240; Faulkner v. Gilbert, 57 Neb.

544; 77 N. W. 1072; Wells v. Mann, 45 N. Y. 327; 6 Am. Rep. 93; Bank v. Bridgers, 98 N. Car. 67; 2 Am. St. Rep. 317; 3 S. E. 826; Brown v. Ray, 10 Ired. Law (N. Car.) 72; 51 Am. Dec. 379; Reddick v. Jones, 6 Ired. Law (N. Car.) 107; 44 Am. Dec. 68; Dalrymple v. Wyker, 60 O. S. 108; 53 N. E. 713; Wright v. Snell, 22 Ohio C. C. 86; 12 Ohio C. D. 308; Bunneman v. Wagner, 16 Or. 433; 8 Am. St. Rep. 306; 18 Pac. 841; Rector v. Wood, 24 Or. 396; 41 Am. St. Rep. 860; 34 Pac. 18; Davis v. Steiner, 14 Pa. St. 275; 53 Am. Dec. 547; Hind v. Holdship, 2 Watts (Pa.) 104; 26 Am. Dec. 107.

⁴ "If the venture subsequently proved disastrous, the purchasers, though they failed to realize their expectations, cannot escape, on that ground, the payment of the purchase money which they bound themselves to pay." Holland v. Lee, 71 Md. 338; 18 Atl. 661.

are necessarily obiter,⁵ cannot from its very breadth be illustrated by adjudicated cases except in fragments.⁶ Thus services rendered under contract to compensate for getting a majority of the property owners fronting on a street to sign a petition for paving the street, are a consideration, even though the petition prepared by the employer is so defective as to be ineffective.⁷ So a promise to lend money on certain storage receipts up to a certain amount is a consideration even though the promisee did not need the money and did not borrow it.⁸ So a sale of personalty which proves to be worthless is a consideration if there is no fraud, mistake, breach of warranty and the like.⁹ So a conveyance of property encumbered by liens which exceed the price ultimately brought for such property on a resale is a valuable consideration.¹⁰ Two groups of topics, remote from consideration as an element of the formation of a contract, are often confused with it. One group consists of facts such as fraud, misrepresentation or mistake, by which the contract in question is rendered either void or voidable. In case of this sort the acquisition or forbearance of a legal right is immaterial. Under the circumstances already discussed¹¹ one of these facts will prevent the formation of a valid contract though a valuable consideration may be present. The other group consists of topics to be treated subsequently under the head of discharge.¹² If the right acquired by one party is the executory promise of the other, this forms a valuable consideration.¹³ The failure of the promisor to do what he agreed to do cannot retroact and make the contract a nullity from the beginning. It has, therefore, nothing to do with the formation of the contract. The fact that it is termed "failure of consideration," and that in some cases it may discharge to the party not

⁵ *Bigelow v. Bigelow*, 95 Me. 17; 49 Atl. 49; *Bigelow v. Burton*, 64 Vt. 387; 16 L. R. A. 664; 24 Atl. 769.

⁶ See § 282 et seq.

⁷ *Cory v. Newton*, 9 Colo. App. 181; 48 Pac. 156.

⁸ *National Deposit Bank v. Bank*, (Ky.); 62 S. W. 725.

⁹ *Hogan v. Brown*, 112 Ga. 662; 37 S. E. 880.

¹⁰ See § 282.

¹¹ See ch. iv. to ch. xi.

¹² See § 1470 et seq.

¹³ See § 296.

in default from the obligation of the contract, tends to a confusion of this topic with that of consideration proper.

§275. Consideration and motive.

While consideration is the legal motive for a promise, a motive for a promise may exist and yet not amount to a consideration.¹ Thus a desire to protect a husband's reputation,² or to support an illegitimate child,³ or a desire to equalize distribution of maker's estate⁴ are not considerations. Indeed, if a motive alone were equivalent to a consideration, every promise made free from fraud, duress and the like would necessarily be enforceable without any consideration.

§276. To whom or from whom consideration must move.

Stating the rule given in the preceding section in the form that consideration must be a "benefit" to the promisor, or a "detriment" to the promisee, we observe that in most cases the same thing that is the "benefit" to the promisor is also a "detriment" to the promisee, the former acquiring what the latter parts with.¹ This, however, is not necessary. It is sufficient if there is a benefit to the promisor, without any "detriment" to the promisee, as where a third person gives something of value to the promisor in return for his promise to the promisee.² Payment by a third person not already bound

¹ *Thompson v. Hudgins*, 116 Ala. 93; 22 So. 632; *Peek v. Peek*, 77 Cal. 106; 11 Am. St. Rep. 244; 1 L. R. A. 185; 19 Pac. 227; *Cook v. Bradley*, 7 Conn. 57; 18 Am. Dec. 79; *Vehon v. Vehon*, 70 Ill. App. 40; *Holloway v. Rudy* (Ky.); 60 S. W. 650; *sub nomine Trimble v. Rudy*, 53 L. R. A. 353; *Warren v. Whitney*, 24 Me. 561; 41 Am. Dec. 406; *Dutera v. Babylon*, 83 Md. 536; 35 Atl. 64; *Hale v. Rice*, 124 Mass. 292; *Martin's Estate*, 131 Pa. St. 638; 18 Atl. 987; *Cobb v. Cowdery*, 40 Vt. 25; 94 Am. Dec. 370; *Valentine v. Bell*, 66 Vt. 280; 29 Atl. 251.

See § 272.

² *Mawhinney v. Cassio*, 63 N. J. L. 412; 43 Atl. 676.

³ *Mercer v. Mercer*, 87 Ky. 30; 7 S. W. 401. (The legal duty not being affected or discharged by the promise.)

⁴ *Parish v. Stone*, 14 Pick. (Mass.) 198; 25 Am. Dec. 378; *Conrad v. Manning*, 125 Mich. 77; 83 N. W. 1038.

¹ See § 282 et seq.

² *Thompson v. Dearborn*, 107 Ill. 87; *Carnahan v. Tousey*, 93 Ind. 561; *Williamson v. Yager*, 91 Ky. 282; 34 Am. St. Rep. 184; 15 S. W.

is a valuable consideration.³ Thus a check of a third person is a consideration for a promise to stay execution.⁴ So payment of part of a debt by a third person is a consideration for a release of the entire debt.⁵ Thus payment out of a relief fund is consideration for release of a right of action against a railroad.⁶ So if A is indebted to B, and A, B and C agree that A shall pay such amount to C and shall be discharged from liability to B, there is a consideration for A's promise in the discharge of his debt to B. It is not necessary that there should be any consideration between B and C nor any moving from C to A.⁷ It is equally sufficient if there is a "detriment" to the promisee without any "benefit" to the promisor.⁸ Thus a discharge of a debt due from a third person to the promisee,⁹ or a claim in tort,¹⁰ or forbearance to sue for a certain time on a debt due from a third person,¹¹ a waiver of a right to rescind a contract with a third person on account

660; *Cooper v. Hayward*, 71 Minn. 374; 70 Am. St. Rep. 330; 74 N. W. 152; *Litchfield v. Flint*, 104 N. Y. 543; *Poe v. Dixon*, 60 O. S. 124; 71 Am. St. Rep. 713; 54 N. E. 86; *Wood v. Moriarty*, 15 R. I. 518; 9 Atl. 427; *Grant v. Lock Co.*, 77 Wis. 72; 45 N. W. 951.

³ *Farmer v. Sellers*, 137 Ala. 112; 33 So. 829.

⁴ *Standard Oil Co. v. Drug Co.*, 1 Neb. Rep. Unofficial 443; 95 N. W. 667.

⁵ *Marshall v. Bullard*, 114 Ia. 462; 54 L. R. A. 862; 87 N. W. 427.

⁶ *Eckman v. R. R.*, 169 Ill. 312; 38 L. R. A. 750; 48 N. E. 496.

⁷ *Tweeddale v. Tweeddale*, 116 Wis. 517; 96 Am. St. Rep. 1003; 61 L. R. A. 509; 93 N. W. 440.

⁸ *Rucker v. Bolles*, 80 Fed. 504; 25 C. C. A. 600; *Sanders v. Carter*, 91 Ga. 450; 17 S. E. 345; *Harris v. Harris*, 180 Ill. 157; 54 N. E. 180; affirming 80 Ill. App. 310; 79 Ill. App. 288; *Crawford v. Shaw*, 18 Ind. 495; *Pratt v. Fishwild*, — Ia.

—; 96 N. W. 1089; *Allen v. Pryor*, 3 A. K. Mar. (Ky.) 305; *Osborne v. Gullikson*, 64 Minn. 218; 66 N. W. 965; *Houck v. Frisbee*, 66 Mo. App. 16; *Henry v. Dussell*, — Neb. —; 99 N. W. 484; *Faulkner v. Gilbert*, 57 Neb. 544; 77 N. W. 1072; *Beakes v. Da Cunha*, 126 N. Y. 293; 27 N. E. 251; *Bank v. Bridgers*, 98 N. C. 67; 2 Am. St. Rep. 317; 3 S. E. 826; *Dalrymple v. Wyker*, 60 O. S. 108; 53 N. E. 713; *Manary v. Runyon*, 43 Or. 495; 73 Pac. 1028; *Barrett v. Mahnken*, 6 Wyom. 541; 71 Am. St. Rep. 953; 48 Pac. 202.

⁹ *Harris v. Haris*, 180 Ill. 157; 54 N. E. 180; affirming 80 Ill. App. 310; same case, 79 Ill. App. 288; *Wright v. McKittrick*, 2 Kan. App. 508; 43 Pac. 977; *Union, etc., Bank v. Jefferson*, 101 Wis. 452; 77 N. W. 889.

¹⁰ *Barrett v. Mahnken*, 6 Wyom. 541; 71 Am. St. Rep. 953; 48 Pac. 202.

¹¹ *McMicken v. Safford*, 100 Ill. App. 102; 64 N. E. 540; *Webb v.*

of fraud,¹² conveyance of realty to a third person,¹³ a release of an estate expectant in curtesy to a third person, the grantee of the wife,¹⁴ a purchase of realty, in reliance on a tenant's promise to surrender,¹⁵ a sale of business by a tenant and surrender to the purchaser,¹⁶ or conveying personalty to a third person,¹⁷ as a direction by the owner of a house to a subcontractor to furnish material and labor for extras makes the owner liable for the same when furnished,¹⁸ an agreement by the promisee to give something of value to a third person,¹⁹ advancing money to a third person in reliance upon the promisor's contract,²⁰ as by way of loan,²¹ or giving a receipt which cost the promisee nothing but enabled the promisor to settle accounts with a third person,²² are all valuable considerations for a promise by one who does not receive the benefits of the right foreborne by the promisee.

Stone Co., 58 Ill. App. 222; Fulton v. Loughlin, 118 Ind. 286; 20 N. E. 796; Howard v. Lawrence, (Ky.); 63 S. W. 589; Cooper v. Jackson (Ky.); 57 S. W. 254; Osborne v. Doherty, 38 Minn. 430; 38 N. W. 111; Fowler v. Allen, 32 S. C. 229; 7 L. R. A. 745; 10 S. E. 947.

¹² Waters v. White, 75 Conn. 88; 52 Atl. 401.

¹³ Johnson v. Rodeger, 119 N. C. 446; 25 S. E. 1021.

¹⁴ Demarest v. Terhune, 62 N. J. Eq. 663; 50 Atl. 664; (consideration for a note given by the wife).

¹⁵ Moore v. Davis, 49 N. H. 45; 6 Am. Rep. 460.

¹⁶ Donahoe v. Rich, 2 Ind. App. 540; 28 N. E. 1001.

¹⁷ Lipsmeier v. Vehslage, 29 Fed. 175; Akers v. Phillips, (Ky.); 58 S. W. 790.

¹⁸ Foley v. Hotel Association, 102 Ia. 272; 71 N. W. 236.

¹⁹ Violet v. Patton, 5 Cranch (U. S.) 142; Chicago, etc., Ry. Co. v. Ry. Co., 47 Fed. 15; Westphal v. Nevills, 92 Cal. 545; 28 Pac. 678; Wickham v. Loan Association, 80

Ill. App. 523; Shaffer v. Ryan, 84 Ind. 140; Marr v. Ry., — Ia. —; 96 N. W. 716; Holland v. Lee, 71 Md. 338; 18 Atl. 661; Heyman v. Dooley, 77 Md. 162; 20 L. R. A. 257; 26 Atl. 117; Osborne v. Gullikson, 64 Minn. 218; 66 N. W. 965; Lewis v. Owen, 26 Neb. 156; 42 N. W. 285; Freed v. Richey, 115 Pa. St. 361; 8 Atl. 626. In some of these cases the payee of the obligation is a corporation in which promisor holds stock. Chicago, etc., Ry. Co. v. Ry. Co., 47 Fed. 15; Holland v. Lee, 71 Md. 338; 18 Atl. 661.

²⁰ Elmer v. Loper, 66 N. J. L. 50; 48 Atl. 550; see § 288.

²¹ Lackey v. Boruff, 152 Ind. 371; 53 N. E. 412; Fassnacht v. Gagen Co., 18 Ind. App. 80; 63 Am. St. Rep. 322; 46 N. E. 45; 47 N. E. 480; Clare County Savings Bank v. Goodman, 119 Mich. 338; 78 N. W. 135; Mahoney v. Barber, 67 Minn. 308; 69 N. W. 886.

²² Sanders v. Carter, 91 Ga. 450; 17 S. E. 345.

So extension of credit by A to B is consideration for C's promise to A to guarantee B's debt.²³ Thus permission to a national bank by the comptroller to resume business and a restoration of the directors of the bank to their lawful relations with it is consideration for a contract by which a third person furnished collateral to secure excessive loans made by a bank to a director.²⁴ So a promise by a grantee of realty to pay a debt of the grantor's to a third person finds sufficient consideration in the conveyance to such grantee.²⁵ So a promise by a remainder-man to pay a debt of the life tenant's is sufficient consideration for a promise by the life tenant to pay interest to the remainder-man.²⁶ The release by one creditor of a part of a debt is consideration for an agreement by another creditor of the same debtor to release a part of his debt.²⁷ So where A, a physician, entered into a contract with B and C, whereby A bought B's practice, and B and C both agreed not to compete with A, C's promise was supported by a sufficient consideration.²⁸

The doctrines discussed so far in this section are often modified by the doctrines of status. Thus where a married woman can contract only for her separate estate, a release of a claim by a third person against her husband for assault, is no consideration for her promise in some jurisdictions.²⁹ So promises by her, to pay her husband's debts are without consideration, even if a detriment to the promisee exists.³⁰ This question is also unfortunately complicated with the question of whether a promise made by A to B upon consideration

²³ *Reed v. Bank*, 23 Colo. 380; 48 Pac. 507; *Garland v. Gaines*, 73 Conn. 662; 84 Am. St. Rep. 182; 49 Atl. 19; *Cowles v. Peck*, 55 Conn. 251; 3 Am. St. Rep. 44; 10 Atl. 569; *Woodward v. Bixby*, 68 N. H. 219; 44 Atl. 298.

²⁴ *Tecumseh National Bank v. Chamberlain*, 63 Neb. 163; 57 L. R. A. 811; 88 N. W. 186.

²⁵ See §§ 282, 1314.

²⁶ *Roberts v. Lamberton*, 117 Wis. 635; 94 N. W. 650.

²⁷ *Pistel v. Ins. Co.*, 88 Md. 552; 43 L. R. A. 219; 42 Atl. 210; *White v. Kuntz*, 107 N. Y. 518; 1 Am. St. Rep. 886; 14 N. E. 423.

²⁸ *Ryan v. Hamilton*, 205 Ill. 191; 68 N. E. 781; reversing, 103 Ill. App. 212.

²⁹ *Mawhinney v. Cassio*, 63 N. J. L. 412; 43 Atl. 676.

³⁰ *Bishop v. Bourgeois*, 58 N. J. Eq. 417; 43 Atl. 655; *Perkins v. Elliott*, 23 N. J. Eq. 526.

moving from B to A, whereby A agrees to do something for C's benefit can be enforced by C.³¹ Some courts hold that C cannot sue on such contract.³² Unfortunately these courts have expressed this view in the form that a consideration moving to the promisor from a third person will not support the promise. This rule has been laid down by the English courts³³ and is followed in some of the United States.³⁴ Thus a contract by A with B, whereby A agreed to convey realty to a corporation X to place the stock in B's hands for sale, and to pay B a commission for effecting such sale, the proceeds of the sale to be placed to the credit of the corporation was held to be without consideration as to A.³⁵ So a contract by A to pay to B a certain sum if a suit against X was dismissed, was held to be without consideration.³⁶ The two questions are really distinct, and the confusion between them is most unfortunate. In the one case, the promisee sues, in the other, a third person not a party to the contract. Accordingly even in States that lay down the rule that a consideration moving from a third party to the promisor is insufficient, it is held that a promise by A to B on consideration that B will convey to A land belonging to C,³⁷ or that C will convey to A certain realty³⁸ are each on valuable consideration. Even in England this rule has proved so unmanageable as to necessitate at least two exceptions. (1) It has no application to accommodation paper, executed by parties who do not all receive the consideration.³⁹ (2) In compositions of creditors the promises of the creditors each to accept a less amount for his debt than that owing to him, are held to be a

³¹ See ch. lx.

³² See § 1306.

³³ *Thomas v. Thomas*, 2 Q. B. 851.

³⁴ *Marsten v. Bigelow*, 150 Mass. 45; 5 L. R. A. 43; 22 N. E. 71; *Styron v. Bell*, 8 Jones Law (N. Car.) 222.

³⁵ *Arnold v. Scharbauer*, 116 Fed. 492. (This decision can be better justified on the ground of mistake.)

³⁶ *Currier v. Clark*, 15 Colo. App. 6; 60 Pac. 958.

³⁷ *Trask v. Vinson*, 20 Pick. (Mass.) 115.

³⁸ *Stearns v. Foote*, 20 Pick. (Mass.) 432.

³⁹ *Scott v. Lifford*, 1 Camp. 246; *In re Overend*, L. R. 6 Eq. 344; *Sturtevant v. Ford*, 4 M. & G. 101; *Carruthers v. West*, 11 Q. B. 143.

consideration for each other, and the debtor is enabled to enforce this agreement.⁴⁰

§277. Consideration must be that contemplated by offer and acceptance.

In discussing all the types of consideration, it must be kept in mind that consideration is an essential element of a contract, and not something foreign to it and outside of it; that the consideration invoked to support the contract must be that contemplated by the offer and acceptance,¹ and that consideration does not dispense with offer and acceptance.

Accordingly if the offer is such as to require a communication of acceptance, and no such communication is made to the offerer, there is no contract, and the subsequent voluntary act or forbearance, even though exactly what was required by the offer, is not a consideration, as there is no contract in which it can be an element. Actual forbearance without any previous promise to forbear² is no consideration, since no obliga-

⁴⁰ *Good v. Cheesman*, 2 B & Ad. 328; (the leading case on this point); *Mallalieu v. Hodgson*, 16 Q. B. 689; *Pfeleger v. Brown*, 28 Beav. 391. (In this case, however, the debtor and the creditors were all parties to the contract.)

¹ *Harris v. Davis*, 44 Fed. 172; *Commercial Bank v. Redfield*, 122 Cal. 405; 55 Pac. 160; modified, 55 Pac. 772; *English v. Landon*, 181 Ill. 614; 54 N. E. 911; *Taylor v. Lehman*, 17 Ind. App. 585; 46 N. E. 84; rehearin denied, 47 N. E. 230; *Smith v. Bibber*, 82 Me. 34; 17 Am. St. Rep. 464; 19 Atl. 89; *French v. Bank*, 179 Mass. 404; 60 N. E. 793; *Hollins v. Hubbard*, 165 N. Y. 534; 59 N. E. 317. "Reliance upon a promise gives it no new validity when such reliance is not the conventional inducement of the promise, that is to say, when it is not contemplated by the

terms of the bargain as the equivalent of the promise." *French v. National Bank*, 179 Mass. 404, 408; 60 N. E. 793; (citing, *Martin v. Meles*, 179 Mass. 114; 60 N. E. 397; *Bragg v. Danielson*, 141 Mass. 195; 4 N. E. 622; *Manter v. Churchill*, 127 Mass. 31). "That which is a mere fortuitous result flowing accidentally from an arrangement but in no degree prompting the actors to it, is not to be esteemed a legal consideration." *Kirkpatrick v. Muirhead*, 16 Pa. St. 117, 126; quoted, *Fire Ins. Association v. Wickham*, 141 U. S. 564, 579. "Nothing is consideration that is not regarded as such by both parties." *Philpot v. Gruninger*, 14 Wall. (U. S.) 570, 577; quoted, *Fire Ins. Association v. Wickham*, 141 U. S. 564, 579.

² *Shadburne v. Daly*, 76 Cal. 355; 18 Pac. 403; *Steadman v. Guthrie*,

tion to forbear rested on the party who forbears. So the assumption of an obligation, as voluntarily assuming a debt after a deed was delivered, which assumption was not required as a term of delivery,³ or payment of a draft,⁴ or marriage,⁵ are not considerations for promises if not made in reliance thereon, under an acceptance thereof. So where A let B take certain property on consideration that B would give A B's note, with C as surety, and C signed after the transaction without knowing of the transaction between A and B, A knowing that C did not know, no consideration for C's promise exists.⁶

The cases given can be explained on the theory that there was really no contract between the parties. Similar states of fact can be explained on the theory of a lack of mutuality.⁷ Thus where A promised B to leave him all his property if B would remain near him so as to assist him if needed, B did not promise, but did so remain, A's promise was held unenforceable against A's estate, as wanting in mutuality.⁸ There is no inconsistency between these two theories. In most cases where mutuality is wanting, there is no offer and acceptance, and consequently no consideration for either promise.

If a gratuitous promise is made, the subsequent act of the

4 Metc. (Ky.) 147; Haldeman v. Bank, (Ky.); 44 S. W. 383; Smith v. Bibber, 82 Me. 34; 17 Am. St. Rep. 464; 19 Atl. 89; Manter v. Churchill, 127 Mass. 31; First National Bank v. Cecil, 23 Or. 58; 32 Pac. 393; 31 Pac. 61.

³ Commercial Bank v. Redfield, 122 Cal. 405; 55 Pac. 160; modified, 55 Pac. 772; Jenkins v. University, 17 Wash. 160; 49 Pac. 247; modified, 17 Wash. 173; 50 Pac. 785. *Contra*, where the debt was assumed after delivery of the deed but at grantor's request. Doran v. McConlogue, 150 Pa. St. 98; 24 Atl. 357.

⁴ Where A voluntarily promised to surrender a bill of lading of cotton to a bank and thereupon without notifying A of the facts

the bank paid a draft drawn against such cotton by A's principal, there was no consideration for A's promise. Hollins v. Hubbard, 165 N. Y. 534; 59 N. E. 317.

⁵ Lafontain v. Hayhurst, 89 Me. 388; 56 Am. St. Rep. 430; 36 Atl. 623. Such as an ante-nuptial contract to convey realty to the future wife where she married without relying on such contract. Markillie v. Markillie, 115 Mich. 658; 74 N. W. 1117.

⁶ Ellis v. Clark, 110 Mass. 389; 14 Am. Rep. 609. "The consideration or motive of the promise must be known to the promisor."

⁷ See § 302 *et seq.*

⁸ Rose v. Oliver, 32 Or. 447; 52 Pac. 176.

promisee in conferring a favor upon the promisor voluntarily and gratuitously cannot be invoked as a consideration for such promise. Thus where A promised B, without consideration, to extend the time of payment of a debt, B's subsequent act of paying interest voluntarily a few days before it was due is no consideration for A's promise.⁹ If the contract for extension of time calls for payment of part of the debt when due, no consideration exists, though payment is in fact made to the bank holding the note for collection and credit given on such note a day before it is due.¹⁰ A recent case which apparently ignores this principle is one in which A gave his relative, B, A's note so that B need not work any more. It was not stipulated that B should resign her position, but B did so after the delivery of the note. The court held that if no consideration really existed, there were at least principles of equitable estoppel which made the note enforceable.¹¹

The terms of the offer, however, may be such that the offer can be accepted only by doing some specified act; and it may not even require that notice of doing such act be communicated to the offerer.¹² Thus in subscriptions, the incurring of liabilities may be acceptance and consideration in one, without a previous promise to incur them.¹³

A consideration may be agreed upon as well impliedly, as expressly. Thus if an agreement for forbearance for a reasonable time can be inferred from the conduct of the parties, forbearance is as much a consideration as if it had been expressly stipulated for.¹⁴ A guaranty to pay the note of another a certain time after maturity, with actual forbearance for that time, may justify a finding of an agreement to delay for such time.¹⁵ So a promise by a materialman to waive his lien is

⁹ *English v. Landon*, 181 Ill. 614; 54 N. E. 911.

¹⁰ *Sully v. Childress*, 106 Tenn. 109; 82 Am. St. Rep. 875; 60 S. W. 499.

¹¹ *Ricketts v. Scothorn*, 57 Neb. 51; 73 Am. St. Rep. 491; 42 L. R. A. 794; 77 N. W. 365.

¹² *Atkinson v. Whitney*, 67 Miss.

655; 7 So. 644; *Cox v. Stokes*, 156 N. Y. 491; 51 N. E. 316; reversing, 78 Hun 331.

¹³ See § 298.

¹⁴ See § 288.

¹⁵ *Breed v. Hillhouse*, 7 Conn. 523; *Boyd v. Freize*, 5 Gray (Mass.) 553; *Reed v. Evans*, 17 Ohio 128.

supported by a consideration where in reliance thereon the owner pays the contractor, instead of withholding payment pending contractor's liens.¹⁶

§278. Consideration supporting several promises.

While a consideration is a necessary element of every contract, it is not necessary that each separate promise or covenant should have a distinct consideration. If there is but one consideration offered in return for several promises, and it is accepted for them together, it will support them.¹ This principle is often invoked in questions of mutuality of obligation.² If A gives value for two or more promises from B, B cannot claim that one of such promises was not mutual, though the parties have not apportioned the consideration to the separate promises.³ Thus a purchase of railroad bonds is a consideration for a promise of such railroad to ship by a certain connect-

¹⁶ Hughes v. Lansing, 34 Or. 118; 75 Am. St. Rep. 574; 55 Pac. 95.

¹ S. Jarvis Adams Co. v. Knapp, 121 Fed. 34; Irwin v. Locke, 20 Colo. 148; 36 Pac. 898; Marske v. Willard, 169 Ill. 276; 48 N. E. 290; affirming, 68 Ill. App. 83; Eisel v. Hayes, 141 Ind. 41; 40 N. E. 119; Koh-i-moor Laundry Co. v. Lockwood, 141 Ind. 140; 40 N. E. 677; Souffrain v. McDonald, 27 Ind. 269; Boyd v. Watson, 101 Ia. 214; 70 N. W. 120; Queen City Coal Co. v. Ry., (Ky.); 44 S. W. 103; Maughlin v. Perry, 35 Md. 352; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230; 91 N. W. 892; Boughn v. Smith, 58 Neb. 590; 79 N. W. 160; Doll v. Crume, 41 Neb. 655; 59 N. W. 806; Lyman v. Lincoln, 38 Neb. 794; 57 N. W. 531; Flack v. Condict, 66 N. J. L. 351; 49 Atl. 508; Wallace v. Leber, 65 N. J. L. 195; 47 Atl. 430; Kramer v. Old, 119 N. Car. 1; 56 Am. St. Rep. 650; 34

L. R. A. 389; 25 S. E. 813; Wetzell v. Richcreek, 53 O. S. 62; 40 N. E. 1004; King v. King, 63 O. S. 363; 81 Am. St. Rep. 635; 52 L. R. A. 157; 59 N. E. 111; House v. Jackson, 24 Or. 89; 32 Pac. 1027; Missouri, etc., Ry. v. Carter, 95 Tex. 461; 68 S. W. 159; Frank v. Jenkins, 11 Wash. 611; 40 Pac. 220.

² See § 304.

³ Franklin Telegraph Co. v. Harrison, 145 U. S. 459; Mississippi River Logging Co. v. Robson, 69 Fed. 773; 16 C. C. A. 400; Bates Machine Co. v. Bates, 192 Ill. 138; 61 N. E. 518; Bank v. Rowlinson, 2 Kan. App. 82; 43 Pac. 304; Sax v. Ry., 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314; House v. Jackson, 24 Or. 89; 32 Pac. 1027; Philadelphia Ball Club v. Lajoie, 202 Pa. St. 210; 90 Am. St. Rep. 627; 58 L. R. A. 227; 51 Atl. 973; Rhoades v. R. R., 49 W. Va. 494; 87 Am. St. Rep. 826; 55 L. R. A. 170; 39 S. E. 209.

ing road.⁴ Thus in addition to the price agreed upon, a sale is consideration for a warranty,⁵ or for a promise not to compete in business,⁶ or for a promise to repurchase,⁷ or to renew the contract,⁸ or to sell an additional tract of land at a stipulated price,⁹ or to repay such amount of duty in excess of a given amount as should be collected by the United States,¹⁰ or for a guaranty of payment made by a third person.¹¹ So a loan of money is a consideration for a guaranty made at the same time,¹² or for a guaranty made after the loan if the loan was made in reliance on a promise to obtain such guaranty,¹³ and a purchase of a wife's realty is a consideration for a contemporaneous promise by the husband.¹⁴ So in a contract whereby A agrees to sell goods for B to customers living in a county outside a city, and B agrees to pay A commissions on all sales to persons living in the city, whether A has helped make such sales or not, and on all sales in the county outside the city, made by A, B's promises are both supported by consideration.¹⁵

A qualification of this doctrine must be noted in cases where A does some act whereon B becomes bound in law to do certain

⁴ *Bald Eagle, etc., Ry. Co. v. Ry. Co.*, 171 Pa. St. 284; 50 Am. St. Rep. 807; 29 L. R. A. 423; 33 Atl. 239.

⁵ *Cable Co. v. Electric Co.*, 76 Fed. 422.

⁶ *McCurry v. Gibson*, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806; *Up River Ice Co. v. Denler*, 114 Mich. 296; 68 Am. St. Rep. 480; 72 N. W. 157.

⁷ *Merchant v. O'Rourke*, 111 Ia. 351; 82 N. W. 759; *Peterson v. Chase*, 115 Wis. 239; 91 N. W. 687.

⁸ *Smitherman Cotton Mills v. Mfg. Co.*, 125 N. C. 329; 34 S. E. 446.

⁹ *Myers v. Metzger*, 61 N. J. Eq. 522; 48 Atl. 1113.

¹⁰ *Wallace v. Leber*, 65 N. J. L. 195; 47 Atl. 430.

¹¹ *Dunlap v. Hopkins*, 95 Fed. 231; 37 C. C. A. 52; *McDonald v. Wood*, 118 Ala. 589; 24 So. 86.

¹² *Bowen v. Bank*, 87 Fed. 430; *Dillman v. Nadelhoffer*, 160 Ill. 121; 43 N. E. 378; *Winans v. Mfg. Co.*, 48 Kan. 777; 30 Pac. 163; *Allen v. Pryor*, 3 A. K. Mar. (Ky.) 305; *Bowen v. Thwing*, 56 Minn. 177; 57 N. W. 468; *Lindsey v. Heaton*, 27 Neb. 662; 43 N. W. 420; *Gogan v. Stevens*, 4 Utah, 348; 9 Pac. 706.

¹³ See § 319, *Williams v. Perkins*, 21 Ark. 18; *Paul v. Stackhouse*, 38 Pa. St. 302.

¹⁴ *Beatty v. Coble*, 142 Ind. 329; 41 N. E. 590.

¹⁵ *Boyd v. Watson*, 101 Ia. 214; 70 N. W. 120.

things, but as consideration for agreeing to do what he is thus bound in law to do he exacts a further promise from A. In such cases B's promise is no consideration for A's further promise. An illustration of this principle is found where B, a common carrier, requires A, a shipper, to assent to a limitation of B's Common-Law liability before he agrees to transport B's goods at regular rates. In such cases B's agreement to relieve A from his Common-Law liability is held in many States to be without consideration.¹⁶

§279. Presumption of consideration.

At Common Law negotiable contracts are said to import a consideration; that is, in the absence of evidence on the point it will be presumed that there was a sufficient consideration; and it is for the party denying the existence of a consideration to show that there was none.¹ This is true even if no consideration is recited on the face of the instrument, and words such as "value received" are wanting.² Thus an agreement to waive protest and a guaranty of prompt payment in a contract of indorsement made before delivery is *prima facie* on valuable consideration.³ This rule is *prima facie* only. If it is shown

¹⁶ See § 359.

¹ Lipsmeier v. Vehslage, 29 Fed. 175; Perot v. Cooper, 17 Colo. 80; 31 Am. St. Rep. 258; 28 Pac. 391; Whitford v. Herting, 60 Ill. App. 413; Murry v. Clayborn, 2 Bibb. (Ky.) 300; Perley v. Perley, 144 Mass. 104; 10 N. E. 726; Young v. Shepard's Estate, 124 Mich. 552; 83 N. W. 403; Manistee National Bank v. Seymour, 64 Mich. 59; 31 N. W. 140; Nichols, etc., Co. v. Dedrick, 61 Minn. 513; 63 N. W. 1110; Cox v. Sloan, 158 Mo. 411; 57 S. W. 1052; Dalrymple v. Wyker, 60 O. S. 108; 53 N. E. 713; Derry v. Holman, 27 S. C. 621; (memorandum opinion); 2 S. E. 841; (full report); Tillman v. Heller, 78 Tex. 597; 22 Am. St. Rep. 77; 11 L. R. A. 628; 14 S. W.

700; McClain v. Lowther, 35 W. Va. 297; 13 S. E. 1003. Even if given by a *bona fide* purchaser of goods sold by one in order to defraud creditors; Tillman v. Heller, 78 Tex. 597; 22 Am. St. Rep. 77; 11 L. R. A. 628; 14 S. W. 700. But in Huntington v. Shute, 180 Mass. 371; 91 Am. St. Rep. 309; 62 N. E. 380; it was said that while the introduction of the note makes a *prima facie* case, yet if the question is put in issue, the party relying on the note must satisfy the jury of the existence of consideration "by a fair preponderance of the evidence."

² Clarke v. Marlow, 20 Mont. 249; 50 Pac. 713.

³ First National Bank v. Sproull, 105 Ala. 275; 16 So. 879.

that no consideration existed, the negotiable instrument is unenforceable,⁴ even if reciting a consideration.⁵

Consideration is not imported by contracts which, while negotiable in form, are not negotiable in law, such as the promissory note of an imbecile.⁶ By an extension of the original rule, property pledged for the debt of another is *prima facie* pledged on valuable consideration.⁷

In the absence of statute, a written contract as such does not import a consideration,⁸ at least where no consideration is recited therein.⁹ Thus a written stipulation that payment of a given note should be extended to a certain time does not import a consideration, as such stipulation is not a negotiable instrument.¹⁰ So a written contract to pay the debt of another does not import a consideration.¹¹ A written contract reciting that it is "for value received" imports a consideration.¹² Thus a written guaranty on the back of a note imports a consideration if one is recited therein.¹³ Such recital is *prima facie* only and may be rebutted.¹⁴

By statute in some jurisdictions written contracts as a class import a consideration.¹⁵ In some states this is true of any

⁴ *Heimann v. Hainz*, 65 Ill. App. 316.

⁵ *Taylor v. Weeks*, 129 Mich. 233; 88 N. W. 466.

⁶ *Hosler v. Beard*, 54 O. S. 398; 56 Am. St. Rep. 720; 35 L. R. A. 161; 43 N. E. 1040.

⁷ *Robinson v. Boyd*, 60 O. S. 57; 53 N. E. 494.

⁸ *Cook v. Bradley*, 7 Conn. 57; 18 Am. Dec. 79; *Walters v. Short*, 10 Ill. 252; *Denison v. Tyson*, 17 Vt. 549.

⁹ *Greer v. Latimer*, 47 S. C. 176; 25 S. E. 136.

¹⁰ *Davis v. Stout*, 126 Ind. 12; 22 Am. St. Rep. 565; 25 N. E. 862. *Contra*, *Felly v. Bradford*, 3 Bibb. (Ky.) 317; 6 Am. Dec. 656; (a bond "to make indefeasible title").

¹¹ *Walker v. Patterson*, 36 Me. 273.

¹² *Frank v. Irgens*, 27 Minn. 43; 6 N. W. 380.

¹³ *Quimby v. Morrill*, 47 Me. 470.

¹⁴ *Fargis v. Walton*, 107 N. Y. 398; 14 N. E. 303.

¹⁵ *Toomy v. Dunphy*, 86 Cal. 639; 25 Pac. 130; *First M. E. Church v. Donnell*, 95 Ia. 494; 64 N. W. 412; *Roller v. Ott*, 14 Kan. 609; *Waynick v. Richmond*, 11 Kan. 488; *Fuller v. Scott*, 8 Kan. 27; *Wulze v. Schaefer*, 37 Mo. App. 551; *Tillman v. Heller*, 78 Tex. 597; 22 Am. St. Rep. 77; 11 L. R. A. 628; 14 S. W. 700; *Gulf, etc., Ry. Co. v. Wright*, 1 Tex. Civ. App. 402; 21 S. W. 80; *Ash v. Beck*, (Tex. Civ. App.); 68 S. W. 53; *Howard v. Zimpelman* (Tex.); 14 S. W. 59.

direct promise to pay money.¹⁶ Even under such statutes, no such presumption exists where the written contract shows affirmatively that no consideration exists.¹⁷ It has been held that the recital of a consideration in a contract estops the parties to deny the existence of a consideration.¹⁸ Thus the recital of one dollar as a consideration is held to make the contract enforceable, as such sum may be collected.¹⁹ An oral promise does not import a consideration.²⁰ The foregoing propositions apply only to simple contracts. The so-called presumption of consideration in contracts under seal is discussed elsewhere.²¹

§280. Consideration unnecessary by statute.

The rule requiring consideration in executory contracts is a rule of Common Law and equity, which are both subordinate to Statute Law. If the legislature sees fit to provide a means at law of enforcing promises which lack consideration, such promises are valid contracts. The chief examples of such contracts are public grants and subscriptions to the stock of corporations to be formed. A legislative grant needs no consideration other than the public good as viewed by the legislature.¹ Where persons subscribe to corporations to be formed, there is no adversary party to the contract and nothing then in existence to serve as a consideration. There is not even an enforceable promise to issue the stock, since the company which is to issue it does not exist. Yet by general incorporation acts subscriptions to stock must be made before the corporation can be created. While it is sometimes sought to find a legal consideration in such subscriptions,² the most logical view is that by

¹⁶ Goodwin v. Goodwin, 65 Ill. 497; Houck v. Frisbee, 66 Mo. App. 16; Wulze v. Schaefer, 37 Mo. App. 551. For presumption of consideration in contracts under seal, see § 561 et seq.

¹⁷ Lane v. Richards, 119 Ia. 24; 91 N. W. 786.

¹⁸ McPherson v. Fargo, 10 S. D. 611; 66 Am. St. Rep. 723; 74 N. W. 1057; *contra*, Koppitz-Melchers

Brewing Co. v. Behm, 130 Mich. 649; 90 N. W. 676.

¹⁹ Southern, etc., Ry. v. Harris, 117 Ga. 1001; 44 S. E. 885.

²⁰ Wheeler v. Hawkins, 101 Ind. 486.

²¹ See § 561 et seq.

¹ Roberts v. Brooks, 71 Fed. 914.

² Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48; 57 N. W. 317.

statute such subscriptions become enforceable on the formation of the corporation, without any consideration.³ Where a statute requires a bond and provides what liability shall attach upon executing such bond, no consideration is necessary to support it.⁴

§281. Executed contracts.

If a contract is fully performed on both sides and each has received what he agreed to take, the question of consideration becomes immaterial. While it is sometimes said that an executed contract needs no consideration, this is a misuse of language. If no consideration ever existed there never was a contract. It is more correct to say that a promise, if fully performed,¹ even of a promise to make a gift,² cannot after performance be rescinded by the promisor because he could have resisted performance successfully. This is true in gifts executed by delivery, even if the donor subsequently regains possession of the gift.³

³ For different theories see *I* Thomp. Corp. § 1201-1213.

⁴ *Buffington v. Bronson*, 61 O. S. 231; 56 N. E. 762. The consideration for an indemnity bond given to protect sureties on an executor's bond is the continuance of the executor in his trust; and that the indemnity is given pursuant to an order of court. *Buffington v. Bronson*, 61 O. S. 231; 56 N. E. 762.

¹ *Maxwell v. Graves*, 59 Ia. 613; 13 N. W. 758; *Oregon, etc., Ry. v. Forrest*, 128 N. Y. 83; 28 N. E. 137.

² *Smith v. Youngblood*, 68 Ark. 255; 58 S. W. 42; *Williams v. Smith*, 66 Ark. 299; 50 S. W. 513; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep.

39; *Berry v. Kinnaird*, (Ky.); 20 S. W. 511; *Grover v. Grover*, 24 Pick. (Mass.) 261; 35 Am. Dec. 319; *Rockwood v. Wiggin*, 16 Gray (Mass.) 402; *Holmes v. McDonald*, 119 Mich. 563; 75 Am. St. Rep. 430; 78 N. W. 647; *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178; *Walker v. Crucible Co.*, 47 N. J. Eq. 342; 20 Atl. 885; *Fasset's Appeal*, 167 Pa. St. 448; 31 Atl. 686; *Marshall v. Russell*, 93 Tenn. 261; 25 S. W. 1070; *Williamson v. Johnson*, 62 Vt. 378; 22 Am. St. Rep. 117; 9 L. R. A. 277; 20 Atl. 279.

³ *Whiting v. Ralph*, 75 Conn. 41; 52 Atl. 406; *Whitford v. Horn*, 18 Kan. 455; *Allen v. Knowlton*, 47 Vt. 512.

III. TYPES OF CONSIDERATION.

§282. Conveyance of rights in realty.

A transfer of property rights in realty is a valuable consideration.¹ Even a conveyance of the mere legal title is a consideration. Thus a conveyance of property to be held in trust is a consideration for a promise by trustee to undertake the trust.² The conveyance need not be in fee. Thus the assignment of a lease,³ even if voidable by re-entry by grantor,⁴ the surrender of rentals of realty to a lienholder,⁵ and a contract between landlord and tenant to work land on shares,⁶ are each valuable considerations. Release of contingent interests in realty is a valuable consideration; such as the release of a husband's interest in his wife's property,⁷ or a wife's inchoate right of dower,⁸ or

¹ Hanold v. Kays, 64 Mich. 439; 8 Am. St. Rep. 835; 31 N. W. 420; Wilson v. Fairchild, 45 Minn. 203; 47 N. W. 642; Goos v. Goos, 57 Neb. 294; 77 N. W. 687; Alexander v. McDaniel, 56 S. Car. 252; 34 S. E. 405; Busby v. Bush, 79 Tex. 656; 15 S. W. 638.

² McKee v. Lamon, 159 U. S. 317; Switzer v. Skiles, 8 Ill. 529; 44 Am. Dec. 723; Ransdel v. Moore, 153 Ind. 393; 53 L. R. A. 753; 53 N. E. 767; Cumberland Valley Bank's Assignee v. Bank, (Ky.); 78 S. W. 889; Hammond v. Hussey, 51 N. H. 40; 12 Am. Rep. 41; Brown v. Ray, 10 Ired. Law (N. C.) 72; 51 Am. Dec. 379; Pires v. Snodgrass, 91 Tex. 105; 41 S. W. 68. But the receipt of trust property by a bishop is no consideration for a promise by him to pay the debts of his predecessor; Baxter v. McDonnell, 155 N. Y. 83; 40 L. R. A. 670; 49 N. E. 667.

³ Edwards v. Spalding, 20 Mont. 54, 60; 49 Pac. 443; rehearing refused, 49 Pac. 591.

⁴ Spear v. Fuller, 8 N. H. 174; 28 Am. Dec. 391.

⁵ Rogers v. Central Loan and Trust Co., 49 Neb. 676; 68 N. W. 1048. The use of the upper floor of a building rent-free is a consideration for the assignment of a lease of the building. Curtis v. Portsmouth, 67 N. H. 506; 39 Atl. 439.

⁶ Reynolds v. Chynoweth, 68 Vt. 104; 34 Atl. 36.

⁷ Wall v. Stapleton, 177 Ill. 357; 52 N. E. 477; affirming, 72 Ill. App. 614; Luttrell v. Boggs, 168 Ill. 361; 48 N. E. 171; Huffman v. Copeland, 139 Ind. 221; 38 N. E. 861; McNutt v. McNutt, 116 Ind. 545; 2 L. R. A. 372; 19 N. E. 115.

⁸ Clay v. Clay, 23 Ill. App. 109; Gould v. Banking Co., 36 Ill. App. 390; 26 N. E. 497; McNutt v. McNutt, 116 Ind. 545; 2 L. R. A. 372; 19 N. E. 115; Worley v. Sipe, 111 Ind. 238; 12 N. E. 385; Ward v. Crotty, 4 Metc. (Ky.) 59; Nichols v. Nichols, 136 Mass. 256; Farwell v. Johnston, 34 Mich. 342; Ficklin v. Rixey, 89 Va. 832; 37

of homestead and dower,⁹ or the interest of a grantee by deed in escrow.¹⁰ Some jurisdictions hold that an heir's transfer of his possible right in his ancestor's estate by descent is a consideration.¹⁰ If such interest passes by a warranty deed it will pass whatever interest descends to the heir, and is a consideration.¹¹ If such interest passes by a warranty deed no interest of any sort passes,¹³ and such conveyance is no consideration. So the conveyance of an equitable interest,¹⁴ such as an equity of redemption,¹⁵ or a right to redeem from a tax sale,¹⁶ or rights under an executory contract for the sale of certain realty,¹⁷ or a transfer by a defective deed good in equity,¹⁸ is a consideration. So a conveyance of mere possessory rights, such as the surrender of a timber culture entry,¹⁹ or a homestead entry,²⁰ a promise by one holding under a homestead entry to perfect his title and give a new mortgage,²¹ or a promise to assign a claim to an entry on land on affirmance of the decision of the

Am. St. Rep. 891; 17 S. E. 325. But in some jurisdictions inchoate dower, *Miller v. Miller*, 104 Ia. 186; 73 N. W. 484; *Le Saulnier v. Krueger*, 85 Wis. 214; 54 N. W. 774, or unassigned dower, *Ritt v. Dodge*, 20 R. I. 133; 37 Atl. 810, cannot be sold or contracted for.

⁹ *Racek v. Bank*, 62 Neb. 669; 87 N. W. 542; *Fiedler v. Howard*, 99 Wis. 388; 67 Am. St. Rep. 865; 75 N. W. 163.

¹⁰ *Griel v. Lomax*, 89 Ala. 420; 6 So. 741.

¹¹ *Weston v. Hight*, 18 Me. 281.

¹² *Trull v. Eastman*, 3 Met. (Mass.) 121; 37 Am. Dec. 126.

¹³ *Hart v. Gregg*, 32 O. S. 502.

¹⁴ *Miner v. O'Harrow*, 60 Mich. 91; 26 N. W. 843; *Lamprey v. Ry.*, 89 Minn. 187; 94 N. W. 553; *Whitebeck v. Whitebeck*, 9 Cow. (N. Y.) 266; 18 Am. Dec. 503; But a conveyance which bars a husband's rights in his wife's property, though informal, leaves no interest to serve as a consideration.

Long v. Rankin, 108 N. Car. 333; 12 S. E. 987.

¹⁵ *Shade v. Creviston*, 93 Ind. 591; *Storms v. Storms*, 21 Ind. App. 191; 51 N. E. 955; *Gunnell v. Emerson*, 80 Mo. App. 322. Even after foreclosure and after the right of the mortgagor to redeem from the sale has elapsed, if the creditors have a right to redeem. *Chytraus v. Smith*, 141 Ill. 231; 30 N. E. 450.

¹⁶ *Lennox v. Brower*, 160 Pa. St. 191; 28 Atl. 839.

¹⁷ *Reed v. Crane*, 89 Mo. App. 670.

¹⁸ *Clinch River Veneer Co. v. Kurth*, 90 Va. 737; 19 S. E. 878.

¹⁹ *Peoples v. Evens*, 8 N. D. 121; 77 N. W. 93; citing *Lindersmith v. Schwiso*, 17 Minn. 26.

²⁰ *Hardesty v. Service*, 45 Kan. 614; *sub nomine Pelham v. Service*, 26 Pac. 29; see also *Waring v. Loomis*, — Or. —; 76 Pac. 510.

²¹ *McKinnon v. Palen*, 62 Minn. 188; 64 N. W. 387.

local land office in favor of such claimant,²² or the right of occupancy of realty, the title to which is in an Indian nation²³ are considerations. So entering on the land of another and erecting buildings,²⁴ or other improvements,²⁵ or doing work thereon,²⁶ as working a mine and paying royalties,²⁷ or even merely occupying it,²⁸ are valuable considerations. So the conveyance of an easement,²⁹ as a right of way,³⁰ a party wall,³¹ or mutual promises to drill no oil wells within two hundred feet of the boundary of the lands of the two contracting parties,³² or conveyance of a franchise, as to operate a street railway,³³ are all valuable considerations. The conveyance may be reciprocal. So an oral partition,³⁴ or other amicable partition,³⁵ or an ex-

²² *Tecumseh State Bank v. Mad-dox*, 4 Okla. 583; 46 Pac. 563.

²³ *Tye v. Town Co.*, 2 Ind. Ter. 113; 48 S. W. 1021.

²⁴ *Burlingame v. Rowland*, 77 Cal. 315; 1 L. R. A. 829; 19 Pac. 526; *Puterbaugh v. Puterbaugh*, 131 Ind. 288; 15 L. R. A. 341; 30 N. E. 519.

²⁵ *Gilpin v. Adams*, 14 Colo. 512; 24 Pac. 566; (ditch, fences, repairs and taxes); *Woodworth v. Thompson*, 44 Neb. 311; 62 N. W. 450.

²⁶ *Wysor Land Co. v. Jones*, 24 Ind. App. 451; 56 N. E. 46.

²⁷ *United Mines Co. v. Hatcher*, 79 Fed. 517; partly affirming and partly reversing, 75 Fed. 368; *Clarno v. Grayson*, 30 Or. 111; 46 Pac. 426.

²⁸ Remaining on property which lessee was not required by the lease to use or occupy is a consideration for a promise by lessor to reduce the rent. *Ten Eyck v. Sleeper*, 65 Minn. 413; 67 N. W. 1026. *Contra*, entering on land without making valuable improvements is no consideration for a promise by a father to make a gift to his son. *Geer v. Goudy*, 174 Ill. 514; 51 N. E. 623.

²⁹ *Barr v. Lamaster*, 48 Neb. 114; 32 L. R. A. 451; 66 N. W. 1110; *Post v. Ry. Co.*, 123 N. Y. 580; 26 N. E. 7.

³⁰ *Fish v. Dunn*, 59 Minn. 99; 60 N. W. 843; *Post v. Ry. Co.*, 123 N. Y. 580; 26 N. E. 7; *Shields v. Titus*, 46 O. S. 528; 22 N. E. 717.

³¹ *Grimely v. Davidson*, 133 Ill. 116; 24 N. E. 439. (Even if located entirely on the land of one party.)

³² *Ware v. Langmade*, 9 Ohio C. C. 85.

³³ *City Railway Co. v. Ry. Co.*, 166 U. S. 557; *People v. Ry. Co.*, 178 Ill. 594; 49 L. R. A. 650; 53 N. E. 349; *Western, etc., Co. v. Ry. Co.*, 128 Ind. 540; 26 N. E. 188; 28 N. E. 88; *Cincinnati v. Ry. Co.*, 2 Ohio Dec. 468. Unless the council which attempts to grant the franchise has no power to grant the same; *Amestoy v. Transit Co.*, 95 Cal. 311; 30 Pac. 550.

³⁴ *Borden v. Curtis*, 46 N. J. Eq. 468; 19 Atl. 127. (Consideration for surrender of a lease on part of the property.)

³⁵ *Badger v. Stephens*, 61 Mo. App. 387; *Stephens v. Stephens*, 1 Baxt. (Tenn.) 52.

change of realty³⁶ is a consideration. Such a transfer of realty is a consideration for a promise to reconvey,³⁷ or to repay any surplus remaining after paying debts or expenses out of the property.³⁸

§283. Transfer of rights in personaity.

A transfer of personal property or any interest therein,¹ even though sold subject to mortgage,² such as stock in a corporation,³ or good-will,⁴ or an assignment of a judgment⁵ or a note,⁶ or a deposit of money in a bank,⁷ or of bank checks

³⁶ Hart v. Strong, 183 Ill. 349; 55 N. E. 629; reversing, 83 Ill. App. 213.

³⁷ Wilson v. Fairchild, 45 Minn. 203; 47 N. W. 642.

³⁸ Adams v. Lombard, 80 Cal. 426; 22 Pac. 180; Visalia, etc., Co. v. Sims, 104 Cal. 326; 37 Pac. 1042; Linscott v. McIntire, 15 Me. 201; 33 Am. Dec. 602.

¹ McCurry v. Gibson, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806; Lemmon v. Sibert, 15 Colo. App. 131; 61 Pac. 202; Hallman v. Schwartz, 44 Ill. App. 84; Phillips v. Gifford, 104 Ia. 458; 73 N. W. 1033; Gunther v. Gunther, 181 Mass. 217; 63 N. E. 402; Richmond v. Nye, 126 Mich. 602; 85 N. W. 1120; De Marco v. Williams, (Miss.); 12 So. 552; Lumber Co. v. Tourtelot, 7 N. D. 587; 75 N. W. 901; Maloney v. Moore, (Tenn. Ch. App.); 42 S. W. 805.

² Gunnell v. Emerson, 73 Mo. App. 291; Provenchee v. Piper, 68 N. H. 31; 36 Atl. 552; Lessel v. Zilmer, 105 Wis. 334; 81 N. W. 403; (as for a promise to pay part of the mortgage).

³ Sawyard v. Houghton, 119 Cal. 545; 51 Pac. 853; rehearing refused, 52 Pac. 44; Knarr v. Turnpike Co., 45 Ind. 278; Up River

Ice Co. v. Denler, 114 Mich. 296; 66 Am. St. Rep. 480; 72 N. W. 157; Wyatt v. Jackson, 55 Minn. 87; 56 N. W. 578; Atwater v. Stromberg, 75 Minn. 277; 77 N. W. 963; consideration for a promise to reconvey; Sayward v. Houghton, 119 Cal. 545; 51 Pac. 853; rehearing refused, 52 Pac. 44; or not to compete in business; Up River Ice Co. v. Denler, 114 Mich. 296; 66 Am. St. Rep. 480; 72 N. W. 157; or to pay judgments and attorney's fees due from the vendor; Sutton v. Dudley, 193 Pa. St. 194; 44 Atl. 438.

⁴ McCurry v. Gibson, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806; Smock v. Pierson, 68 Ind. 405; 34 Am. Rep. 269; Davis v. Garrison, 85 Ia. 447; 52 N. W. 359; Phillips v. Gifford, 104 Ia. 458; 73 N. W. 1033.

⁵ Cox v. Robinson, 70 Fed. 760; Dickerson v. Derrickson, 39 Ill. 574; State National Bank v. Walser, 46 Mo. 348.

⁶ Farber v. Iron Co., 140 Ind. 54; 39 N. E. 249; Dockray v. Dunn, 37 Me. 442; Backus v. Spaulding, 116 Mass. 418.

⁷ Deal v. Bank, 79 Mo. App. 262; Pollock v. Loan Association, 51 S. Car. 420; 64 Am. St. Rep. 683; 29 S. E. 77.

signed by a third person,⁸ or assent of an insurance company to an assignment of a policy,⁹ or a sale of rights in an unperfected invention¹⁰ are all valuable considerations. The transfer by a debtor to a creditor of property already pledged to such creditor is a consideration for a release of the debt by payment of a part thereof.¹¹ So is a payment of money to which the payee was not already entitled,¹² such as a loan,¹³ as one made by a wife to a husband,¹⁴ or a payment by mistake of fact.¹⁵ The payment of the premium of an insurance policy by an agent is consideration for a note therefor given to the agent by the insured,¹⁶ and such note can be enforced even if the insurance company is then insolvent, and the policy is practically worthless.¹⁷

So change of possession of personal property is a considera-

⁸ Deal v. Bank, 79 Mo. App. 262.

⁹ Equitable Marine Ins. Co. v. Adams, 173 Mass. 436; 53 N. E. 883; Hughson v. Hardy, 62 Minn. 209; 64 N. W. 389. (A consideration for the promise of assignee to pay premiums thereon.)

¹⁰ Watson v. Deeds, 3 Ind. App. 75; 29 N. E. 151.

¹¹ Herman v. Schlesinger, 114 Wis. 382; 91 Am. St. Rep. 922; 90 N. W. 460.

¹² Dunn v. Abrams, 97 Ga. 762; 25 S. E. 766; McHenry v. Brown, 66 Minn. 123; 68 N. W. 847; Black v. Oliva, 80 Minn. 396; 83 N. W. 386; Loewen v. Forsee, 137 Mo. 29; 59 Am. St. Rep. 489; 38 S. W. 712; reversing, 35 S. W. 1138, on rehearing. A payment to the surety on the bond of a defaulting contract of the unpaid price due under the contract is a consideration for his promise to complete the building and discharge liens to the extent of his obligation on the bond and the money paid to him; Mc-

Henry v. Brown, 66 Minn. 123; 68 N. W. 847; and a payment of partnership funds to one partner is consideration for his promise to pay a firm note. Black v. Oliva, 80 Minn. 396; 83 N. W. 386.

¹³ Loewen v. Forsee, 137 Mo. 29; 59 Am. St. Rep. 489; 38 S. W. 712; reversing, 35 S. W. 1138; Cole v. Lee, 45 N. J. Eq. 779; 18 Atl. 854; Norwood v. Faulkner, 22 S. Car. 367; 53 Am. Rep. 717; Bruce v. Hastings, 41 Vt. 380; 98 Am. Dec. 592.

¹⁴ Muir v. Miller, 103 Ia. 127; 72 N. W. 409.

¹⁵ DeVoin v. DeVoin, 76 Wis. 66; 44 N. W. 839.

¹⁶ Dunn v. Abrams, 97 Ga. 762; 25 S. E. 766. (Even where the policy was not to go into effect till the premium was paid and the application which was a part thereof mistakenly recited that the premium was unpaid.)

¹⁷ Hudson v. Compere, 94 Tex. 449; 61 S. W. 389.

tion,¹⁸ as for a promise to pay a third person,¹⁹ as to pay debts of the person delivering the property,²⁰ or to accept an order drawn by the party delivering the goods,²¹ or to insure such property,²² or to care for it, as where a consignee of coal barges agrees to protect them from the ice.²³

Transfer of possession in bailment is consideration for a promise made by the bailee.²⁴ So a loan of a painting for competitive exhibition at a fair is a consideration for a promise to re-deliver it.²⁵

§284. Change of form of obligation.

A change in the form of a debt is a consideration for a promise based upon such change. Thus the giving of a note for a debt which was not before evidenced by a negotiable instrument is a consideration.¹ The giving of security for a pre-existing debt,² such as a chattel mortgage,³ even if in fact nothing is realized from such security⁴ is a valuable consideration.

¹⁸ *Hellman v. Schwartz*, 44 Ill. App. 84. (A promise by a creditor to release one partner if firm goods were surrendered to the other). *State v. McDuffie*, 34 N. H. 523; 69 Am. Dec. 516; *McDaniels v. Robinson*, 26 Vt. 316; 62 Am. Dec. 574.

¹⁹ *Keyes v. Allen*, 65 Vt. 667; 27 Atl. 319.

²⁰ *Clark v. Chapman*, 98 Cal. 110; 32 Pac. 812; 33 Pac. 750. (A promise to indemnify A against claims, settled by arbitration on his delivering certain property to arbitrators.) *Drye v. Cunningham*, (Ky.); 74 S. W. 272; *Hind v. Holdship*, 2 Watts. (Pa.) 104; 26 Am. Dec. 107. (A promise by assignee to pay creditors of assignor.)

²¹ *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 62; 24 N. E. 589.

²² *Keller v. Smith*, 59 Minn. 203; 60 N. W. 1102.

²³ *Pierce v. Walton*, 20 Ind. App. 66; 50 N. E. 309.

²⁴ *Sturm v. Baker*, 150 U. S. 312; *Prince v. State Fair*, 106 Ala. 340; 28 L. R. A. 716; 17 So. 449; *Miller v. Upton*, 6 Ind. 53; *Rickey v. Morrison*, 69 Mich. 139; 37 N. W. 56; *Keller v. Smith*, 59 Minn. 203; 60 N. W. 1102; *Smith v. Library*, 58 Minn. 108; 25 L. R. A. 280; 59 N. W. 979.

²⁵ *Prince v. State Fair*, 106 Ala. 340; 28 L. R. A. 716; 17 So. 449. To the same effect is *Smith v. Library*, 58 Minn. 108; 25 L. R. A. 280; 59 N. W. 979.

¹ *Bugh v. Crum*, 26 Ind. App. 465; 59 N. E. 1076; *Jaffray v. Davis*, 124 N. Y. 164; 11 L. R. A. 710; 26 N. E. 351.

² *Kerr v. Topping*, 109 Ia. 150; 80 N. W. 321; *Jaffray v. Davis*, 124 N. Y. 164; 11 L. R. A. 710; 26 N. E. 351.

³ *Jaffray v. Davis*, 124 N. Y. 164; 11 L. R. A. 710; 26 N. E. 351.

⁴ *Kerr v. Topping*, 109 Ia. 150; 80 N. W. 321.

§285. Work and labor.

Performing work and labor which the party performing was not otherwise bound to do forms a consideration for a promise made in return for such work and labor.¹ Examples of such considerations are agreements either express² or implied,³ to work as agent, doing work not called for by pre-existing contract,⁴ perfecting a patent,⁵ sinking an oil well,⁶ and furnishing water to cattle.⁷

So furnishing service by quasi-public corporations, such as by a water-works company,⁸ or a gas company,⁹ operating a street railway,¹⁰ or changing the service from horse cars to electric cars,¹¹ are considerations. If the party performing the services agrees in advance not to make any charge therefor, the opportunity to work is a consideration for his promise to work gratuitously, insofar that after doing the work he cannot charge

¹ *Steves v. Frazee*, 19 Ind. App. 284; 49 N. E. 385; *Harper v. Ry. Co.*, (Ky.); 22 S. W. 849; *Murray v. Kennedy*, 15 La. Ann. 385; 77 Am. Dec. 189; *Cowee v. Cornell*, 75 N. Y. 91; 31 Am. Rep. 428; *McFeaters v. Pattison*, 188 Pa. St. 270; 41 Atl. 609.

² *Forbes v. Bushnell*, 47 Minn. 402; 50 N. W. 368. And the additional promise of the agent to take a certain amount of goods is still more clearly a consideration; *Condit v. Bergmeier*, 63 Fed. 937; *Weiboldt v. Fashion Co.*, 80 Ill. App. 67.

³ Thus it is a consideration for a promise to pay commissions. *Travelers' Ins. Co. v. Parker*, 92 Md. 22; 47 Atl. 1042; or to give the agent exclusive territory; *Condit v. Bergmeier*, 63 Fed. 937; *Mueller v. Spring Co.*, 88 Mich. 390; 50 N. W. 319.

⁴ *Barley v. Buell*, 70 Cal. 335; 11 Pac. 632. Additional work is a consideration for a promise to pay an invalid assessment, *Bernstein v. Downs*, 112 Cal. 197; 44 Pac. 557.

A promise by employees of a sub-contractor to continue work is a consideration for the promise of the contractor to pay them, *McDonald v. Fernald*, 68 N. H. 171; 38 Atl. 729. So where a partner who purchases the entire business makes a similar promise to one who was working for the old firm; *Franks v. Stevens*, 82 Mich. 192; 46 N. W. 369.

⁵ *Barry v. Colville*, 129 N. Y. 302; 29 N. E. 307.

⁶ *Stahl v. Van Vleck*, 53 O. S. 136; 41 N. E. 35; (though it is not operated).

⁷ *Osmundson v. Thompson*, 90 Ia. 755; 57 N. W. 863.

⁸ *Muscatine Waterworks Co. v. Lumber Co.*, 85 Ia. 112; 39 Minn. St. Rep. 284; 52 N. W. 108; *Harsky v. Water Co.*, 13 Mont. 229; 33 Pac. 689.

⁹ *Chicago, etc., Co. v. Lake*, 130 Ill. 42; 22 N. E. 616.

¹⁰ *City Railway Co. v. Ry. Co.*, 66 U. S. 557.

¹¹ *Cincinnati v. Ry. Co.*, 2 Ohio Dec. 468.

therefor.¹² Such party could ordinarily refuse at any time to continue such gratuitous performance.

§286. Forbearance of legal rights.—Release of debts.

A forbearance of any legal right may be a consideration.¹ The right forborne is usually a legal right to property of some sort, either in possession or in action.² Thus release of a note,³ a release of a guarantor's right to sue the maker of the note,⁴ a release of a pre-existing debt,⁵ especially if secured,⁶ or release of liability on a bond⁷ are all considerations. A release of a claim not originating on contract is a consideration.⁸ A release by A of a claim for goods stolen by B and used in C's business without C's knowledge of the theft,⁹ or a release of a claim

¹² Appointment of receiver who agrees to charge no fees. *Polk v. Johnson*, 160 Ind. 292; 66 N. E. 752.

¹ *Ballard v. Barton*, 64 Vt. 387; 16 L. R. A. 664; 24 Atl. 769.

² See § 283.

³ *Safe Deposit & Trust Co. v. Wright*, 105 Fed. 155; 44 C. C. A. 421; *Scribner v. Hanke*, 116 Cal. 613; 48 Pac. 714; *Hart v. Church*, 126 Cal. 471; 77 Am. St. Rep. 195; 58 Pac. 910; *Whelan v. Swain*, 132 Cal. 389; 64 Pac. 560; *Post v. Bank*, 138 Ill. 559; 28 N. E. 978; *First National Bank v. Tile Works*, 91 Ill. App. 116; *Wooley v. Cobb*, 165 Mass. 503; 43 N. E. 497; *Judy v. Louderman*, 48 O. S. 562; 29 N. E. 181; *First National Bank v. Reid*, (Tenn. Ch. App.); 58 S. W. 1124; *Union etc., Bank v. Jefferson*, 101 Wis. 452; 77 N. W. 889.

⁴ *Ditmar v. West*, 7 Ind. App. 637; 35 N. E. 47.

⁵ *Hunt v. Johnson*, 96 Ala. 130; 11 So. 387; *Bevens v. Barnett*, (Ark.); 22 S. W. 160; *Hart v. Church*, 126 Cal. 471; 77 Am. St. Rep. 195; 58 Pac. 910; *Pope v. Vajen*, 121 Ind. 317; 6 L. R. A. 688; 22 N. E. 308; *Reed v. Brown*,

89 Ia. 454; 48 Am. St. Rep. 406; 56 N. W. 661; *Lever v. Hebert*, 51 La. Ann. 222; 25 So. 118; *Spaulding v. Kendrick*, 172 Mass. 71; 51 N. E. 453; *Hilbert v. Barry*, 111 Mich. 698; 70 N. W. 318; *Hanold v. Kays*, 64 Mich. 439; 8 Am. St. Rep. 835; 31 N. W. 420; *Decocq v. Decocq*, 69 Mo. App. 558; *Lancaster v. Elliott*, 55 Mo. App. 249; *Lamkin v. Palmer*, 164 N. Y. 201; 58 N. E. 123. A release of part of premiums due a loan association is a consideration for release of a claim for usurious interest paid in. *International, etc., Association v. Fortassain*, (Tex. Civ. App.); 23 S. W. 496.

⁶ *Cahill v. Smith* 9 Ohio C. C. 4.

⁷ *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369; 24 So. 405; *Court Valhalla v. Olson*, 14 Colo. App. 243; 59 Pac. 883; (though made payable to the state instead of the real obligee). As the discharge of a bond, though unenforceable because not returned for taxation. *Spence v. Repass*, 94 Va. 716; 27 S. E. 583.

⁸ *Brem v. Covington*, 104 N. Car. 589; 10 S. E. 706.

⁹ *Barrett v. Webster*, 125 N. Y. 18; 25 N. E. 1068.

for money embezzled,¹⁰ or for fraud,¹¹ or misrepresentation,¹² are considerations. So an agreement by A, an attorney, to release B from a debt due from B to A, and to collect certain debts due to B if possible is a consideration for B's assignment to A of one-sixth of the amount collected.¹³

§287. Release of liens.

The release of a lien,¹ such as a mortgage,² or a vendor's lien,³ or a mechanic's lien,⁴ or a judgment lien,⁵ or a levy,⁶ or a lien

¹⁰ A discharge of a defaulting church treasurer from civil and criminal liability is a consideration for an assignment by his wife of an insurance policy payable to her. *Dusenberry v. Life Insurance Co.*, 188 Pa. St. 454; 41 Atl. 736.

¹¹ *Kemp v. Bank*, 109 Fed. 48; 48 C. C. A. 213.

¹² *Charvat v. Myers*, 5 Wash. 799; 32 Pac. 726.

¹³ *Fairbanks v. Sargent*, 117 N. Y. 320; 6 L. R. A. 475; 22 N. E. 1039.

¹ *Bluthenthal v. Moore*, 106 Ga. 424; 32 S. E. 344; *Day v. Gardner*, 42 N. J. Eq. 199; 7 Atl. 365; *Le Page v. Slade*, 79 Tex. 473; 15 S. W. 496; *Finks v. Buck*, (Tex. Civ. App.); 27 S. W. 1094. Such release is consideration for a guaranty of the debt secured by the lien, *Bluthenthal v. Moore*, 106 Ga. 424; 32 S. E. 344; as where a stockholder guarantees a corporation debt in consideration of a discharge of a lien on corporation property, *Koenigsberg v. Lennig*, 161 Pa. St. 171; 28 Atl. 1016; or several purchasers of several tracts promise to pay any deficiency in a lien held on an undivided interest in one of the tracts to induce the owner of such unliquidated lien to agree to the value apportioned to the tract covered by the lien. *Sloan v. Courteney*, 54 S. Car. 314; 32 S. E. 431.

² *Cliff Foy v. Dawkins*, — Ala. —; 35 So. 41; *Blagborne v. Hun-*

ger, 101 Mich. 375; 59 N. W. 657; a satisfaction of a mortgage upon other realty and also on realty conveyed is a consideration for such conveyance; *Brown v. Bank*, 55 S. Car. 51; 32 S. E. 816. A promise by remainder-men to treat mortgages made by a life tenant as valid is supported by the consideration of the mortgagee's promise to release all the realty but one parcel from the lien and to aid in preventing a sale of the premises by the sheriff; *Columbia Avenue S. F., S. D. T. & T. Co. v. Lewis*, 190 Pa. St. 558; 42 Atl. 1094. (Even though the premises were sold at public sale, but not by sheriff.)

³ *Lane v. Logue*, 12 Lea (Tenn.) 681.

⁴ *Wilson v. Samuels*, 109 Cal. 514; 35 Pac. 148; *Allmendinger v. Lumber Co.*, 82 Ill. App. 166; *Hillenbrand v. Shippen*, (Ky.); 58 S. W. 525; *Mason v. Gass*, 62 Mo. App. 449; *Hughes v. Lansing*, 34 Or. 118; 75 Am. St. Rep. 574; 55 Pac. 95.

⁵ *Bradshaw v. Bratton*, 96 Va. 577; 32 S. E. 56. (The purchaser of realty encumbered by a judgment lien promised to pay it personally in consideration of delay in enforcing such lien.) A promise not to attack a fraudulent judgment lien is a consideration for an agreement to postpone such lien; *Hanchett v. Ives*, 171 Ill. 122; 49 N. E. 206; affirming, 69 Ill. App. 83.

⁶ *Mygatt v. Tarbell*, 18 Wis.

on chattels,⁷ a chattel mortgage, defective but not void,⁸ or a pledge,⁹ a release of an attachment,¹⁰ or a waiver of an attorney's lien on papers,¹¹ are all considerations. So the waiver of a right to obtain a lien,¹² or an agreement to refrain from obtaining garnishment,¹³ is a consideration.

§288. Extension of time.

A promise to extend for a definite time the payment of a debt due the promisor,¹ or for a "reasonable time,"² or since if

351; 47 N. W. 618. But if the property is clearly exempt from execution, forbearance to levy thereon is no consideration for the promise of a third person; *Hennessey v. Hill*, 52 Ill. 281.

⁷ *Rollins v. Hare*, 15 Ind. App. 677; 44 N. E. 374; *Sharp v. Carmody*, (Ky.); 32 S. W. 749.

⁸ *Green v. Hadfield*, 89 Wis. 138; 61 N. W. 310. But waiver of a void chattel mortgage is no consideration; *Mandeville v. Avery*, 124 N. Y. 376; 21 Am. St. Rep. 678; 26 N. E. 951.

⁹ *Saunders v. Pope*, 1 Ohio, 486.

¹⁰ *Smith v. Taylor*, 39 Me. 242; *Bartlett v. Woodworth-Mason Co.*, 69 N. H. 316; 41 Atl. 264. It is a consideration for a guaranty by a third person; *Smith v. Weed*, 20 Wend. (N. Y.) 184; 32 Am. Dec. 525; or for a promise by other creditors to take eighty cents on the dollar; *Bartlett v. Woodworth-Mason Co.*, 69 N. H. 316; 41 Atl. 264.

¹¹ *Rollins v. Hare*, 15 Ind. App. 677; 44 N. E. 374.

¹² *Culver v. Ice Co.*, 206 Pa. St. 481; 56 Atl. 29.

¹³ *First National Bank v. Border*, 9 Tex. Civ. App. 670; 29 S. W. 659; (for a guaranty). But a promise not to attach, where no ground for attachment exists is no consideration for a guaranty by a third per-

son; *Bates v. Sandy*, 27 Ill. App. 552.

¹ *Lyons v. Donkin*, 23 N. S. 258; *Hobson v. Hassett*, 76 Cal. 203; 9 Am. St. Rep. 193; 18 Pac. 320; *Tuttle v. Bigelow*, 1 Root (Conn.) 108; 1 Am. Dec. 35; *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620; 18 N. E. 657; *Wickham v. Loan Association*, 80 Ill. App. 523; *Sweeney v. Kaufman*, 64 Ill. App. 151; *Burke v. Dillin*, 92 Ia. 557; 61 N. W. 370; *Whitt v. Bailey*, (Ky.); 59 S. W. 514; *Pulliam v. Withers*, 8 Dana (Ky.) 98; 33 Am. Dec. 479; *Wooley v. Cobb*, 165 Mass. 503; 43 N. E. 497; *Union Trust Co. v. Zynda*, 129 Mich. 156; 88 N. W. 407; *Lundburg v. Elevator Co.*, 42 Minn. 37; 43 N. W. 685; *Peterson v. Russell*, 62 Minn. 220; 54 Am. St. Rep. 634; 29 L. R. A. 612; 64 N. W. 555; *Murdock v. Lewis*, 26 Mo. App. 234; *Farmers', etc., Bank v. Wallace*, 45 O. S. 152; 12 N. E. 439; *Brainard v. Harris*, 14 Ohio 107; *Hamaker v. Eberley*, 2 Binn. (Pa.) 506; 4 Am. Dec. 477; *Sidwell v. Evans*, 1 Pen. & Watts (Pa.) 383; 21 Am. Dec. 387; *Walker v. Cole*, (Tex. Civ. App.); 28 S. W. 1012; *Washburn Co. v. Thompson*, 99 Wis. 585; 75 N. W. 309.

² *Morgan v. Bank*, 44 Ill. App. 582.

no time is mentioned a reasonable time is intended³ a promise to extend payment for an indefinite time, if followed by delay for a reasonable time in pursuance of such promise, and in reliance thereon to the knowledge of the promisor,⁴ are considerations for promises made in reliance on such extension, and therefore will support a promise for additional security by others than the original debtor,⁵ or for a new note given to evidence such debt,⁶ or for a bond given for such purpose,⁷ or for a note given by the debtor as collateral security for the debt thus extended,⁸ or for the indorsement by the debtor of a note signed by other makers as collateral security for the debt extended.⁹ So agreeing to forbear a right to withdraw money from a bank without fixing any

³ *Moore v. McKenney*, 83 Me. 80; 23 Am. St. Rep. 753; 21 Atl. 749; *Traders' National Bank v. Parker*, 130 N. Y. 415; 29 N. E. 1094.

⁴ *Marshall v. Old*, 14 Colo. App. 32; 59 Pac. 217; *Breed v. Hillhouse*, 7 Conn. 523; *McMicken v. Safford*, 100 Ill. App. 102; 64 N. E. 540; *Webbe v. Stone Co.*, 58 Ill. App. 222; *Cooper v. Jackson*, (Ky.); 57 S. W. 254; *Moore v. McKenney*, 83 Me. 80; 23 Am. St. Rep. 753; 21 Atl. 749; *Haskell v. Tukesbury*, 92 Me. 551; 69 Am. St. Rep. 529; 43 Atl. 500; *Howe v. Taggart*, 133 Mass. 284.

⁵ *Stroud v. Thomas*, 139 Cal. 274; 96 Am. St. Rep. 111; 72 Pac. 1008; *Scribner v. Hanke*, 116 Cal. 613; 48 Pac. 714; *Elton v. Johnson*, 16 Conn. 253; 41 Am. Dec. 141; *Metzerott v. Wood*, 10 App. D. C. 514; *Jones v. Sikes*, 85 Ga. 546; 11 S. E. 664; *Webbe v. Stone Co.*, 58 Ill. App. 222; *Jackson v. Cooper*, (Ky.); 39 S. W. 39; *Haskell v. Tukesbury*, 92 Me. 551; 69 Am. St. Rep. 529; 43 Atl. 500; *Moore v. Kenney*, 83 Me. 80; 23 Am. St. Rep. 753; *King v. Upton*, 4 Me. 387; 16 Am.

Dec. 266; *Robertson v. Rowell*, 158 Mass. 94; 35 Am. St. Rep. 466; 32 N. E. 898; *Howe v. Taggart*, 133 Mass. 284; *Prouty v. Wilson*, 123 Mass. 297; *Robinson v. Gould*, 11 Cush. 55; *Union Banking Co. v. Martin*, 113 Mich. 521; 71 N. W. 867; *Peterson v. Russell*, 62 Minn. 220; 54 Am. St. Rep. 634; 29 L. R. A. 612; 64 N. W. 555; *Nichols & S. Co. v. Dedrick*, 61 Minn. 513; 63 N. W. 1110; *Hooper v. Pike*, 70 Minn. 84; 68 Am. St. Rep. 512; 72 N. W. 829; *North Atchison Bank v. Gay*, 114 Mo. 203; 21 S. W. 479; *Grandy v. Campbell*, 78 Mo. App. 502; *Giles v. Ackles*, 9 Pa. St. 147; 49 Am. Dec. 551; *Saalfeld v. Manrow*, 165 Pa. St. 114; 30 Atl. 823; *Fowler v. Allen*, 32 S. C. 229; 7 L. R. A. 745; 10 S. E. 947.

⁶ *Cox v. Sloan*, 158 Mo. 411; 57 S. W. 1052.

⁷ *Union Trust Co. v. Zynda*, 129 Mich. 156; 88 N. W. 407.

⁸ *Red River Valley National Bank v. Barnes*, 8 N. D. 432; 79 N. W. 880.

⁹ *Mansur, etc., Co. v. Beer*, 19 Tex. Civ. App. 311; 45 S. W. 972.

time, followed by forbearance for a reasonable time, is consideration for a third person's signing a certificate of deposit as surety to secure such indebtedness.¹⁰ These cases rest on the theory that from the facts given it can be inferred that the parties intended delay for a reasonable time.¹¹ If, on the other hand, such inference cannot be drawn, and if the promisee did not agree, expressly or impliedly, to give an extension of time, and could have sued at any time without breaking his contract, actual extension of time is no consideration.¹² On the same principle a promise to delay a "short time" has been held no consideration.¹³ If, however, the party agreeing to extend the time is bound by such extension even for a short time such extension is a consideration. Thus extension of time for one day has been held a consideration.¹⁴

§289. Forbearance to sue.

Forbearance to sue on a claim which is asserted in good faith,¹ such as the waiver of a bastardy suit,² or forbearance to bring a justifiable suit for divorce,³ or a delay in bringing such suit,⁴

¹⁰ Ballard v. Burton, 64 Vt. 387; 10 L. R. A. 664; 24 Atl. 769.

¹¹ Boyd v. Frieze, 5 Gray (Mass.) 553; First National Bank v. Cecil, 23 Or. 58; 31 Pac. 61; 32 Pac. 393.

¹² Blumenthal v. Tibbits, 160 Ind. 70; 66 N. E. 159; Manter v. Churchill, 127 Mass. 31; First National Bank v. Cecil, 23 Or. 58; 31 Pac. 61; 32 Pac. 393.

¹³ Gates v. Hackethal, 57 Ill. 534; 11 Am. Rep. 45.

¹⁴ Whelan v. Swain, 132 Cal. 389; 64 Pac. 560.

¹ Wickham v. Hyde Park, etc., Association, 80 Ill. App. 523; Johnson v. Staley, — Ind. App. —; 70 N. E. 541; Mosher v. Lumber Co., 112 Mich. 517; 71 N. W. 161; Minneapolis Land Co. v. McMillan, 79 Minn. 287; 82 N. W. 591; Hills v. Ry. Co., 82 Mo. App. 188; Matthews v. Seaver, 34 Neb. 592; 52 N. W. 283; Manahan v. Smith, 19

O. S. 384; Holzworth v. Koch, 26 O. S. 33; Brownell v. Harsh, 29 O. S. 631. To be a consideration, forbearance to sue must not of course be illegal. See § 417 et seq.

² Davis v. Harrington, 53 Ark. 5; 13 S. W. 215; Van Epps v. Redfield, 68 Conn. 39; 34 L. R. A. 360; 35 Atl. 809; but a promise by the father to support the child has no consideration where no right against him is waived; Mercer v. Mercer, 87 Ky. 30; 7 S. W. 401.

³ Polson v. Stewart, 167 Mass. 211; 57 Am. St. Rep. 452; 36 L. R. A. 771; 45 N. E. 737; so, Moayon v. Moayon, — Ky. —; 60 L. R. A. 415; 72 S. W. 33. *Contra*, such consideration is not valid as against the creditors of the husband; Oppenheimer v. Collins, 115 Wis. 283; 60 L. R. A. 406; 91 N. W. 690;

⁴ Stein v. Blake, 56 Ill. App. 525.

or to sue for personal injuries,⁵ or to sue on a bond,⁶ or on a note,⁷ or to enforce a lien,⁸ or the withdrawal of a claim on a fund held by the government,⁹ are considerations.

Thus if circumstances exist under which a wife has a claim against her husband for alimony, her forbearance to sue therefor is a valuable consideration.¹⁰ So a waiver of a right to sue for a violation of the provisions of a decree for alimony is a consideration.¹¹

Such contracts are not favorites of the law. If the separation is voluntary, the wife has no claim for alimony and her forbearance to sue is no consideration.¹²

If cohabitation continues, a promise by a wife to live harmoniously, manage the house properly and the like is a promise to do "just what is demanded by her marital relations," and therefore no consideration.¹³

Thus forbearance to sue is consideration for a promise not to plead limitations,¹⁴ or for a promise by a third person to pay such debt,¹⁵ or for a promise to pay the

⁵ Sax v. Ry., 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314.

⁶ Howard v. Lawrence, (Ky.); 63 S. W. 589; Fink v. Bank, 178 Pa. St. 154; 56 Am. St. Rep. 746; 35 Atl. 636.

⁷ Pollak v. Billing, 131 Ala. 519; 32 So. 639; Colver v. Wheeler, 11 Ohio C. C. 604.

⁸ Cornell v. Electric Co., 61 Ill. App. 325; Rollins v. Hare, 15 Ind. App. 677; 44 N. E. 374; Hillenbrand v. Shippen, (Ky.); 58 S. W. 525; Sharp v. Carmody, (Ky.); 32 S. W. 749.

⁹ Barber v. Coburn, 165 Mass. 323; 43 N. E. 95.

¹⁰ Droop v. Ridenour, 11 App. D. C. 224; Roll v. Roll, 51 Minn. 353; 53 N. W. 716; Galusha v. Galusha, 116 N. Y. 633; 15 Am. St. Rep. 453; 22 N. E. 1114; Pettit v. Pettit, 107 N. Y. 677; 14 N. E. 500; Henderson v. Henderson, 37 Or. 141; 82 Am. St. Rep. 741; 48 L. R. A. 766;

60 Pac. 597; 61 Pac. 136. Whether such promise is legal, see § 430.

¹¹ Lancaster v. Elliott, 55 Mo. App. 249.

¹² Scherer v. Scherer, 23 Ind. App. 384; 77 Am. St. Rep. 437; 55 N. E. 494.

¹³ Miller v. Miller, 78 Ia. 177; 16 Am. St. Rep. 431; 35 N. W. 464; 42 N. W. 641.

¹⁴ Wells Fargo & Co. v. Enright, 127 Cal. 669; 49 L. R. A. 647; 60 Pac. 439; Bridges v. Stephens, 132 Mo. 524; 34 S. W. 555.

¹⁵ Marshall v. Old, 14 Colo. App. 32; 59 Pac. 217; Mascolo v. Montesanto, 61 Conn. 50; 29 Am. St. Rep. 170; 23 Atl. 714; Coffin v. Asbury University, 92 Ind. 337; Lemaster v. Burkhart, 2 Bibb. (Ky.) 25; Howe v. Taggart, 133 Mass. 284; Barber v. Coburn, 165 Mass. 323; 43 N. E. 95; Mosher v. Lumbar Co., 112 Mich. 517, 521; 71 N. W. 161; Union Bank Co. v. Mar-

creditor "well" for waiting till the death of the debtor.¹⁰

§290. Dismissal of action.

Dismissal of an action instituted in good faith is a valuable consideration,¹ as discontinuance of attachment proceedings,² or a suit contesting a will,³ or the dismissal of a prosecution for removing goods of a debtor to prevent a levy.⁴ Thus such dismissal by A is consideration for B's promise to pay A's attorney's fees,⁵ or costs,⁶ or money.⁷

§291. Waiver of rights to legal process and procedure.

A waiver of rights concerning procedure, mode of trial and remedies given by law to parties litigant, as a promise to submit a cause to the court without summons or jury,¹ or to waive a jury,² or abandonment of a right to appeal and withdrawal of motion for a new trial,³ or a motion to set aside a judgment,⁴

tin, 113 Mich. 521; 71 N. W. 867; Harris v. Gates, 121 Mich. 163; 79 N. W. 1098; Bartlett v. Woodworth-Mason Co., 69 N. H. 316; 41 Atl. 264; Trader's National Bank v. Parker, 130 N. Y. 415; 29 N. E. 1094; Holzworth v. Koch, 26 O. S. 33; Brownell v. Harsh, 29 O. S. 631; Brown v. McCreight, 187 Pa. St. 181; 41 Atl. 45; Bailey v. Marshall, 174 Pa. St. 602; 34 Atl. 326; Allen v. Morgan, 5 Humph. (Tenn.) 624.

¹⁰ Davis v. Teachout, 126 Mich. 135; 86 Am. St. Rep. 531; 85 N. W. 475. (Hence limitations does not run till the death of the debtor.)

¹ Spielberger v. Thompson, 131 Cal. 55; 63 Pac. 132; rehearing denied, 63 Pac. 678; Murphy v. Murphy, 93 Ill. App. 671; Rains v. Lee, (Ky.); 36 S. W. 176; Weilage v. Abbott, (Neb.); 90 N. W. 1128; County Court v. Hall, 51 W. Va. 269; 41 S. E. 119.

² Bartlett v. Woodworth-Mason Co., 69 N. H. 316; 41 Atl. 264;

Bolln v. Metcalf, 6 Wyom. 1; 71 Am. St. Rep. 898; 42 Pac. 12; 44 Pac. 694.

³ Murphy v. Murphy, 93 Ill. App. 671.

⁴ Brown v. McCreight, 187 Pa. St. 181; 41 Atl. 45.

⁵ Spielberger v. Thompson, 131 Cal. 55; 63 Pac. 132; rehearing denied, 63 Pac. 678; Weilage v. Abbott, — Neb. —; 90 N. W. 1128.

⁶ Weilage v. Abbott, — Neb. —; 90 N. W. 1128; County Court v. Hall, 51 W. Va. 269; 41 S. E. 119.

⁷ Murphy v. Murphy, 93 Ill. App. 671.

¹ Pendleton v. Electric Light Co., 121 N. Car. 20; 27 S. E. 1003.

² Lanahan v. Heaver, 77 Md. 605; 20 L. R. A. 759; 26 Atl. 866.

³ Lundon v. Waddick, 98 Ia. 478; 67 N. W. 388; Russell v. Daniels, 5 Colo. App. 224; 37 Pac. 726; Collins v. Fawcett (Ky.); 39 S. W. 250.

⁴ Read v. French 28 N. Y. 285.

forbearing to go into bankruptcy,⁵ or a waiver of a right to a detailed accounting by a partner,⁶ a waiver of the right to plead the statute of frauds,⁷ or allowing default judgment,⁸ the continuance of an injunction in force,⁹ a relinquishment of costs by a party,¹⁰ or a saving of costs to the adversary party,¹¹ or B's permission to A to manage a suit to which B is a party,¹² as where B, a subcontractor, agrees with A, the contractor, not to sue the city for damages for delaying work, but to co-operate with A in A's suit, A to pay B his share of the amount recovered,¹³ are considerations. So consent by an heir to a suit to contest a will, payment of \$1 and a promise to pay costs and attorney fees is consideration for a promise by another heir to contest the will and pay the first heir a specified sum in case of success.¹⁴ So reducing a claim to judgment is a considera-

⁵ Dawson v. Beall, 68 Ga. 328; Herman v. Schlesinger, 114 Wis. 382; 91 Am. St. Rep. 922; 90 N. W. 460.

⁶ McCullough v. Barr, 145 Pa. St. 459; 22 Atl. 962; (for a promise that all property held by such partner shall be divided equally with the other.)

⁷ Wohl v. Barnum, 116 N. Y. 87; 5 L. R. A. 623; 22 N. E. 280.

⁸ Heim v. Butin, 109 Cal. 500; 50 Am. St. Rep. 54; 40 Pac. 39; (a promise by mortgagee not to take a deficiency judgment but to bid off the property for the full amount of his judgment); McDaniel v. Evans, 90 Ky. 568; 14 S. W. 541; Ryan v. Trimble, (Ky.); 60 S. W. 633, (for a promise that a certain minimum price should be paid for the land when sold); Dabney v. McFarlen (Tex. Civ. App.); 34 S. W. 142; Ward v. Gibbs, 10 Tex. Civ. App. 287; 30 S. W. 1125. But where no such right exists, a waiver of a pretended right by one having no interest in land to prevent confirmation of a judicial sale is no

consideration. Davezac v. Seiler, (Ky.); 14 S. W. 590.

⁹ Terre Haute, etc., Ry. v. Ry. Co.-81 Ill. App. 435.

¹⁰ Berry v. Ry. Co., 89 Me. 552; 36 Atl. 904.

¹¹ Gemberling v. Spaulding, 104 Mich. 217; 62 N. W. 342; McLane v. Mackey, (Tex. Civ. App.); 59 S. W. 944. So a promise of a vendor to pay the widow of a vendee ten per cent. of the value of the land subject to the vendor's lien if she would be appointed an independent administratrix, so that she could convey the land without suit is supported by a consideration. McLane v. Mackey, (Tex. Civ. App.); 59 S. W. 944.

¹² Goodspeed v. Fuller, 46 Me. 141; 71 Am. Dec. 572; (for A's promise to pay costs). Tarbell v. Linehan, 151 Mass. 448; 24 N. E. 325.

¹³ Tarbell v. Linehan, 151 Mass. 448; 24 N. E. 325.

¹⁴ Ridenbaugh v. Young, 145 Mo. 274; 46 S. W. 959.

tion.¹⁵ A's promise to pay the expenses of an action to be brought by B against C, if not champertous,¹⁶ or A's promise to pay the costs if B defends a suit against A,¹⁷ are considerations.

§292. Abstinence from competition.

Abstinence from competition, whenever lawful, is a valuable consideration.¹ Thus lawful agreements to abstain from bidding at public sales,² or to refrain from competition in business,³ or to "pool" stock belonging to different owners,⁴ are valuable considerations.

§293. Rights in decedent's estate.

A waiver of rights in a decedent's estate is a valuable consideration; such as an agreement between the heirs or next of kin for an amicable settlement of such estate,¹ or to waive claim for advancement,² or to waive a right to administer an estate,³

¹⁵ Beckwith v. Brackett, 97 N. Y. 52.

¹⁶ A, an insurance company indebted to B on a policy, promised to pay the expenses if B would sue the railroad company for the negligence causing loss on the policy; Norwich, etc., Ins. Co. v. Stang, 9 Ohio C. D. 576.

¹⁷ Wells v. Mann, 45 N. Y. 327; 6 Am. Rep. 93.

¹ Marshalltown Stone Co. v. Mfg. Co., 114 Ia. 574; 87 N. W. 496; Camden v. Dewing, 47 W. Va. 310; 81 Am. St. Rep. 797; 34 S. E. 911.

² Kearney v. Taylor, 15 How. (U. S.) 494; Wicker v. Hoppock, 6 Wall. (U. S.) 94; Garrett v. Moss, 20 Ill. 549; Phippen v. Stickney, 3 Met. (Mass.) 384; German v. Gilbert, 83 Mo. App. 411; Carter v. Gibson, 29 Neb. 324; 26 Am. St. Rep. 381; 45 N. W. 634; National Bank v. Sprague, 20 N. J. Eq. 159; Hopkins v. Ensign, 122 N. Y. 144; 9 L. R. A. 731; 25 N. E. 306; Marie v. Gar-

rison, 83 N. Y. 14; Tom v. Daily, 4 Ohio, 368; Gregg v. Allen, 130 Pa. St. 611; 18 Atl. 1020; Maffat v. Ijams, 103 Pa. St. 266; Brown v. Jackson, (Tex. Civ. App.); 40 S. W. 162; Camden v. Dewing, 47 W. Va. 310; 81 Am. St. Rep. 797; 34 S. E. 911. As to whether such contracts are legal see § 405.

³ Marshalltown Stone Co. v. Mfg. Co., 114 Ia. 574; 87 N. W. 496.

See ch. xix.

⁴ Green v. Higham, 161 Mo. 333; 61 S. W. 798.

¹ McDole v. Kingsley, 163 Ill. 433; 45 N. E. 281; Fain v. Turner, 96 Ky. 634; 29 S. W. 628; Ralston's Estate, 172 Pa. St. 104; 33 Atl. 273; Supreme Assembly, etc., v. Campbell, 17 R. I. 402; 13 L. R. A. 601; 22 Atl. 307. If under seal, McDole v. Kingsley, 163 Ill. 433; 45 N. E. 281.

² Fain v. Turner, 96 Ky. 634, 29 S. W. 628.

³ Mott v. Fowler, 85 Md. 676; 37

or to waive *bona fide* objections to the probate of a will.⁴ But waiver of an alleged right to contest a will, for which no ground exists, is no consideration.⁵

§294. Waiver of other property rights.

A waiver of a right to rescind a contract,¹ as for fraud,² or for breach by the adversary party,³ a waiver of a right to be released from a bond,⁴ as by surrender of the principal,⁵ or a waiver of a right to withdraw an offer,⁶ are all considerations.

A definite promise to refrain from attempting to obtain additional security has been held a consideration,⁷ and actually refraining from getting security without any agreement to refrain has been held a consideration.⁸

A waiver of exemptions,⁹ the waiver by an indorser of his right to demand and notice,¹⁰ a waiver of a right to declare dividends and an agreement to apply the surplus to making certain improvements,¹¹ and destroying an unrecorded assignment of a patent to revest the title in the assignor,¹² are valuable considerations. So A's promise to B, his broker, not to close his sales of stock to avoid loss, is a consideration for B's promise to carry the stock without further margin.¹³

Atl. 717; held sufficient consideration for a promise by one to serve as administrator without compensation.

⁴ Rector, etc., St. Mark's Church v. Teed, 120 N. Y. 583; 24 N. E. 1014.

⁵ Prater v. Miller, 25 Ala. 320; 60 Am. Dec. 521.

¹ Osborne v. O'Reilly, 42 N. J. Eq. 467; 9 Atl. 209.

² Waters v. White, 75 Conn. 88; 52 Atl. 401; Sisson v. Kaper, 105 Ia. 599; 75 N. W. 490; Pratt v. Coke Co., 155 Ill. 531; 40 N. E. 1032.

³ King v. Ry. Co., 61 Minn. 482; 63 N. W. 1105.

⁴ Sureties' remaining on a bond and justifying is consideration for a promise by the attorney to indemnify them. Esch v. White, 76 Minn. 220; 78 N. W. 1114.

⁵ Thomson v. Way, 172 Mass. 423; 52 N. E. 525.

⁶ Manary v. Runyon, 43 Or. 495; 73 Pac. 1028.

⁷ Heitsch v. Cole, 47 Minn. 320; 50 N. W. 235.

⁸ Robinson v. Boyd, 60 O. S. 57; 53 N. E. 494; Pollock v. Loan Association, 51 S. Car. 420; 64 Am. St. Rep. 683; 29 S. E. 77. But see § 277.

⁹ Gunther v. Gunther, 181 Mass. 217; 63 N. E. 402.

¹⁰ L'Amoreaux v. Gould, 7 N. Y. 349; 57 Am. Dec. 524.

¹¹ Knickerbocker v. Athletic Co., 20 Ohio C. C. 655.

¹² Winfrey v. Gallatin, 72 Mo. App. 191.

¹³ Rogers v. Wiley, 131 N. Y. 527; 30 N. E. 582.

§295. Waiver of rights not involving property.

The examples of benefits or detriments thus far given have been rights involving property directly or indirectly. Consideration, however, is not necessarily limited to rights of this kind. Any forbearance of any legal right is a consideration, though it may not and cannot involve financial loss to the party forbearing, or financial gain to the other. Even if the forbearance can be shown to be really beneficial to the party forbearing the right, the forbearance is nevertheless a consideration.¹ Thus a waiver of the right to use tobacco,² or to drink liquor, use tobacco, swear or play cards,³ or to abstain from the use of intoxicating liquor,⁴ a waiver by a parent of the right to name a child,⁵ surrender of the control of a child⁶ attending a university,⁷ a promise by a son not to move away,⁸ mutual agreements among merchants to close their stores at six thirty P. M.,⁹ a promise by one who has been intimate with a married woman beyond the limits of propriety, though not of morality, to influence her to return to her husband, and for himself to leave the country,¹⁰ are all considerations, though in almost every case it

¹ *Dendy v. Russell*, — Kan. —; 74 Pac. 248.

² *Talbott v. Stemmons*, 89 Ky. 222; 25 Am. St. Rep. 531; 5 L. R. A. 856; 12 S. W. 297.

³ *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693; 12 L. R. A. 463; 27 N. E. 256.

⁴ *Lindell v. Rokes*, 60 Mo. 249; 21 Am. Rep. 395.

⁵ *Wolford v. Powers*, 85 Ind. 294; 44 Am. Rep. 16; *Diffenderfer v. Scott*, 5 Ind. App. 243; 32 N. E. 87; *Daily v. Minnick*, 117 Ia. 563; 60 L. R. A. 840; 91 N. W. 913; *Eaton v. Libbey*, 165 Mass. 218; 52 Am. St. Rep. 511; 42 N. E. 1127; *Parks v. Francis*, 50 Vt. 626; 28 Am. Rep. 517.

⁶ *Healey v. Simpson*, 113 Mo. 340; 20 S. W. 881. So where the mother of an illegitimate child, who has the exclusive right to its custody surrenders it to its putative father; *Berge*

v. Hiatt, 82 Ky. 666; 56 Am. Rep. 912; *Story v. Story*, (Ky.); 62 S. W. 865. So a father's consent to the marriage of his minor daughter is a consideration; *Henry v. Russell*, — Neb. —; 99 N. W. 484.

⁷ *Hoshor v. Kautz*, 19 Wash. 258; 53 Pac. 51. (Consideration for a promise by A to pay B a certain sum each year that B attends.)

⁸ *Hull v. Hull*, 16 Ohio C. C. appx. 688; 9 Ohio C. D. 19 (citing *Law v. Henry*, 39 Ind. 414; *Ungeley v. Ungeley*, L. R. 4 Ch. Div. 73); *Second Nat. Bank of Beloit v. Merrill*, 81 Wis. 142; 29 Am. St. Rep. 870; 50 N. W. 503.

⁹ *Stovall v. McCutchen*, 107 Ky. 577; 92 Am. St. Rep. 373; 47 L. R. A. 287; 54 S. W. 969.

¹⁰ *Lyts v. Keevey*, 5 Wash. 606; 32 Pac. 534; (a consideration for a note from the husband.)

is impossible to discover any trace of financial loss or gain. In most of them, the promisee is clearly the gainer by his act or forbearance, and the promisor gets nothing of financial value.

Furnishing information,¹¹ attending a funeral,¹² going to Europe¹³ and guessing at the weight of a block of soap,¹⁴ are all examples of forbearance of legal rights which are considerations, though no financial loss may result to the promisee or gain to the promisor. The waiver by a city of the right to prohibit interment within city limits is consideration for a promise by a cemetery association not to charge more than a certain price for burial lots.¹⁵

§296. Mutual promises.

If the promisor is willing to accept a promise in return for his promise, and does not insist on the performance of the act or forbearance stipulated for, such promise is as lawful a consideration as the doing of the thing promised would have been.¹ Thus a promise to sell land,² even if subject to vendor's

¹¹ *Wilkinson v. Oliveira*, 1 Bing. N. Cas. 490; *Green v. Brooks*, 81 Cal. 328; 22 Pac. 849; *Reed v. Golden*, 28 Kan. 632; 42 Am. Rep. 180; *Cobb v. Cowdery*, 40 Vt. 25; 94 Am. Dec. 370.

¹² *Earle v. Angell*, 157 Mass. 294; 32 N. E. 164.

¹³ *Deveemon v. Shaw*, 69 Md. 199; 9 Am. St. Rep. 422; 14 Atl. 464.

¹⁴ *Dunham v. Soap Mfg. Co.*, 34 N. B. 243.

¹⁵ (*City of*) *Austin v. Cemetery Association*, 96 Tex. 384; 73 S. W. 525.

¹ *Wells Fargo & Co. v. Enright*, 127 Cal. 669; 60 Pac. 439; *Davis v. Calloway*, 30 Ind. 112; 95 Am. Dec. 671; *Steves v. Frazee*, 19 Ind. App. 284; 49 N. E. 385; *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205; 44 N. E. 940, 558; *Harper v. Ry. Co. (Ky.)*; 22 S. W. 849; *Pike v. Thomas*, 4 Bibb (Ky.) 486; 7 Am. Dec. 741; *Cowan v. Hite*, 2 A. K. Mar. (Ky.) 238; *Preble v. Hunt*, 85 Me. 267; 27 Atl. 151; *Babcock v. Wilson*, 17 Me. 372; 35 Am.

Dec. 263; *Lamb v. Wilson*, (Neb.); 97 N. W. 325; vacating on rehearing, 92 N. W. 167; *Pryor v. Hunter*, 31 Neb. 678; 48 N. W. 736; *Tradesman's National Bank v. Curtis*, 167 N. Y. 194; 52 L. R. A. 430; 60 N. E. 429; *Gould v. Banks*, 8 Wend. (N. Y.) 562; 24 Am. Dec. 90; *Utica, etc., Ry. Co. v. Brinckerhoff*, 21 Wend. (N. Y.) 139; 34 Am. Dec. 220; *Tucker v. Woods*, 12 Johns. (N. Y.) 190; 7 Am. Dec. 305; *Howe v. O'Mally*, 1 Murph. (N. Car.) 287; 3 Am. Dec. 693; *Shields v. Titus*, 46 O. S. 528; 22 N. E. 717; *McFeaters v. Pattison*, 188 Pa. St. 270; 41 Atl. 609; *Ames v. Pierson*, 174 Pa. St. 597; 34 Atl. 317; *Flanders v. Wood*, 83 Tex. 277; 18 S. W. 572; *James v. Fulcrud*, 5 Tex. 512; 55 Am. Dec. 743; *Arnold v. Chamberlain*, 14 Tex. Civ. App. 634; 39 S. W. 201; *Lillard v. Oil Co.*, 14 Tex. Civ. App. 67; 36 S. W. 792; *Abba v. Smyth*, 21 Utah 109; 59 Pac. 756; *Cramer v. Redman*, 10 Wyom. 328; 68 Pac. 1003.

² *Easton v. Montgomery*, 90 Cal.

subsequently obtaining a patent from the government for the realty contracted for, the purchase money to be returned if the patent is not issued,³ to sell personalty,⁴ even if on conditional sale, the title not passing till payment,⁵ or if subject to subsequent testing,⁶ to buy bonds,⁷ to buy claims against a third person,⁸ to pay money not due or owing,⁹ to exchange notes,¹⁰ to rescind a sale,¹¹ mutual promises to bequeath stock,¹² a promise to make a will,¹³ a promise between the payees to give the whole of a note payable to two jointly, to the survivor,¹⁴ to pay future premiums on an insurance policy,¹⁵ to pay an insurance policy,¹⁶ to let a contract,¹⁷ are considerations for promises in return therefor.¹⁸ Where a promise is accepted as consideration the

307; 25 Am. St. Rep. 123; 27 Pac. 280; *Van Wert v. Grocery Co.*, 100 Mich. 328; 59 N. W. 139.

³ *Southern Pacific Ry. v. Allen*, 112 Cal. 455; 44 Pac. 796.

⁴ *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85; 31 L. R. A. 529; 43 N. E. 774; *Baker v. Ry.*, 91 Mo. 152; *Cherry v. Smith*, 3 Humph. (Tenn.) 19; 39 Am. Dec. 150; *McCall Co. v. Icks*, 107 Wis. 232; 83 N. W. 300.

⁵ *Beach's Appeal*, 58 Conn. 464; 20 Atl. 475.

⁶ *Schleicher v. Light Co.*, 114 Ala. 228; 21 So. 1014.

⁷ *Ritchie v. McMullen*, 79 Fed. 522; 25 C. C. A. 50. A conditional promise to buy stock is consideration for a promise by vendor to repurchase at the selling price with interest if the vendee wishes; *White v. Taylor*, 113 Mich. 542; 71 N. W. 871.

⁸ *Cohen v. Grimes*, 18 Tex. Civ. App. 327; 45 S. W. 210.

⁹ *Taylor v. Williams*, 120 Ind. 414; 22 N. E. 118.

¹⁰ *Backus v. Spaulding*, 116 Mass. 418.

¹¹ *Willard v. Tatum*, (Cal.); 31 Pac. 912.

¹² *Crofut v. Layton*, 68 Conn. 91; 35 Atl. 783.

¹³ *Lawrence v. Oglesby*, 178 Ill. 122; 52 N. E. 945; affirming, 75 Ill. App. 669; *Williamson v. Yager*, 91 Ky. 282; 34 Am. St. Rep. 184; 15 S. W. 660; *Gilpatrick v. Glidden*, 81 Me. 137; 10 Am. St. Rep. 245; 2 L. R. A. 662; 16 Atl. 464; *Yearance v. Powell*, 55 N. J. Eq. 577; 37 Atl. 735; *Hinds v. Holdslip*, 2 Watts (Pa.) 104; 26 Am. Dec. 107.

¹⁴ *Taylor v. Smith*, 116 N. Car. 531; 21 S. E. 202.

¹⁵ *Michigan, etc., Ins. Co. v. Custer*, 128 Ind. 25; 27 N. E. 124; *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205; 44 N. E. 558, 940. A promise to keep the buildings of another insured, which is performed for a time, renders the promisor liable. *Kaw Brick Co. v. Hogsett*, 73 Mo. App. 432; citing *Thorne v. Deas*, 4 Johns. 84; *Criswell v. Riley*, 5 Ind. App. 496; 30 N. E. 1101; 32 N. E. 814.

¹⁶ *Union, etc., Ins. Co. v. Hilliard*, 63 O. S. 478; 59 N. E. 230.

¹⁷ *Kauffman v. Cooper*, 46 Neb. 644; 65 N. W. 796. A consideration for a promise by contractor to pay for all labor and material.

¹⁸ See §§ 297 and 303 et seq.

party so accepting cannot thereafter insist on performance as a condition to his own liability.¹⁹ Thus a promise to deliver coal is a consideration for a draft given in advance therefor.²⁰ So if co-sureties who have paid a note in equal shares agree to divide collections made by either from the principal debtor, a surety who has not collected anything from the principal may compel the other surety to share with him whatever he has collected from the principal.²¹

§297. Incurring obligations.

If a person not otherwise liable assumes obligations so that they become enforceable against him personally or against his property, such assumption is consideration for a promise made therefor.¹ Security for a claim, whether personal security,² or mortgage security,³ as wife's joining in a mortgage of her

¹⁹ *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205; 44 N. E. 558, 940; *Tradesmen's National Bank v. Curtis*, 167 N. Y. 194; 52 L. R. A. 430; 60 N. E. 429; *Arnold v. Chamberlain*, 14 Tex. Civ. App. 634; 39 S. W. 201; *Abba v. Smyth*, 21 Utah, 109; 59 Pac. 756; *Cramer v. Redman*, 10 Wyom. 328; 68 Pac. 1003.

²⁰ *Tradesmen's National Bank v. Curtis*, 167 N. Y. 194; 52 L. R. A. 430; 60 N. E. 429.

²¹ *Cramer v. Redman*, 10 Wyom. 328; 68 Pac. 1003.

¹ *Golden State, etc., Works v. Angell*, 89 Cal. 643; 27 Pac. 65; *Farr v. Bach*, 13 Ind. App. 125; 41 N. E. 393; *Martin v. Meles*, 179 Mass. 114; 60 N. E. 397; *Durgin v. Smith*, 115 Mich. 239; 73 N. W. 361; *Sands v. Crooke*, 46 N. Y. 564; *Sterling Wrench Co. v. Amstutz*, 50 O. S. 484; 34 N. E. 794; *Kountz v. Gates*, 78 Wis. 415; 47 N. W. 729.

² *Bevens v. Barnett*, (Ark.); 22 S. W. 160; (indemnity promised debtor); *Grigsby v. Shwarz*, 82 Cal.

278; 22 Pac. 1041; *Resseter v. Waterman*, 151 Ill. 169; 37 N. E. 875; reversing, 45 Ill. App. 155; (a promise by payee to secure collateral so as to protect surety); *Selz v. Mayer*, 151 Ind. 422; 51 N. E. 485; *Gibson v. McIntire*, 110 Ia. 417; 81 N. W. 699. (Security to creditor.) *Smith v. Rankin*, 45 Kan. 176; 25 Pac. 586 (indemnity to surety.) *Lucas v. Chamberlain*, 8 B. Mon. (Ky.) 276; *Kempton v. Coffin*, 12 Pick. (Mass.) 129; *Staver v. Missimer*, 6 Wash. 173; 36 Am. St. Rep. 142; 32 Pac. 995 (security to creditor.) A wishing to give his mother a present had B deed her property. She gave B a note and mortgage for the purchase money and A gave her his note for the same amount. Her incurring such liability was a consideration for A's note. *Brooks v. Owen*, 112 Mo. 251; 19 S. W. 723; 20 S. W. 492. A promise to pay a lien is a consideration for the conveyance of realty. *Drey v. Doyle*, 99 Mo. 459; 12 S. W. 287.

³ *Savings Bank v. Asbury*, 117

husband's realty,⁴ or homestead,⁵ or chattel property;⁶ a promise to support one whom promisor is not otherwise obliged to support,⁷ as a promise to care for a brother,⁸ or a father who is financially able to support himself,⁹ or where the son who renders the support is an emancipated minor;¹⁰ purchasing property in reliance on the promise of another to take a part,¹¹ or all,¹² thereof and pay for it; or to advance a part of the purchase price,¹³ or agreeing to erect a building,¹⁴ or to transport property at certain rates,¹⁵ or giv-

Cal. 96; 48 Pac. 1081; *Talbott v. Barber*, 11 Ind. App. 1; 54 Am. St. Rep. 491; 38 N. E. 487; *Stacy v. Cook*, 62 Kan. 50; 61 Pac. 399; *Lamb v. Rathburn*, 118 Mich. 666; 77 N. W. 268; *Brooks v. Owen*, 112 Mo. 251; 19 S. W. 723; 20 S. W. 492; *Sloan v. Van Buskirk*, 51 Neb. 390; 70 N. W. 948; *Columbia Ave., etc., Co., v. Lewis*, 190 Pa. St. 558; 42 Atl. 1094; *Brown v. Kern*, 21 Wash. 211; 57 Pac. 798. A owed B a certain amount, but had the right to set off a smaller debt owed by B to A. A agreed to pay the entire debt, waiving set-off, in return for a mortgage to B to secure his debt. A's promise is supported by a consideration. *Stacy v. Cook*, 62 Kan. 50; 61 Pac. 399.

⁴ *Talbott v. Barber*, 11 Ind. App. 1; 54 Am. St. Rep. 491; 38 N. E. 487.

⁵ *Sloan v. Van Buskirk*, 51 Neb. 390; 70 N. W. 948.

⁶ The additional security as of promisee's wife to a chattel mortgage is a consideration for a promise to reduce rent. *Lamb v. Rathburn*, 118 Mich. 666; 77 N. W. 268; citing, *Lawrence v. Davey*, 28 Vt. 264; *Connelly v. Devoe*, 37 Conn. 570; *Rollins v. Marsh*, 128 Mass. 116.

⁷ *Waldron v. Alexander*, 133 Ill.

30; 24 N. E. 557; *Schneider v. Carman*, 98 Ia. 276; 67 N. W. 249; *Harlan v. Harlan*, 102 Ia. 701; 72 N. W. 286; *Braswell v. Braswell*, 109 Ky. 15; 58 S. W. 426; *Grimm v. Taylor*, 96 Mich. 5; 55 N. W. 447; *Taylor v. Crockett*, 123 Mo. 300; 27 S. W. 620; *Collins v. Collins*, 45 N. J. Eq. 813; 18 Atl. 860; *Fritz v. Menges*, 179 Pa. St. 122; 36 Atl. 213; *Keener v. Keener*, 34 W. Va. 421; 12 S. E. 729.

⁸ *Waldron v. Alexander*, 133 Ill. 30; 24 N. E. 557.

⁹ *Collins v. Collins*, 45 N. J. Eq. 813; 18 Atl. 860; *Glasgow v. Turner*, 91 Tenn. 163; 18 S. W. 261.

¹⁰ *Grimm v. Taylor*, 96 Mich. 5; 55 N. W. 447.

¹¹ *Steele v. Steele*, 75 Md. 477; 23 Atl. 959; *James v. Fulcrod*, 5 Tex. 512; 55 Am. Dec. 743.

¹² *Anderson v. Best*, 176 Pa. St. 498; 35 Atl. 194.

¹³ *Berry v. Graddy*, 1 Metc. (Ky.) 553.

¹⁴ *Brewer v. Bessinger*, 25 Miss. 86 (consideration for a conveyance of realty).

¹⁵ *Bald Eagle Valley Ry. Co. v. Ry. Co.*, 171 Pa. St. 284; 50 Am. St. Rep. 807; 29 L. R. A. 423; 33 Atl. 239; *Bigelow v. Ry.*, 104 Wis. 109; 80 N. W. 95.

ing credit to A on B's promise,¹⁶ are all considerations. So becoming security on the note of another is consideration for a promise of indemnity,¹⁷ especially where such promise is made by one primarily liable, to induce promisee to give his note to the former's creditor.¹⁸ So incurring expenses in litigation is a consideration for a promise by interested parties to give indemnity.¹⁹ So A's incurring expenses of a trip to Europe in reliance on B's promise to reimburse him therefor is a consideration for B's promise.²⁰ So a railroad's agreement to support in part a relief department for its employes is consideration for a promise by the employes to release rights of action for personal injury.²¹

§298. Subscriptions.

A promise to donate money as a subscription to some purpose of public utility is a gratuitous promise, unenforceable unless some consideration therefor exists.¹ Some intimation has been made in obiter that a promise for religious or charitable pur-

¹⁶ *Hartzell v. Saunders*, 49 Mo. 433; 8 Am. Rep. 136 (a promise to hold A's baggage till he paid his bill to B and to the promisee).

¹⁷ *Hagar v. Whitmore*, 82 Me. 248; 19 Atl. 444 (indemnity to accommodation indorser).

¹⁸ *Murphey v. Bank*, 57 Neb. 519; 77 N. W. 1102.

¹⁹ *Martin v. Meles*, 179 Mass. 114; 60 N. E. 397. But it has been held that B's promise to contribute to the expenses of a suit defended by A, which A has told B he means to resist independent of B's action, has no consideration. *Columbia Incandescent Lamp Co. v. Mfg. Co.*, 64 Mo. App. 115.

²⁰ *Devecmon v. Shaw*, 69 Md. 199; 9 Am. St. Rep. 422; 14 Atl. 464.

²¹ *Chicago, etc., R. Co. v. Bell*, 44

Neb. 44; 62 N. W. 314; *Pittsburg, etc., Ry. v. Cox*, 55 O. S. 497; 35 L. R. A. 507; 45 N. E. 641; *Ringle v. R. R. Co.*, 164 Pa. St. 529; 44 Am. St. Rep. 628; 30 Atl. 492.

¹ *Augustine v. Episcopal Society*, 79 Ill. App. 452; *Bucklen v. Johnson*, 19 Ind. App. 406; 49 N. E. 612; *University of Des Moines v. Livingstone*, 57 Ia. 307; 42 Am. Rep. 42; 10 N. W. 738; *Twenty-thiru Street Baptist Church v. Cornell*, 117 N. Y. 601; 6 L. R. A. 807; 23 N. E. 177; *Presbyterian Church v. Cooper*, 112 N. Y. 517; 8 Am. St. Rep. 767; 3 L. R. A. 468; 20 N. E. 352; *Hassenzahl v. Bevans*, 24 Ohio C. C. 173; *Sutton v. University*, 7 Ohio C. C. 343; *Montpelier Seminary v. Smith*, 69 Vt. 382; 38 Atl. 66.

poses needs no consideration,² but this view receives little support.

The necessary consideration is usually found in the assumption by the promisee of new liabilities in reliance upon the promise, such liabilities being of a kind contemplated by the offer.³ Examples of such liabilities are: expending money in continuing an institution of learning,⁴ erection of a library building,⁵ a hospital,⁶ a church edifice,⁷ a railroad,⁸ or a shoe factory,⁹ construction of a bridge by a town,¹⁰ locating a col-

² *Garrigus v. Missionary Society*, 3 Ind. App. 91; 50 Am. St. Rep. 262; 28 N. E. 1009; *Irwin v. Lombard University*, 56 O. S. 9; 60 Am. St. Rep. 727; 36 L. R. A. 239; 46 N. E. 63.

³ *Rogers v. College*, 64 Ark. 627; 39 L. R. A. 636; 44 S. W. 454; *Lasar v. Johnston*, 125 Cal. 549; 58 Pac. 161; *Whitsitt v. Church*, 110 Ill. 125; *Richelieu Hotel Co. v. Encampment Co.*, 140 Ill. 248; 33 Am. St. Rep. 234; 29 N. E. 1044; affirming, 41 Ill. App. 268; *Kinsley v. Encampment Co.*, 41 Ill. App. 259; *Trustees of Methodist Church v. Garvey*, 53 Ill. 401; 5 Am. Rep. 51; *McCabe v. O'Connor*, 69 Ia. 134; 28 N. W. 573; *University of Des Moines v. Livingston*, 57 Ia. 307; 42 Am. Rep. 42; 10 N. W. 738; *White v. Scott*, 26 Kan. 476; *Haskell v. Oak*, 75 Me. 519; *Sherwin v. Fletcher*, 168 Mass. 413; 47 N. E. 197; *Chicago, etc., Co. v. Higginbotham*, — Miss. —; 29 So. 79; *Albert Lea College v. Brown*, 88 Minn. 524; 60 L. R. A. 870; 93 N. W. 672; *Kansas City School District v. Sheidley*, 138 Mo. 672; 60 Am. St. Rep. 576; 37 L. R. A. 406; 40 S. W. 656; *James v. Clough*, 25 Mo. App. 147; *Swain v. Hill*, 30 Mo. App. 436; *Homan v. Steele*, 18 Neb. 652; 26 N. W. 472; *Fremont Bridge Co. v. Fuhrman*, 8 Neb. 99; *Osborn v. Crosby*, 63 N. H.

583; 3 Atl. 429; *Miller v. Preston*, 4 N. M. 396; 17 Pac. 565; *Ohio, etc., College v. Love*, 16 O. S. 20; *Cooper v. McCrimmin*, 33 Tex. 383; 7 Am. Rep. 268; *Catt v. Olivier*, 98 Va. 580; 36 S. E. 980; (*Town of*) *Grand Isle v. Kinney*, 70 Vt. 381; 41 Atl. 130; *Gibbons v. Grinsel*, 79 Wis. 365; 48 N. W. 255.

⁴ *Burlington University v. Barrett*, 22 Ia. 60; 92 Am. Dec. 376; *Irwin v. Lombard University*, 56 O. S. 9; 60 Am. St. Rep. 727; 36 L. R. A. 239; 46 N. E. 63; *Irwin v. Webster*, 7 Ohio C. C. 269; *Ohio, etc., College v. Love*, 16 O. S. 20; *Commissioners Canal Fund v. Perry*, 5 Ohio 56.

⁵ *Kansas City School District v. Sheidley*, 138 Mo. 672; 60 Am. St. Rep. 576; 37 L. R. A. 406; 40 S. W. 656.

⁶ *Cottage Hospital v. Merrill*, 92 Ia. 649; 61 N. W. 490.

⁷ *Howell v. Church*, 61 Ill. App. 121.

⁸ *Judson v. Gage*, 91 Cal. 304; 27 Pac. 676; *Cook v. McNaughton*, 128 Ind. 410; 24 N. E. 361; 28 N. E. 74.

⁹ *Sherwin v. Fletcher*, 168 Mass. 413; 47 N. E. 197; *Davis, etc., Co. v. Caigle*, (Tenn. Ch. App.); 53 S. W. 240.

¹⁰ *Town of Grand Isle v. Kinney*, 70 Vt. 381; 41 Atl. 130.

lege,¹¹ a railroad,¹² a post-office,¹³ a manufacturing plant,¹⁴ holding an election,¹⁵ raising money by taxation to meet the terms of the subscription,¹⁶ giving a ball,¹⁷ assumption of certain debts by the trustees individually,¹⁸ and advances made by the trustees,¹⁹ if in accordance with the terms of the respective subscriptions and in reliance upon them. Past considerations do not make a subscription enforceable. Thus the work of a pastor of a church to obtain subscriptions is no consideration for subscriptions already made.²⁰ So a promise made by a subscriber to enable a college to pay its pre-existing debts lacks consideration.²¹

Consideration for subscriptions is sometimes sought in the mutual promises of the subscribers.²² If the offer is made by each of the subscribers to the others and is conditioned on their subscriptions, such mutual promises may be considerations each

¹¹ *Rogers v. College*, 64 Ark. 627; 39 L. R. A. 636; 44 S. W. 454; *Schuler v. Myton*, 48 Kan. 282; 29 Pac. 163; *Keuka College v. Ray*, 167 N. Y. 96; 60 N. E. 325.

¹² *Leshner v. Karshner*, 47 O. S. 302; 24 N. E. 882. The location of a railroad is consideration for a promise to donate land for right of way, depot and termini. *Dewey v. Spring Valley Land Co.*, 98 Wis. 83; 73 N. W. 565.

¹³ *Fearnley v. De Mainville*, 5 Colo. App. 441; 39 Pac. 73.

¹⁴ *Rogers v. Burr*, 105 Ga. 432; 70 Am. St. Rep. 50; 31 S. E. 438; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164; 47 N. W. 652.

¹⁵ The expense of holding election and issuing of bonds voted thereat is consideration for a note given to the school district. *Kansas City School District v. Sheidley*, 138 Mo. 672; 60 Am. St. Rep. 576; 37 L. R. A. 406; 40 S. W. 656.

¹⁶ *La Fayette Co. Monument Association v. Magoon*, 73 Wis. 627; 3 L. R. A. 761; 42 N. W. 17.

¹⁷ *Laser v. Johnston*, 125 Cal. 549; 58 Pac. 161.

¹⁸ *First M. E. Church v. Donnell*, 110 Ia. 5; 46 L. R. A. 858; 81 N. W. 171; *United Presbyterian Church v. Baird*, 60 Ia. 237; 14 N. W. 303.

¹⁹ *Board of Trustees of Seventh Day Baptist Memorial Fund v. Saunders*, 84 Wis. 570; 54 N. W. 1094.

²⁰ *Augustine v. Methodist Episcopal Society*, 79 Ill. App. 452.

²¹ *Johnson v. Otterbein*, 41 O. S. 527.

²² *Berkeley Divinity School v. Jarvis*, 32 Conn. 412; *Petty v. Church*, 95 Ind. 278; *Watkins v. Eames*, 9 Cush. (Mass.) 537; *Trustees v. Stetson*, 5 Pick. (Mass.) 506. (The doctrine of these Massachusetts cases was not followed in *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528; 23 Am. Rep. 286.) *Congregational Society v. Perry*, 6 N. H. 164; 25 Am. Dec. 455; (since overruled, *Curry v. Rogers*, 21 N. H. 247).

for the other.²³ If the promises are made to the payee, and are not conditioned on the other subscriptions, they form no consideration for each other, and any attempt to construe them as considerations is an attempt to make two independent gratuitous promises each a consideration for the other.²⁴

Consideration is also sought in the obligation of the donee to use the donation for the purpose specified.²⁵ But this obligation does not attach until the donation is paid in, and is nothing more than the legal duty resting upon the donee, which cannot be a consideration,²⁶ and is held not to be a consideration for a subscription.²⁷

If the donee undertakes more than the mere application of the donation to the purposes thereof, as where it promises to give "free tuition to twenty students forever,"²⁸ a consideration exists. If in return for their subscription, the donors are to receive something of value,²⁹ such as corporate stock,³⁰ or land,³¹ a consideration exists, as this is an executory contract of sale or something equivalent thereto.

Pending acceptance a subscription is in legal effect an offer,

²³ *Allen v. Duffie*, 43 Mich. 1; 38 Am. Rep. 159; 4 N. W. 427; *Armann v. Buel*, 40 Neb. 803; 59 N. W. 515; *Bates v. Taylor*, 28 S. Car. 476; 6 S. E. 327. If the liability of one subscriber is fixed, as by the location of a college, his promise to pay his subscription cannot be a consideration for a subsequent subscription. *Schuler v. Mynton*, 48 Kan. 282; 29 Pac. 163.

²⁴ *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528; *Hamilton College v. Stewart*, 1 N. Y. 581; *First Presbyterian Church v. Cooper*, 112 N. Y. 517; 8 Am. St. Rep. 767; 3 L. R. A. 468; 20 N. E. 352.

²⁵ *Barnett v. Franklin College*, 10 Ind. App. 103, 697; 37 N. E. 427, 432; *Collier v. Society*, 8 B. Mon. (Ky.) 68; *Maine Central Institute v. Haskell*, 73 Me. 140; *Trustees v. Ripley*, 6 Me. 442; *Ladies', etc., In-*

stitute v. French, 16 Gray (Mass.) 196.

²⁶ See § 311.

²⁷ *Cottage Street Church v. Kendall*, 121 Mass. 528; 23 Am. Rep. 286; *Montpelier Seminary v. Smith*, 69 Vt. 382; 38 Atl. 66.

²⁸ *Burlington University v. Barrett*, 22 Ia. 60; 92 Am. Dec. 376.

²⁹ *Ives v. Sterling*, 6 Met. (Mass.) 310.

³⁰ *Fish v. Smith*, 73 Conn. 377; 47 Atl. 711; *Rotch v. French*, 176 Mass. 1; 56 N. E. 893; *McDermott v. Squier*, 124 Mich. 523; 83 N. W. 287.

³¹ A subscription to an investment company which is to build a college building with the proceeds and deed it to a college corporation, and to deed land to such subscribers is valid. *Fulton v. Investment Co.*, 47 Kan. 621; 28 Pac. 720.

subject to revocation,³² as by expressly withdrawing it,³³ or by the death of the subscriber,³⁴ or insanity,³⁵ at any time before acceptance.

§299. Change of status.

Change of status as far as the same can be changed by agreement is a valuable consideration. Thus marriage¹ is a valuable consideration, as for a marriage settlement,² even by a third party,³ or for a contract whereby the prospective husband and wife waive dower rights, each in the property of the other.⁴

³² *Sullivan v. Corbett*, 3 Kan. App. 390; 42 Pac. 1105.

³³ *Augustin v. M. E. Society*, 72 Ill. App. 452; *Helpenstein's Estate*, 77 Pa. St. 328; 18 Am. Rep. 449.

³⁴ *Pratt v. Society*, 93 Ill. 475; 34 Am. Rep. 187; *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601; 6 L. R. A. 807; 23 N. E. 177; *First Presbyterian Church v. Cooper*, 112 N. Y. 517; 8 Am. St. Rep. 767; 3 L. R. A. 468; 20 N. E. 352; *Phipps v. Jones*, 20 Pa. St. 260; 59 Am. Dec. 708.

³⁵ *Beach v. Church*, 96 Ill. 177.

¹ *Prewitt v. Wilson*, 103 U. S. 22; *Andrews v. Andrews*, 8 Conn. 79; *Barth v. Lines*, 118 Ill. 374; 59 Am. Rep. 374; 7 N. E. 679; *Parsons v. Ely*, 45 Ill. 232; *Marmon v. White*, 151 Ind. 445; 51 N. E. 930; *McNutt v. McNutt*, 116 Ind. 545; 2 L. R. A. 372; 19 N. E. 115; *Jacobs v. Jacobs*, 42 Iowa 600; *Kinnard v. Daniel*, 13 B. Mon. (Ky.) 496; *Whitehouse v. Whitehouse*, 90 Me. 468; 60 Am. St. Rep. 278; 38 Atl. 374; *Dugan v. Gittings*, 3 Gill (Md.) 138; 43 Am. Dec. 306; *Nowack v. Berger*, 133 Mo. 24; 54 Am. St. Rep. 663; 31 L. R. A. 810; 34 S. W. 489; *Mellick v. Mellick*, 47 N.

J. Eq. 86; 19 Atl. 870; *Pierce v. Pierce*, 71 N. Y. 154; 27 Am. Rep. 22; *Wood v. Jackson*, 8 Wend. (N. Y.) 9; 22 Am. Dec. 603; *Gurvin v. Cromartie*, 11 Ired. Law (N. Car.) 174; 53 Am. Dec. 406; *Finch v. Finch*, 10 O. S. 501; *Shea's Appeal*, 121 Pa. St. 302; 1 L. R. A. 422; 15 Atl. 629; *Bogges v. Richards*, 39 W. Va. 567; 45 Am. St. Rep. 938; 26 L. R. A. 537; 20 S. E. 599; *Beard v. Beard*, 22 W. Va. 130

² *Barnes v. Barnes*, 110 Cal. 418; 42 Pac. 904; *Whitehouse v. Whitehouse*, 90 Me. 468; 60 Am. St. Rep. 278; 38 Atl. 374; *Finch v. Finch*, 10 O. S. 501.

³ *Wright v. Wright*, 114 Ia. 748; 55 L. R. A. 261; 87 N. W. 709; *Thompson v. Thompson*, 17 O. S. 649; *Cains v. Jones*, 5 Verg. (Tenn.) 249. Where the settlement is made after the agreement to marry is entered into, it may be questioned whether the settlement has any consideration as the parties do only what they have bound themselves to do. See § 311. However such settlements are held to be for value.

⁴ *McNutt v. McNutt*, 116 Ind. 545; 2 L. R. A. 372; 19 N. E. 115.

§300. Legal duty as consideration for promise to perform.

If a person is liable in law or equity, the discharge of such liability is a sufficient consideration to support an express promise by him to do what he is legally liable to do, or to do something accepted in lieu thereof by the person to whom such obligation is owed.¹ Thus a liability in equity,² such as that of a trustee,³ a pre-existing debt,⁴ a liability growing out of an ante-nuptial contract,⁵ a liability as surety,⁶ or indorser,⁷ a principal's liability to indemnify a surety or guarantor,⁸ a duty to return collateral when the debt is paid,⁹ a duty to a director who has paid for stock issued to him with property at an excessive valuation,¹⁰ the duty of a husband to support his wife,¹¹ of a town to support its paupers,¹² or of the State to care for

¹ *McKee v. Lamon*, 159 U. S. 317; *Jaffe v. Lilienthal*, 86 Cal. 91; 24 Pac. 835; *Gray v. Phillips*, 88 Ga. 199; 14 S. E. 205; *Comstock v. Coon*, 135 Ind. 640; 35 N. E. 909; *Steinriede v. Tegge*, (Ky.); 14 S. W. 357; *Callahan v. Linthicum*, 43 Md. 97; 20 Am. Rep. 106; *Hill v. Mining Co.*, 124 Mo. 153; 25 S. W. 926; 32 S. W. 111; *Haile v. Morgan*, 25 S. Car. 601; *Brown v. Brown*, 44 S. Car. 378; 22 S. E. 412; *Cobb v. Cowdery*, 40 Vt. 25; 94 Am. Dec. 370; *Franklin, etc., School v. Bailey*, 62 Vt. 467; 10 L. R. A. 405; 20 Atl. 820; *Durfey v. South Burlington*, 65 Vt. 412; 26 Atl. 587; *Baldwin v. Worcester*, 66 Vt. 54; 28 Atl. 633.

² *Proctor v. Cole*, 104 Ind. 373; 3 N. E. 106; 4 N. E. 303; *Callahan v. Linthicum*, 43 Md. 97; 20 Am. Rep. 106.

³ *McKee v. Lamon*, 159 U. S. 317.

⁴ *Hart v. Church*, 126 Cal. 471; 77 Am. St. Rep. 195; 58 Pac. 910; *Comstock v. Coon*, 135 Ind. 640; 35 N. E. 909; *First National Bank v. Grignon*, 7 Ida. 646; 65 Pac. 365; *Steinriede v. Tegge*, (Ky.); 14 S. W. 357; *Bank v. Planting & Re-*

fining Co., 107 La. 650; 31 So. 1031; *North Atchison Bank v. Gay*, 114 Mo. 203; 21 S. W. 479; *National Bank v. Place*, 86 N. Y. 444; *Haile v. Morgan*, 25 S. Car. 601. As where at the request of a prospective son-in-law the father of the bride expended money for a wedding, a trousseau and household goods for the married couple. *Jaffe v. Lilienthal*, 86 Cal. 91; 24 Pac. 835.

⁵ *Ransdel v. Moore*, 153 Ind. 393; 53 L. R. A. 753; 56 N. E. 767.

⁶ *Pauly v. Murray*, 110 Cal. 13; 42 Pac. 313.

⁷ *Bromley v. Hawley*, 60 Vt. 46; 12 Atl. 220.

⁸ *Smith v. Rankin*, 45 Kan. 176; 25 Pac. 586; *Carroll v. Sullivan*, 103 Mass. 31.

⁹ *Gray v. Phillips*, 88 Ga. 199; 14 S. E. 205.

¹⁰ *Hill v. Mining Co.*, 124 Mo. 153; 25 S. W. 926; 32 S. W. 111.

¹¹ *Brown v. Brown*, 44 S. Car. 378; 22 S. E. 412.

¹² Even where the promise to pay for their support is made to the father, *Baldwin v. Worcester*, 66 Vt. 54; 28 Atl. 633; or the mother, *Dur-*

school lands and apply the income to school purposes,¹³ and a liability caused by a city's issuing valid warrants and then exhausting the fund by a misappropriation¹⁴ are all sufficient considerations to support an express promise based on such liability, made by the party liable therefor.¹⁵ Thus the receipt of assets of a decedent's estate liable to be taken for his debts is a consideration for a promise to pay such debts.¹⁶

If such promise is to perform the legal duty and something more, no consideration for the additional promise exists. If receipt of assets of a decedent's estate is the sole consideration for a promise to pay the debt of a decedent, such promise is not enforceable to the extent that it exceeds such assets.¹⁷ Of course if there is an additional consideration, promises to do more than the law requires are upon consideration. Hence if the claim against decedent's estate is released, there is a consideration for a promise to pay such claim whether the promisor receives assets or not.¹⁸ So if there is an agreement for an

fey v. South Burlington, 65 Vt. 412; 26 Atl. 587, the pauper being emancipated, and it does not appear that the parent is "of sufficient ability," and the statute requires the parent to support adult or emancipated children only if "of sufficient ability."

¹³ Franklin, etc., School v. Bailey, 62 Vt. 467; 10 L. R. A. 405; 20 Atl. 820.

¹⁴ Quaker City National Bank v. Tacoma, 27 Wash. 259; 67 Pac. 710.

¹⁵ See § 300.

¹⁶ Promise by administrator, Carter v. Thomas, 3 Ind. 213; McGrath v. Barnes, 13 S. C. 328; 36 Am. Rep. 687; Boyd v. Johnston, 39 Tenn. 284; 14 S. W. 804. Promise by the widow, French v. French, 91 Ia. 140; 59 N. W. 21; s. c., 84 Ia. 655; 15 L. R. A. 300; 51 N. W. 145; Hummel's Estate, 55 Minn. 315; 56 N. W. 1064. Promise by an heir, Holmden v. Janes, 42 Kan. 762; 23

Pac. 92. As a promise by an heir to pay a debt of his ancestor's which is a lien on his property, Blakemore v. Blakemore, (Ky.); 44 S. W. 96.

¹⁷ Bank v. Topping, 13 Wend. 557. Promise by executor, Paxson v. Nields, 137 Pa. St. 385; 21 Am. St. Rep. 888; 20 Atl. 1016; McGrath v. Barnes, 13 S. C. 328; 36 Am. Rep. 687; Boyd v. Johnston, 39 Tenn. 284; 14 S. W. 804. Promise by heir, Holmden v. Janes, 42 Kan. 762; 23 Pac. 92.

¹⁸ Promise by administrator, Wilton v. Eaton, 127 Mass. 174; Stebbins v. Smith, 4 Pick. (Mass.) 97; Erwin v. Carroll, 1 Yerg. (Tenn.) 115. Promise by widow, Young v. Shepard's Estate, 124 Mich. 552; 83 N. W. 403; Taylor v. Clark, (Tenn. Ch. App.); 35 S. W. 442; Reuter v. Sullivan, (Tex. Civ. App.); 47 S. W. 683. Promise by heirs, Safe Deposit & Trust Co. v. Wright, 105 Fed. 155; 41 C. C. A. 421;

extension of time, extension forms a consideration for a promise to pay the debt personally, whether there were any assets or not.¹⁹ Thus a contract whereby a creditor of a decedent agrees to surrender notes given by such decedent in consideration of a promise by an heir to pay the holder interest thereon for life, has consideration.²⁰

There is a conflict of authority as to the effect of giving a note to take up a debt of decedent's; but the conflict arises not on questions of consideration, but on the question of the effect of such new note upon the prior debt. In some jurisdictions such new note does not discharge the prior debt or in any way affect it. The prior debt of decedent, cannot, therefore be a consideration for the new note.²¹ If the new note discharges decedent's debt, the debt is a consideration for the note.²² But the original liability must be discharged to afford a consideration for the new promise. Thus if A promises, before he obtains a discharge in bankruptcy, to pay a debt from which he is subsequently discharged and such debt remains in force, no consideration for the new promise exists.²³ So a written promise to pay a debt not then barred by limitations has no consideration if the original debt is still in force.²⁴

The pre-existing liability must be a real one, however. Thus where A had promised to make a gift to B, but such gift never took effect for want of delivery, A's subsequent promise to B,

Union & Planters' Bank v. Jefferson, 101 Wis. 452; 44 N. W. 889. Promise by legatee, Young v. Shepard's Estate, 124 Mich. 552; 83 N. W. 403; McCormac v. Redden, 46 Neb. 776; 65 N. W. 881. Promise by father, Judy v. Louderman, 48 O. S. 562; 29 N. E. 181.

¹⁹ Mosely v. Taylor, 4 Da. 415. 542; Leonard v. Duffie, 94 Pa. St. 218.

²⁰ Lodge v. Hulings, 63 N. J. Eq. 159; 51 Atl. 1015.

²¹ Peter v. Beverley, 10 Pet. (U. S.) 532; Dunne v. Deery, 40 Ia. 251; Schroeder v. Fink, 60 Md. 436;

Walker v. Patterson, 36 Me. 273; Williams v. Nichols, 10 Gray (Mass.) 83; Germania Bank v. Michaud, 62 Minn. 459; 54 Am. St. Rep. 653; 30 L. R. A. 286; 65 N. W. 70; Nelson v. Larson, 57 Minn. 133; 58 N. W. 687; Hill v. Buford, 9 Mo. 869; Kennerly v. Martin, 8 Mo. 698;

Stockton v. Reed, 65 Mo. App. 605; Jacobs v. Maloney, 64 Mo. App. 270.

²² Bank v. Topping, 9 Wend. (N. Y.) 273.

²³ Ogden v. Redd, 13 Bush. (Ky.) 581.

²⁴ Gilmore v. Green, 14 Bush. (Ky.) 772.

based on A's supposed liability arising out of such gift is void for want of consideration.²⁵

IV. APPARENT CONSIDERATIONS.

§301. Apparent considerations which are non-existent.

While the parties to a contract may make such terms and select such consideration as they choose, the consideration selected must be the forbearance or acquisition of some legal right. If they select something which is not a legal right, the acquisition or forbearance of it constitutes no consideration, though the parties may believe otherwise. Thus a transfer of property is a consideration,¹ but if a vendor has no interest of any sort in such property an attempted conveyance thereof is no consideration. Thus a sale by an individual of vacant public land,² as where the vendor has neither possession of such land nor right therein³ and has merely hopes of getting such land,⁴ or a sale of improvements thereon,⁵ or of land to which the vendor holds a government homestead certificate which he has forfeited by abandoning the land before remaining there the necessary period of five years,⁶ are not considerations, and a promise to pay rent to one who has neither title, right of possession nor possession has no consideration.⁷ Forbearance, waiver and the like are considerations where a right is asserted in good faith,⁸ but if the forbearance is of what the promisee has no legal right to do,⁹ as an abandonment of an effort to

²⁵ *Flanders v. Blandy*, 45 O. S. 108; 12 N. E. 321.

¹ See § 282 *et seq.*

² *Rayner Cattle Co. v. Bedford*, 91 Tex. 642; 45 S. W. 554; refusing writ of error to, 44 S. W. 410.

³ *Smith v. Rankin*, 4 Yerg. (Tenn.) 1; 26 Am. Dec. 213.

⁴ *Telfener v. Russ*, 162 U. S. 170.

⁵ *Carson v. Clark*, 1 Scam. (Ill.) 113; 25 Am. Dec. 79.

⁶ *McCullum v. Edmonds*, 109 Ala. 322; 19 So. 501; *Sumpter v. Bank*, 69 Ark. 224; 62 S. W. 577.

⁷ *Clary v. O'Shea*, 72 Minn. 105; 71 Am. St. Rep. 465; 75 N. W. 115.

⁸ See § 286 *et seq.*

⁹ *Graham v. Johnson*, L. R. 8 Eq. 36; *Kenan v. Holloway*, 16 Ala. 53; 50 Am. Dec. 162; *Palfrey v. Ry. Co.*, 4 All. (Mass.) 55; *Long v. Towl*, 42 Mo. 545; 97 Am. Dec. 355; *Lennig's Estate*, 182 Pa. St. 485; 61 Am. St. Rep. 725; 38 L. R. A. 378; 38 Atl. 466; *Hibbert v. Mackinnon*, 79 Wis. 673; 49 N. W. 21.

obtain a change in the will of another,¹⁰ or a promise not to issue execution on an alleged judgment which clearly has no existence,¹¹ or satisfying an execution which has been perpetually enjoined,¹² or consent by one joint owner to a transfer of the interests of the other owners¹³ no consideration exists. So if there is no genuine dispute and no cause of action, a promise to forbear suit¹⁴ or a promise to waive a claim which is void and cannot be maintained in good faith¹⁵ are neither of them considerations. Thus the seduction or alienation of affections of a woman is no consideration for a note given by the seducer to her affianced.¹⁶

§302. The doctrine of mutuality.

The principles which control in determining the validity of a promise as a consideration are substantially the same as those which apply to considerations in general. The promise must be such as to offer a legal right or the forbearance of a legal right to which the promisor would not otherwise have been entitled. On the one hand, it is not necessary that the contract, if in writing, be in one instrument in order to be mutually binding. The agreements may be in two separate written instruments¹ even though executed on different days² if in fact a part of the same transaction; or the agreement may be written on the one side and oral on the other.³

Neither is it necessary that each covenant on the one part have a corresponding obligation on the other, apportioned to that

¹⁰ Lennig's Estate, 182 Pa. St. 485; 61 Am. St. Rep. 725; 38 L. R. A. 378; 38 Atl. 466.

¹¹ Price v. Bank, 62 Kan. 743; 64 Pac. 639.

¹² Kenan v. Holloway, 16 Ala. 53; 50 Am. Dec. 162.

¹³ Hibbert v. Mackinnon, 79 Wis. 673; 49 N. W. 21.

¹⁴ Newell v. Fisher, 11 S. & M. (Miss.) 431; 49 Am. Dec. 66; New Hampshire Savings Bank v. Colcord, 15 N. H. 119; 41 Am. Dec. 685.

¹⁵ Herbert v. Mueller, 83 Ill. App. 391; Corbyn v. Brokmeyer, 84 Mo. App. 649.

¹⁶ Case v. Smith, 107 Mich. 416; 61 Am. St. Rep. 341; 31 L. R. A. 282; 65 N. W. 279.

¹ Martin v. Murphy, 129 Ind. 464; 28 N. E. 1118; Cohu v. Husson, 119 N. Y. 609; 23 N. E. 573.

² Ahl's Appeal, 129 Pa. St. 26; 18 Atl. 471.

³ Hutt v. Hickey, 67 N. H. 411; 29 Atl. 456.

particular covenant,⁴ since one consideration can support several promises.⁵ Thus, where as part of the lease, lessor agreed to give lessee sixty days' notice of an intended sale, and to give him the first opportunity to purchase, such promise is valid though lessee did not agree to buy.⁶ So if A buys a certain lot of logs from B with a privilege of taking another amount at a specified price, a consideration for the contract exists.⁷

On the other hand, if the promise offers only what the promisor is already entitled to, there is no consideration.⁸ So if a promise does not offer any enforceable legal right or forbearance it is not a consideration. This principle is sometimes expressed in the rule that promises, in order to be a valid consideration each for the other, must be mutual.⁹

§303. Lack of mutuality.—Gratuitous promises.

Mutuality of obligation may be lacking in at least three different classes of cases. In the first there does not purport to be any right conferred or forborne in return for the promise; in the second, there may be some apparently valid promise which on analysis does not by its terms fix any legal liability on the party making it; and in the third, the promise offered as a consideration does by its terms attempt to fix a real liability, but by reason of some extrinsic fact, as incapacity of the party making the promise, the illegality of the thing promised and the like, no enforceable liability attaches. These three classes of cases are not distinct in principle, but only in the manner in which the lack of consideration is more or less disguised. First; if by the terms of the agreement the promisor is not to receive for his promise any legal right or forbearance,

⁴ *Mississippi River Logging Co. v. Robson*, 69 Fed. 773; 16 C. C. A. 400; *Miller v. Weld County*, — Colo. App. —; 67 Pac. 347; *Prudential Ins. Co. v. Hite*, 69 Ill. App. 416; *Staples v. O'Neal*, 64 Minn. 27; 65 N. W. 1083; *Pittsburg, etc., Ry. v. Cox*, 55 O. S. 497; 35 L. R. A. 507; 45 N. E. 641.

⁵ See § 278.

⁶ *Marske v. Willard*, 169 Ill. 276; 48 N. E. 290; affirming, 68 Ill. App. 83.

⁷ *Staples v. O'Neal*, 64 Minn. 27; 65 N. W. 1083.

⁸ See §§ 311, 312.

⁹ *Vogel v. Pekoc*, 157 Ill. 339; 30 L. R. A. 491; 42 N. E. 386; *Weaver v. Weaver*, 109 Ill. 225.

his promise is without consideration and cannot be enforced.¹ Thus a promise to extend the time for the payment of a mortgage,² a promise by the payee of a note given for a pre-existing debt to renew the note when due,³ or to extend the time of payment of a debt,⁴ or a promise to reduce the rate of interest,⁵ are none of them enforceable if no promise in return, or other consideration, exists.

§304. Promise imposing no liability as consideration.

Where the parties assume to make a contract in which a promise is the consideration for a promise, and analysis shows that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise.¹ This is what is often meant by saying that promises must be mutual. Illustrations of this principle are an agreement that a manufacturer will sell all his goods in a given locality through A, who is to get a specified commission, A not agreeing to do anything with reference to such sales,²

¹ Peek v. Peek, 77 Cal. 106; 11 Am. St. Rep. 244; 1 L. R. A. 185; 19 Pac. 227; Jackson v. Bloom, 66 Ill. App. 473; Houghton v. Granite Co., 171 Mass. 354; 50 N. E. 646; Rose v. Bank, 165 Mass. 273; 43 N. E. 93; Hicks v. Hamilton, 144 Mo. 495; 66 Am. St. Rep. 431; 46 S. W. 432; Lincoln v. Wright, 23 Pa. St. 76; 62 Am. Dec. 316.

² Olmstead v. Latimer, 158 N. Y. 313; 43 L. R. A. 685; 53 N. E. 5.

³ Arend v. Smith, 151 N. Y. 502; 45 N. E. 872.

⁴ Davis v. Stout, 126 Ind. 12; 25 N. E. 862; Howe v. Klein, 89 Me. 376; 36 Atl. 620; Coleman v. Applegarth, 68 Md. 21; 6 Am. St. Rep. 417; 11 Atl. 284; Bank v. Gay, 114 Mo. 203; 21 S. W. 479; Walz v. Parker, 134 Mo. 458; 35 S. W. 1149; Arend v. Smith, 151 N. Y. 502; 45 N. E. 872.

⁵ Harris v. Creveling, 80 Mich. 240; 45 N. W. 85.

¹ Richardson v. Hardwick, 106 U. S. 252; Stanton v. Singleton, 126 Cal. 657; 59 Pac. 146; Krause v. Kraus, 162 Ill. 328; 44 N. E. 736; Vogel v. Pekoc, 157 Ill. 339; 30 L. R. A. 491; 42 N. E. 386; Weaver v. Weaver, 109 Ill. 225; Allen v. Rouse, 78 Ill. App. 69; Louisville, etc., R. R. Co. v. Flanagan, 113 Ind. 488; 3 Am. St. Rep. 674; 14 N. E. 370; Heiland v. Ertel, 4 Kan. App. 516; 44 Pac. 1005; Jackson v. Sessions, 109 Mich. 216; 67 N. W. 315; Davie v. Mining Co., 93 Mich. 491; 24 L. R. A. 357; 53 N. W. 625, 491; McDonald v. Bewick, 51 Mich. 79; 16 N. W. 240; Stensgaard v. Smith, 43 Minn. 11; 19 Am. St. Rep. 205; 44 N. W. 669; Rose v. Oliver, 32 Or. 447; 52 Pac. 176; Lowber v. Connit, 36 Wis. 176; Dodge v. Hopkins, 14 Wis. 630.

² Benjamin v. Bruce, 87 Md. 240; 39 Atl. 810; Hirschhorn v. Drug Co., 26 Utah 110; 72 Pac. 386.

an employer's continuing a previous employment without being bound to continue it for any period of time,³ a promise to employ A where A is not bound to continue in the employment for any given period,⁴ a promise to do work assigned to the promisor where the adversary party is not bound by the promise to assign any work or to pay any compensation if no work is assigned,⁵ a promise to reconvey realty for a certain price without any corresponding obligation to purchase it,⁶ a promise by an assignee for the benefit of creditors to sell realty, to be good for a certain time subject to the approval of the court, where the court does not approve it till the time fixed has elapsed and the vendee has repudiated it,⁷ and a promise to pay for water furnished where the adversary party is not bound to furnish any.⁸

If some other consideration is furnished by the employee a contract for permanent employment may be valid, though such employee does not agree to remain in such employment for any

³ No consideration for a release of damages by the employee; *Potter v. Ry.*, 122 Mich. 179; 81 N. W. 80; 82 N. W. 245; *Purdy v. Ry. Co.*, 125 N. Y. 209; 21 Am. St. Rep. 736; 26 N. E. 255; *Gulf, etc., Ry. v. Winton*, 7 Tex. Civ. App. 57; 26 S. W. 770. But in *Texas Midland Railroad v. Sullivan*, 20 Tex. Civ. App. 50; 48 S. W. 598, a similar contract was held binding on the theory that the employee could if he chose fix a reasonable time for such employment to continue, within which time he could not be discharged.

⁴ *Louisville, etc., Ry. v. Offutt*, 99 Ky. 427; 59 Am. St. Rep. 467; 36 S. W. 181. Accordingly he may be discharged at any time. "There was no contract that he would serve and that the appellant would employ him for any stated time—the agreement of both being necessary to fix the time of service—and consequently no violation of a contract

by the discharge of appellee before the expiration of any particular time." *St. Louis, etc., Ry. v. Mathews*, 64 Ark. 398; 39 L. R. A. 467; 42 S. W. 902; (citing, *Harper v. Hassard*, 113 Mass. 187; *Bolles v. Sachs*, 37 Minn. 315; 33 N. W. 862; *Coffin v. Landis*, 46 Pa. St. 426; *East Line, etc., Ry. v. Scott*, 72 Tex. 70; 10 S. W. 99. In similar contracts the courts by construction of the contract have found obligations assumed by the employee, and hence have enforced the promise.

⁵ *Vogel v. Pekoc*, 157 Ill. 339; 30 L. R. A. 491; 42 N. E. 386; *Vogel v. Conrad*, 157 Ill. 368; 42 N. E. 389.

⁶ *Nagengast v. Alz*, 93 Md. 522; 49 Atl. 333; *Rose v. Bank*, 165 Mass. 273; 43 N. E. 93.

⁷ *Krause v. Krause*, 162 Ill. 328; 44 N. E. 736.

⁸ *Jordan v. Water Co.*, (Ind. App.); 61 N. E. 12.

specified time. Thus if the employee releases a claim for damages,⁹ or agrees to and does abandon other employment to enter upon the one in question,¹⁰ a consideration for the employer's promise exists. It is not necessary, however, that the contract should impose obligations expressly upon each party. It is sufficient if they are imposed by the legal effect of the contract.¹¹ Thus an agreement by A to lease a room in a building which A is erecting, when it is completed, impliedly binds A to complete it and hence is a consideration.¹²

§305. Options.

If A offers to sell certain property to B and promises to give B a certain time in which to accept, the transaction up to this point is clearly an offer without acceptance.¹ Accordingly if there is no further consideration than appears from such statement of the case A's promise to leave the offer open for a certain time is unenforceable and he may revoke his offer at any time,² and the death of the offeree³ revokes the offer. So if there was once a consideration for the option, it is no consideration for an extension thereof.⁴ For these reasons it is often said that an option has no consideration;⁵ but this means

⁹ *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455; 50 S. W. 685; *Sax v. Ry.*, 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314; *Smith v. Ry.*, 60 Minn. 330; 62 N. W. 392.

¹⁰ *Carnig v. Carr*, 167 Mass. 544; 57 Am. St. Rep. 488; 35 L. R. A. 512; 46 N. E. 117.

¹¹ *Raphael v. Hartman*, 87 Ill. App. 634; *Morris v. Taliaferro*, 75 Ill. App. 182.

¹² *Hammond v. Barton*, 93 Wis. 183; 67 N. W. 412.

¹ See § 41.

² *Smith v. Bateman*, 25 Colo. 241; 53 Pac. 457; affirming, 8 Colo. App. 336; 46 Pac. 213; *Litz v. Goosling*, 93 Ky. 185; 21 L. R. A. 127; 19 S. W. 527; *Warren v. Castello*, 109 Mo. 338; 32 Am. St. Rep. 669; 19 S. W. 29; *Davis v. Petty*, 147 Mo. 374; 48

S. W. 944; *Darr v. Mumert*, 57 Neb. 378; 77 N. W. 767; *Bosshardt, etc., Co. v. Oil Co.*, 171 Pa. St. 109; 32 Atl. 1120; *Bradford v. Foster*, 87 Tenn. 4; 9 S. W. 195; *Walker v. Bamberger*, 17 Utah 239; 54 Pac. 108; *Barton v. Spinning*, 8 Wash. 458; 36 Pac. 439; *Weaver v. Burr*, 31 W. Va. 736; 3 L. R. A. 94; 8 S. E. 743.

³ *Newton v. Newton*, 11 R. I. 390; 23 Am. Rep. 476.

⁴ *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417; 11 Atl. 284; *Ide v. Leiser*, 10 Mont. 5; 24 Am. St. Rep. 17; 24 Pac. 695; *Cockrill v. Whitworth*, (Tenn. Ch. App.); 52 S. W. 524.

⁵ *Bosshart, etc., Co. v. Oil Co.*, 171 Pa. St. 109; 32 Atl. 1120.

only that it usually has no consideration, not that it cannot have one. If B confers some legal right upon A or forbears some legal right of his own, as waiving a pre-existing right of action,⁶ or where A receives money for the option,⁷ or if A's promise is a part of transaction in which value passes on each side, as where an option to sell is part of a lease for value,⁸ the option has a consideration and is enforceable, even by specific performance.⁹ If the option is accepted before it is revoked a contract binding on both parties is created thereby, as it is in the nature of a continuing offer.¹⁰

§306. Contract terminable at option of one party.

If A and B make mutual promises each to the other, and A is to have the right at his election to withdraw from the contract and relieve himself from all liability thereunder at his pleasure, some courts hold that such contract is without consideration.¹ If a "default could be held as satisfaction of the consideration the instrument would be without consideration and therefore void."² The same rule applies where this is the legal effect of the contract, though not its express stipulation. Thus where

⁶ Robson v. Logging Co., 43 Fed. 364.

⁷ Calanchini v. Branstetter, 84 Cal. 249; 24 Pac. 149; Simms v. Lide, 94 Ga. 553; 21 S. E. 220; Woodland Oil Co. v. Crawford, 55 O. S. 161; 34 L. R. A. 62; 44 N. E. 1093.

⁸ Marske v. Willard, 169 Ill. 276; 48 N. E. 290; affirming, 68 Ill. App. 83.

⁹ Johnston v. Trippe, 33 Fed. 530; Ross v. Parks, 93 Ala. 153; 30 Am. St. Rep. 47; 11 L. R. A. 148; 8 So. 368; Moses v. McClain, 82 Ala. 370; 2 So. 741.

¹⁰ Willard v. Tayloe, 8 Wall. (U. S.) 557; Moses v. McClain, 82 Ala. 370; 2 So. 741; Ross v. Parks, 93 Ala. 153; 30 Am. St. Rep. 47; 8 So. 368; Wilks v. R. R., 79 Ala. 180;

Johnston v. Trippe, 33 Fed. 530; Boston, etc., R. R. v. Bartlett, 3 Cush. (Mass.) 224; Old Colony R. R. v. Evans, 6 Gray (Mass.) 25; 66 Am. Dec. 394; Wardwell v. Williams, 62 Mich. 50; 4 Am. St. Rep. 814; 28 N. W. 796; Stout v. Watson, 45 Minn. 454; 48 N. W. 195; Yerkes v. Richards, 153 Pa. St. 646; 34 Am. St. Rep. 721; 26 Atl. 221; Bradford v. Foster, 87 Tenn. 4; 9 S. W. 195; Barrett v. McAllister, 33 W. Va. 738; 11 S. E. 220.

¹ Vogel v. Pekoc, 157 Ill. 339; 30 L. R. A. 491; 42 N. E. 386; Woodland Oil Co. v. Crawford, 55 O. S. 161; 34 L. R. A. 62; 44 N. E. 1093.

² Woodland Oil Co. v. Crawford, 55 O. S. 161; 34 L. R. A. 62; 44 N. E. 1093.

A had a right to cancel a contract of employment on sixty days' notice for "good cause," the expression, for "good cause," was held so indefinite that A could end the contract at will. A's promise was therefore no consideration.³ If, however, A must give notice for a substantial period of time before ending his liability under the contract, and such liability is to last until the end of time for which the notice is given, A's promise is a consideration. Thus if A has a right to end the contract at the end of any year,⁴ or on ten days' notice,⁵ or on two weeks' notice,⁶ A's promise is a consideration. So a contract by which A is to drill a well for B at so much per foot, according to depth, A to drill until water is struck or B orders drilling stopped, is supported by consideration.⁷ In other cases a contract which one party may terminate at his option is held to constitute a valuable consideration for the promise of the adversary party.⁸ Thus a contract where A agrees to give B permanent employment, subject to the right to remove B for cause, is a consideration for B's agreement to release a claim for damages.⁹

§307. Contract to be performed at option of adversary party.

Cases of this class in which the lack of mutuality is difficult to detect are those in which A and B agree upon the terms on which A is to furnish services or property to B, but leave it to B to decide how much, if any, of such services or property he will accept and pay for. Thus an agreement by a railroad company to carry, at certain fixed rates, whatever goods of certain kinds the promisee should ship,¹ as a promise by a rail-

³ *Cummer v. Butts*, 40 Mich. 322; 29 Am. Rep. 530.

⁴ *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459.

⁵ *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210; 90 Am. St. Rep. 627; 58 L. R. A. 227; 51 Atl. 973.

⁶ *Vogel v. Pekoc*, 157 Ill. 339; 30 L. R. A. 491; 42 N. E. 386.

⁷ *Woodward v. Smith*, 109 Wis.

607; 85 N. W. 424.

⁸ *Carter White Lead Co. v. Kinlin*, 47 Neb. 409; 66 N. W. 536.

⁹ *Rhoades v. Ry.*, 49 W. Va., 494; 87 Am. St. Rep. 826; 55 L. R. A. 170; 39 S. E. 209.

¹ *Wagner v. Meakin*, 92 Fed. 76; *Chicago, etc., Ry. Co. v. Jones*, 53 Ill. App. 431.

road to carry all the milk and butter² or corn,³ or a promise whereby A agrees to order extra parts to machines from B, but B is not to be liable for failure to furnish extras;⁴ or a promise to deliver stone "in such quantities as may be desired,"⁵ or a promise to transport by ship "any and all of this lumber as may be desired by the parties of the second part,"⁶ or a promise by A to saw all the lumber which B shall furnish⁷ are not enforceable.⁸ So an agreement whereby A agrees to sell to B at certain rates all the goods of certain kinds that B may order, and B is not bound to order any goods, no consideration for A's promise exists.⁹ Such a promise is clearly only an offer; which may be accepted by ordering the property or services specified in the offer at any time before

² *Morrow v. Express Co.*, 101 Ga. 810; 28 S. E. 998; (citing *Burton v. Ry. Co.*, 9 Exch. 507; *Dorsey v. Packwood*, 12 How. 126; *Stiles v. McClellan*, 6 Colo. 89; *McKinley v. Watkins*, 13 Ill. 140; *Buckingham v. Ludlum*, 40 N. J. Eq. 422; 2 Atl. 265; *Lester v. Jewett*, 12 Barb. (N. Y.) 502; *Macedon, etc., Road Co. v. Snediker*, 18 Barb. (N. Y.) 317; *Utica, etc., Ry. Co. v. Brinckerhof*, 21 Wend. (N. Y.) 139; 34 Am. Dec. 220; *Burnet v. Bisco*, 4 Johns. (N. Y.) 235; *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *Tucker v. Woods*, 12 Johns. (N. Y.) 190; *Cool v. Cunningham*, 25 S. Car. 136.)

³ *Missouri, etc., Ry. v. Bagley*, 60 Kan. 424; 56 Pac. 759; (citing *Dave v. Lumberman's Min. Co.*, 93 Mich. 491; 24 L. R. A. 357; 53 N. W. 625; *Vogel v. Pekoc*, 157 Ill. 339; 30 L. R. A. 491; 42 N. E. 386; *Campbell v. Lambert*, 36 La. Ann. 35; 51 Am. Rep. 1; *Dayton W. Valley & X. Turnp. Co. v. Coy*, 13 O. S. 84; *Stensgaard v. Smith*, 43 Minn. 11; 19 Am. St. Rep. 205; 44 N. W. 669; *Wilkinson v. Heavenrich*, 58 Mich. 574; 55 Am. Rep. 708; 26 N. W. 139; *Tucker v. Woods*, 12 Johns.

(N. Y.) 190; 7 Am. Dec. 305.

⁴ *Harvester King Co. v. Mitchell, etc., Co.*, 89 Fed. 173.

⁵ *Hoffman v. Maffioli*, 104 Wis. 630; 47 L. R. A. 427; 80 N. W. 1032.

⁶ *Dennis v. Slyfield*, 117 Fed. 474; 54 C. C. A. 520.

⁷ *Harrison v. Lumber Co.*, — Ga. —; 45 S. E. 730.

⁸ *Contra*, where A's schooner was aground and A agreed to hire two barges, and to pay five dollars an hour for B's tug if he needed it, and B agreed to keep steam up all night ready for service if necessary, the contract was held binding. *Nott v. Johnson*, 7 O. S. 270. But it seems that A had in reliance on B's promise and as part of the arrangement promised to be responsible for damages to the barges, and B did not notify A of his revocation of his offer, but left him on a lee shore in a storm without notice, by which ship and barges were lost.

⁹ *Cold Blast Transportation Co. v. Nut Co.*, 114 Fed. 77; 57 L. R. A. 696; 52 C. C. A. 25; *American Cotton-Oil Co. v. Kirk*, 68 Fed. 791; 15 C. C. A. 540; *Crane v. Crane*, 105

it is withdrawn, and thus making a contract as to such order,¹⁰ but which may be withdrawn at any time before such acceptance. It thus stands on the same footing as an option.¹¹ Thus where A gives B his note for services which B does not agree to perform, performance constitutes a consideration.¹² Where A was to have half the oil which might be located on B's land by A's drilling, but A was not bound to drill, his drilling in pursuance of B's promise is a consideration, making a contract which equity will enforce specifically.¹³ So a promise to pay a certain sum of money to a railroad when its road is completed to a certain place is enforceable when the road is so completed.¹⁴

In some jurisdictions, however, such an agreement has been regarded not as an offer, but merely as an expression of willingness to negotiate.¹⁵ Where such theory obtains, sending in an order for goods at the specified rates is not an acceptance of a prior offer, but is itself an offer which may be rejected.¹⁶

Fed. 869; 45 C. C. A. 96; *American Refrigerator Transit Co. v. Chilton*, 94 Ill. App. 6; *Drake v. Vorse*, 52 Ia. 417; 3 N. W. 465; *Campbell v. Lambert*, 36 La. Ann. 35; 51 Am. Rep. 1; *Bailey v. Austrian*, 19 Minn. 535; *Teipel v. Meyer*, 106 Wis. 41; 81 N. W. 982; *Hoffman v. Maffioli*, 104 Wis. 630; 47 L. R. A. 427; 80 N. W. 1032.

¹⁰ *Storm v. United States*, 94 U. S. 76; *Wilson v. Steam-Boiler Co.*, 105 Fed. 846; *Johnson v. Staenglen*, 85 Fed. 603; *Wheeler, etc., Mfg. Co. v. Lyon*, 71 Fed. 374; *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654; 67 Pac. 1086; *Muscantine Water Co. v. Lumber Co.*, 85 Ia. 112; 39 Am. St. Rep. 284; 52 N. W. 108; *Allen v. Gas. Co.*, — Ky. —; 73 S. W. 747; *Train v. Gold*, 5 Pick. (Mass.) 380; *Cooper v. Wheel Co.*, 94 Mich. 272; 34 Am. St. Rep. 341; 54 N. W. 39; *Welch v. Whelpley*, 62 Mich. 15; 4 Am. St. Rep. 810; 28 N. W. 744; *Wardell v. Williams*, 62 Mich. 50; 4 Am. St. Rep. 814; 28

N. W. 796; *Potter v. Holmes*, 72 Minn. 153; 75 N. W. 591; *Willetts v. Ins. Co.*, 45 N. Y. 45; 6 Am. Rep. 31; *White v. Baxter*, 71 N. Y. 254; *Marie v. Garrison*, 83 N. Y. 14; *Herrick v. Wardwell*, 58 O. S. 294; 50 N. E. 903; *Weaver v. Burr*, 31 W. Va. 736; 3 L. R. A. 94; 8 S. E. 743; *Barrett v. McAllister*, 33 W. Va. 738; 11 S. E. 220. By such acceptance the want of mutuality is eliminated.

¹¹ See § 305.

¹² *Miller v. McKenzie*, 95 N. Y. 575; 47 Am. Rep. 85.

¹³ *Boyd v. Brown*, 47 W. Va. 238; 34 S. E. 907; *Spires v. Urbahn*, 124 Cal. 110; 56 Pac. 794.

¹⁴ *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654; 67 Pac. 1086.

¹⁵ See § 26.

McCaw Mfg. Co. v. Felder, 115 Ga. 408; 41 S. E. 664.

¹⁶ *Cold Blast Transportation Co. v. Nut Co.*, 114 Fed. 77; 57 L. R. A. 696; 52 C. C. A. 25.

If there is an independent consideration for A's promise to furnish goods or services at a certain fixed price,¹⁷ or if A's promise is under seal,¹⁸ he cannot revoke such promise. So a promise by A to drive all the logs that B might buy in a certain river is valid where B, though he does not agree to buy any logs releases a claim against A.¹⁹ In such cases acceptance of the irrevocable offer makes a contract, even if the offerer has attempted to revoke his offer.²⁰

§308. Contract to supply needs of adversary party.

If the contract is that A is to furnish all the goods that B needs, B impliedly or expressly agreeing to take from A all that he needs, the case is somewhat different from those just discussed. Some authorities hold that even this promise is not mutual, since B may not need any goods, and is not bound to order any unless he needs them.¹ Others hold that B's promise to buy of A only, is a consideration for A's promise to furnish goods, and that the obligation is mutual.² Where A agreed to furnish B all the ice B needed for five years, B to take such amount, B cannot end contract by selling his business.³ So a contract to deliver to a corporation all the milk produced by A, amounting to twenty gallons or more per-day, for a year, for which the corporation agrees to pay a fixed price, is binding and not void either as indefinite or as lacking in mutuality.⁴

¹⁷ Calanchini v. Branstetter, 84 Cal. 249; 24 Pac. 149; Staples v. O'Neal, 64 Minn. 27; 65 N. W. 1083.

¹⁸ See § 35, and ch. xxxiii.

¹⁹ Mississippi River Logging Co. v. Robson, 69 Fed. 773; 16 C. C. A. 400.

²⁰ Calanchini v. Branstetter, 84 Cal. 849; 24 Pac. 149.

¹ McCaw Mfg. Co. v. Felder, 115 Ga. 408; 41 S. E. 664; Drake v. Vorse, 52 Ia. 417; 3 N. W. 465; Bailey v. Austrian, 19 Minn. 535.

² Loudenback Fertilizer Co. v. Phosphate Co., 121 Fed. 298; 61 L. R. A. 402; 58 C. C. A. 220; Robert, etc., Co. v. Omaha, etc., Co., 16 Colo.

118; 26 Pac. 326; National Furnace Co. v. Mfg. Co., 110 Ill. 427; Minnesota, etc., Co. v. Coal Co., 160 Ill. 85; 31 L. R. A. 529; 43 N. E. 774; reversing, 56 Ill. App. 248; Smith v. Morse, 20 La. Ann. 220; E. G. Dailey Co. v. Canning Co., 128 Mich. 591; 87 N. W. 761; Wells v. Alexandre, 130 N. Y. 642; 15 L. R. A. 218; 29 N. E. 142; McCall Co. v. Icks, 107 Wis. 232; 83 N. W. 300.

³ Hickey v. O'Brien, 123 Mich. 611; 81 Am. St. Rep. 227; 49 L. R. A. 594; 82 N. W. 241.

⁴ Herrick v. Wardwell, 58 O. S. 294; 50 N. E. 903.

Where by statute option contracts are made illegal in order to suppress gambling, such a contract is not an option.⁵

§309. Contract requiring test.

A contract otherwise binding does not lack mutuality because the thing sold is to satisfy a test by the purchaser to determine if it is suitable for his purpose,¹ as where A bought bonds of B, B to furnish a certified transcript of the proceedings authorizing the issuing of such bonds to the satisfaction of A's attorney.² Such contracts are considered under the subject of Performance.³

§310. Unenforceable promise as consideration.

If the promise which is invoked as a consideration is itself unenforceable for some reason outside of the form of the promise,¹ as where it is illegal,² as being a compromise which contains a secret preference of one creditor,³ in compromise of a felony,⁴ or on consideration of concealing from the wife of the maker his criminal intimacy with another woman,⁵ or under a collusive agreement for a divorce,⁶ or on a gambling consideration,⁷ or on a "red-line wheat" contract,⁸ or for permission from one in whose life the promisor has no insurable interest to take insurance on such life,⁹ or on a monopoly contract,¹⁰

⁵ *Smith v. Preston*, 82 Ill. App. 285.

¹ *Schleicher v. Light Co.*, 114 Ala. 228; 21 So. 1014.

² *Michigan, etc., Co. v. Harris*, 81 Fed. 928.

³ See ch. lxvi.

¹ *Siddall v. Clark*, 89 Cal. 321; 26 Pac. 829; *Grimmer v. Carlton*, 93 Cal. 189; 27 Am. St. Rep. 171; 28 Pac. 1043.

² See on this subject chapters xv-xxi.

³ *Bannantine v. Cantwell*, 27 Mo. App. 658.

⁴ *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207; 28 Pac. 1068.

⁵ *Case v. Smith*, 107 Mich. 416; 61 Am. St. Rep. 341; 31 L. R. A. 282; 65 N. W. 279.

⁶ *Stokes v. Anderson*, 118 Ind. 533; 4 L. R. A. 313; 21 N. E. 331.

⁷ *People's Savings Bank v. Gifford*, 108 Ia. 277; 79 N. W. 63.

⁸ *Hunt v. Rumsey*, 83 Mich. 136; 9 L. R. A. 674; 47 N. W. 105.

⁹ *Burbage v. Windley*, 108 N. C. 357; 12 L. R. A. 409; 12 S. E. 839.

¹⁰ *Gulick v. Ward*, 10 N. J. L. 87; 18 Am. Dec. 389; *Milwaukee, etc., Association v. Niezerowski*, 95 Wis. 129; 60 Am. St. Rep. 97; 37 L. R. A. 127; 70 N. W. 166.

or to secure the promisor's election as trustee of a savings society,¹¹ or for articles purchased contrary to the anti-trust laws,¹² or for a liquor license which by statute can be paid only in money,¹³ or where it is unenforceable under the Statute of Frauds,¹⁴ as an ante-nuptial contract,¹⁵ an oral promise by an executor to pay decedent's debt out of the executor's estate,¹⁶ an oral promise to convey realty,¹⁷ or to devise realty,¹⁸ such promise is not a consideration for a promise based thereon. So where a limited partnership can incur a debt exceeding five hundred dollars only by a written contract signed by two managers, an oral contract by such a partnership exceeding such sum is no consideration.¹⁹ So if a promise is unenforceable because it is *ultra vires* of the corporation promising²⁰ it is not a consideration. So a promise made by a married woman where such promises are void, is no consideration.²¹ So according to some courts a contract consisting of executory promises, in which the agent of one party has exceeded his authority, is not binding on the principal and therefore is no consideration for the promise of the adversary party. According to this view, therefore, ratification by the principal does not make the contract binding on the adversary party unless he acquiesces therein after such ratification.²² Performance of a promise which is

¹¹ Dickson v. Baker, 75 Minn. 168;
74 Am. St. Rep. 447; 77 N. W. 820.

¹² Columbia Carriage Co. v. Hatch,
19 Tex. Civ. App. 120; 47 S. W.
288.

¹³ Hencke v. Standiford, 66 Ark.
535; 52 S. W. 1.

¹⁴ Binion v. Browning, 26 Mo.
270; Stickler v. Giles, 9 Wash. 147;
37 Pac. 293; Nicholas v. Mitchell,
30 Wis. 329; Hooker v. Knab, 26
Wis. 511. *Contra*, rescission of a
contract within the Statute of
Frauds is a valuable consideration.
Merchant v. O'Rourke, 111 Ia. 351;
82 N. W. 759.

¹⁵ Richardson v. Richardson, 148
Ill. 563; 26 L. R. A. 305; 36 N. W.
608.

¹⁶ Philpot v. Bryant, 4 Bing. 719.

¹⁷ Agee v. Steele, 8 Ala. 948.

¹⁸ De Moss v. Robinson, 46 Mich.
62; 41 Am. Rep. 144; 8 N. W. 712.

¹⁹ Park Bros. v. Harwi, 2 Kan.
App. 629; 42 Pac. 939.

²⁰ Portland v. Paving Co., 33 Or.
307; 72 Am. St. Rep. 713; 44 L. R.
A. 527; 52 Pac. 28; Bosshardt, etc.,
Co. v. Oil Co., 171 Pa. St. 109; 32
Atl. 1120.

²¹ Shaver v. Mining Co., 10 Cal.
396; Howe v. Wildes, 34 Me. 566.
So of a conveyance. Henrici v.
Davidson, 149 Pa. St. 323; 24 Atl.
334.

²² Atlee v. Bartholomew, 69 Wis.
43; 5 Am. St. Rep. 103; 33 N. W.
110. Such a contract is said to be

unenforceable but not illegal and which is intended by the parties as a consideration for a promise by the adversary party, eliminates the original want of consideration. Thus performance by a married woman of her promise to convey realty, void on account of her coverture,²³ constitutes a valuable consideration. The questions presented here are treated in detail elsewhere.²⁴

§311. Performance of legal duty.

The doing of what one is bound in law to do or promising so to do are neither of them considerations for a promise made to the person upon whom the legal liability rests, to induce him to perform such act or to make such promise.¹ Surrender of property to the owner by one having no right thereto,² as a

"mere waste paper." *Calvary Baptist Church v. Dart*, — S. C. —; 47 S. E. 66.

²³ *Hoffman v. Colgan*, — Ky. —; 74 S. W. 724. (Her husband did not join in the contract but did join in the deed.)

²⁴ See Ch. xli.

¹ *Sullivan v. Sullivan*, 99 Cal. 187; 33 Pac. 862; *Dennis v. Piper*, 21 Ill. App. 169; *Moran v. Peace*, 72 Ill. App. 135; *Spencer v. McLean*, 20 Ind. App. 626; 67 Am. St. Rep. 271; 50 N. E. 769; *Mader v. Cool*, 14 Ind. App. 299; 56 Am. St. Rep. 304; 42 N. E. 945; *Schuler v. Myton*, 48 Kan. 282; 29 Pac. 163; *Warren v. Hodge*, 121 Mass. 106; *Keith v. Miles*, 39 Miss. 442; 77 Am. Dec. 685; *Allen v. Plasmeyre*, (Neb.); 90 N. W. 1125; *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb. 265; 59 N. W. 804; *Conover v. Stilwell*, 34 N. J. L. 54; *Carpenter v. Taylor*, 164 N. Y. 171; 58 N. E. 53; *Olmstead v. Latimer*, 158 N. Y. 313; 43 L. R. A. 685; 53 N. E. 5; *Arend v. Smith*, 151 N. Y. 502;

45 N. E. 872; *Robinson v. Jewett*, 116 N. Y. 40; 22 N. E. 224; *Seybolt v. R. R.*, 95 N. Y. 562; 47 Am. Rep. 75; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Crosby v. Wood*, 6 N. Y. 369; *Gaar v. Green*, 6 N. D. 48; 68 N. W. 318; *Hanks v. Barron*, 95 Tenn. 275; 32 S. W. 195; (payment by the owner of amount due a contractor and contractor's payment to a subcontractor no consideration for subcontractor's agreement to hold the owner harmless against lien of material men). *Chase v. Soule*, — Vt.—; 57 Atl. 754; *Cobb v. Cowdery*, 40 Vt. 25; 94 Am. Dec. 370; *Smith v. Phillips*, 77 Va. 548.

² *McCaleb v. Price*, 12 Ala. 753; *Ward v. Yorba*, 123 Cal. 447; 56 Pac. 58; reversing, 54 Pac. 80; *Sullivan v. Sullivan*, 99 Cal. 187; 33 Pac. 862; *Crosby v. Wood*, 6 N. Y. 369; *McDonald v. Neilson*, 2 Cow. (N. Y.) 139; 14 Am. Dec. 431; *Morgan v. Hodges*, 89 Mich. 404; 15 L. R. A. 438; 50 N. W. 876; *Fink v. Smith*, 170 Pa. St. 124; 50 Am. St. Rep. 750; 32 Atl. 566.

return of stolen property by the holder,³ or a surrender of personal property taken possession of under a mortgage given by one not the owner,⁴ surrender by executor of a life insurance policy of decedent to the beneficiary thereof;⁵ or indorsement to the owner of property insured of an insurance policy made payable by mistake to another,⁶ surrender of mortgaged premises by mortgagor after condition broken,⁷ release of a mortgage after payment of the debt secured thereby,⁸ or shipment of property by the holder to a third person with the owner's consent⁹ are not considerations; nor is a promise to pay rent, made to prevent unlawful eviction,¹⁰ nor an agreement by a railroad to fence its right of way as required by law,¹¹ or to repair its bridges,¹² or to allow a sewer to be built in a public street under its tracks,¹³ or to carry a mail clerk,¹⁴ nor payment by a railroad of medical attendance on one injured by its negligence,¹⁵ nor a surrender of a lease by one having title thereto

³ *Worthen v. Thompson*, 54 Ark. 151; 15 S. W. 192. Even if the party surrendering possession does not know that the possession is clearly wrongful. *Fink v. Smith*, 170 Pa. St. 124; 50 Am. St. Rep. 750; 32 Atl. 566. Such surrender is no consideration for a promise to let the possessor retain part of the property. *Morgan v. Hodges*, 89 Mich. 404; 15 L. R. A. 438; 50 N. W. 876; or for a promise to return the property to the possessor, unless the alleged thief by whom such property is said to have been stolen is convicted of such larceny. *Fink v. Smith*, 170 Pa. St. 124; 50 Am. St. Rep. 750; 32 Atl. 566.

⁴ *Martin v. Armstrong*, — Tex. Civ. App. —; 62 S. W. 83.

⁵ *Sullivan v. Sullivan*, 99 Cal. 187; 33 Pac. 862.

⁶ *Kortlander v. Elston*, 52 Fed. 180; 2 C. C. A. 657.

⁷ *Wendover v. Baker*, 121 Mo. 273; 25 S. W. 918.

⁸ A deed in form but a mortgage

in reality was given. On payment of the mortgage debt, the making of a deed to the property by mortgagee was merely doing what he was bound to do and was no consideration for allowing him to retain rents. *Chilson v. Bank*, 9 N. D. 96; 81 N. W. 33; *Jones v. Risley*, 91 Tex. 1; 32 S. W. 1027.

⁹ *Tolhurst v. Powers*, 133 N. Y. 460; 31 N. E. 326.

¹⁰ *Smith v. Coker*, 110 Ga. 654; 36 S. E. 107.

¹¹ *Shortle v. Ry. Co.*, 131 Ind. 338; 30 N. E. 1084.

¹² *City of Newton v. Ry.*, 66 Ia. 422; 23 N. W. 905.

¹³ *Kansas City, etc., Ry. v. Morley*, 45 Mo. App. 304. (No consideration for a promise by the contractor to pay for supporting its tracks while building such sewer, as the right of the railroad is subordinate to the public easement).

¹⁴ *Seybolt v. R. R.*, 95 N. Y. 562; 47 Am. Rep. 75.

¹⁵ *Richmond, etc., Ry. Co. v.*

as trustee to the *cestui que* trust,¹⁶ or the resignation of a defaulting trustee,¹⁷ nor a promise by an officer,¹⁸ as an executor,¹⁹ to do what the law requires him to do. Nor is a promise by a wife to a husband to live harmoniously with him and to manage the house,²⁰ nor a promise by her to resume marital relations after an estrangement due to her,²¹ nor a promise by a minor step-daughter to her step-father, who stands to her *in loco parentis* to travel with him and care for him, a consideration.²² Since a common carrier is bound by law to carry goods offered to him for transportation at his regular rates, his promise to do so in consideration of such regular rates and of an agreement by the shipper limiting the carrier's Common Law liability is no consideration for the shipper's promise thus relieving the carrier.²³ A reduced rate of freight is a sufficient consideration in such cases.²⁴ Special applications of this principle are found in the following sections.²⁵

If there is no legal obligation to do a certain act, the doing of such act is a consideration, even though there may be an apparent obligation to do it. Thus where the court had no

Walker, 92 Ga. 485; 17 S. E. 604. (No consideration for a release of damages.)

¹⁶ Robinson v. Jewett, 116 N. Y. 40; 22 N. E. 224.

¹⁷ Withers v. Ewing, 40 O. S. 400.

¹⁸ See § 413.

¹⁹ Orr v. Sanford, 74 Mo. App. 187.

²⁰ Miller v. Miller, 78 Ia. 177; 16 Am. St. Rep. 431; 35 N. W. 464; 42 N. W. 641.

²¹ Kesler's Estate, 143 Pa. St. 386; 24 Am. St. Rep. 557; 13 L. R. A. 581; 22 Atl. 892.

²² Gamet v. Simmons, 103 Ia. 163; 72 N. W. 444. (Hence no consideration for his conveyance to her as against his creditors.)

²³ York Co. v. Ry., 3 Wall. (U. S.) 107; Illinois Central Ry. v. Ins. Co., 79 Miss. 114; 30 So. 43; Ward v. Ry., 158 Mo. 226; 58 S. W. 28; Kellerman v. R. R., 136 Mo. 177; 34 S.

W. 41; 37 S. W. 828; Wilson v. Ry., 66 Mo. App. 388; Nelson v. R. R., 48 N. Y. 498; Gardner v. Ry., 127 N. C. 293; 37 S. E. 328; Missouri, etc., Ry. v. Darlington (Tex. Civ. App.); 40 S. W. 550; Berry v. Ry. 44 W. Va. 538; 67 Am. St. Rep. 781; 30 S. E. 143; Schaller v. Ry., 97 Wis. 31; 71 N. W. 1042. No separate consideration is necessary. Cau v. Ry., 194 U. S. 427; Charnock v. Ry., 194 U. S. 432.

²⁴ Mouton v. Ry., 128 Ala. 537; 29 So. 602; Stewart v. Ry., 21 Ind. App. 218; 52 N. E. 89; Wyrick v. Ry., 74 Mo. App. 406; Duvenick v. Ry., 57 Mo. App. 550; Texas, etc., Ry. Co. v. Klepper (Tex. Civ. App.); 24 S. W. 567; (consideration for agreement to waive damages if suit is not brought in forty days).

²⁵ See § 312 *et seq.*

jurisdiction, but assumed to render an order to garnishee to pay in his debt, his promise to pay such debt is a consideration.²⁸

§312. Performance of contract.

Mere performance of an existing contract or a part thereof is of itself no consideration for a new promise to the party performing.¹ Thus rendering services as letter carrier under contract with the government,² or rendering services under a prior contract³ is no consideration. If, without legal justification, one party to a contract breaks it, or threatens to break it, and to induce performance on his part the adversary party promises to pay more than was provided for by the original contract, there is on principle no consideration for such promise, as the party who threatens to break the contract does, when he finally performs it, no more than he was bound in law to do.⁴ Accordingly some courts hold that there is no consideration for such promises.⁵ Thus promises by a surety to induce the principal to pay the note,⁶ a subsequent promise to one who had agreed to take a certain note and mortgage as compensation for

²⁸ Taylor v. Williams, 120 Ind. 414; 22 N. E. 118.

¹ Johnson v. Sellers, 33 Ala. 265; Ellison v. Water Co., 12 Cal. 542; Havana Press Drill Co. v. Ashurst, 148 Ill. 115; 35 N. E. 873; Peelman v. Peelman, 4 Ind. 612; Bender v. Been, 78 Ia. 283; 5 L. R. A. 596; 43 N. W. 216; Barringer v. Ryder, 119 Ia. 121; 93 N. W. 56; Westcott v. Mitchell, 95 Me. 377; 50 Atl. 21; King v. Ry. Co., 61 Minn. 482; 63 N. W. 1105; Lingenfelder v. Brewing Co., 103 Mo. 578; 15 S. W. 844; Easterly v. Jackson, — Mont. —; 75 Pac. 357; Arend v. Smith, 151 N. Y. 502; 45 N. E. 872; Wadhams v. Page, 1 Wash. 420; 25 Pac. 462.

² Putnam v. Woodbury, 68 Me. 58. (No consideration for a promise by a private person to pay for part of such work.)

³ Alaska Packers' Association v. Domenico, 117 Fed. 99; 54 C. C. A.

485; C. H. Davis Co. v. Morgan, 117 Ga. 504; 97 Am. St. Rep. 171; 61 L. R. A. 148; 43 S. E. 732. (No consideration for an agreement changing compensation but not changing services due.)

⁴ See § 311.

⁵ Johnson v. Sellers, 33 Ala. 265; Clark v. Jones, 85 Ala. 127; Ellison v. Water Co., 12 Cal. 542; Havana Press Drill Co. v. Ashurst, 148 Ill. 115; 35 N. E. 873; Ford v. Garner, 15 Ind. 298; Reynolds v. Nugent, 25 Ind. 328; Ritenour v. Mathews, 42 Ind. 7; King v. Ry. Co., 61 Minn. 482; 63 N. W. 1105; Davidson v. Benefit Society, 39 Minn. 303; 1 L. R. A. 482; 39 N. W. 803; Vanderbilt v. Schreyer, 91 N. Y. 392; Seybolt v. R. R., 95 N. Y. 562; 47 Am. Rep. 75; Arend v. Smith, 151 N. Y. 502; 45 N. E. 872.

⁶ Ford v. Garner, 15 Ind. 298; Ritenour v. Mathews, 42 Ind. 7.

a building to guarantee such note,⁷ a promise of additional bounty made to induce A to perform his contract of enlistment for a certain bounty,⁸ a promise to induce one who has subscribed for stock to pay therefor,⁹ a promise to induce a debtor to give his note for a debt,¹⁰ a promise to induce an architect to complete a building contract,¹¹ additional compensation to a sub-contractor for work required by the contract,¹² or a promise to do additional work, made after the contract was completed, but before notes were signed, as provided by the terms of the contract,¹³ as a promise by a builder, after completing a house according to contract, to put on an additional coat of varnish,¹⁴ are not supported by consideration. So a promise by a mortgagor to assign an insurance policy after loss, which policy he had agreed to assign when the loan was made,¹⁵ a reinstatement of a forfeited policy in accordance with the terms of the original contract,¹⁶ a direction in a will for repayment of a loan made to testator by his wife,¹⁷ or carrying mail under contract with the government,¹⁸ or executing a deed in accordance with a contract so to do,¹⁹ are none of them considerations for promises based thereon. Other courts hold that there is a consideration in such cases for a promise by the adversary

⁷ *Vanderbilt v. Schreyer*, 91 N. Y. 392.

⁸ *Reynolds v. Nugent*, 25 Ind. 328.

⁹ *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115; 35 N. E. 873.

¹⁰ *Arend v. Smith*, 151 N. Y. 502; 45 N. E. 872. (This case seems to ignore the rule that a change in form from a non-negotiable to a negotiable debt is a consideration.)

¹¹ *Lingenfelder v. Brewing Co.*, 103 Mo. 578; 15 S. W. 844. To the same effect see *Willingham, etc., Co. v. Drew*, 117 Ga. 850; 45 S. E. 237.

¹² *Jones v. Risley*, 91 Tex. 1; 32 S. W. 1027. Where there is no breach to justify him in abandoning the contract.

¹³ *Gaar v. Green*, 6 N. D. 48; 68

N. W. 318; see *Abbott v. Doane*, 163 Mass. 433; 34 L. R. A. 33; 40 N. E. 197.

¹⁴ *Widiman v. Brown*, 83 Mich. 241; 47 N. W. 231.

¹⁵ *Lewis v. McReavey*, 7 Wash. 294; 34 Pac. 832.

¹⁶ *Davidson v. Benefit Society*, 39 Minn. 303; 1 L. R. A. 482; 39 N. W. 803.

¹⁷ *Charch v. Charch*, 57 O. S. 561; 49 N. E. 408. (No consideration for her surrender of her own property.)

¹⁸ *Putnam v. Woodbury*, 68 Me. 58. (No consideration for a promise to pay for part of such work, if made by a third party.)

¹⁹ *Easterly v. Jackson*, — Mont. —; 75 Pac. 357.

party,²⁰ or by a stranger to the contract,²¹ to induce performance. The theory of these last cited cases is that the original contract was in part executory, and that the parties might rescind, the waiver of their mutual rights being a consideration, and that there is then no objection to their making a new contract which may cover the same subject-matter as the original contract. As stated abstractly this is no doubt true. The objection to applying the doctrine to these cases is that it assumes facts which do not exist: for in almost every case the transaction was not a rescission and a subsequent independent new contract, but simply a promise to pay additional compensation for performance of the old contract, often made after rights were fixed by breach. Thus a promise to reduce rent after the tenant had taken possession and refused to pay the rent stipulated,²² a promise to repair, made after a lease was executed,²³ a promise to pay a certain amount extra to induce the adversary party to deliver lumber,²⁴ or ice,²⁵ or a locomotive,²⁶ or plated ware,²⁷

²⁰ *Domenico v. Packers' Association*, 112 Fed. 554; *Doherty v. Doe*, 18 Colo. 456; 33 Pac. 165; *Hyman v. Jockey Club Co.*, 9 Colo. App. 299; 48 Pac. 671; *Rogers v. Rogers*, 139 Mass. 440; 1 N. E. 122; *Blodgett v. Foster*, 120 Mich. 392; 79 N. W. 625; *Conkling v. Tuttle*, 52 Mich. 630; 18 N. W. 391; *Goebel v. Linn*, 47 Mich. 489; 41 Am. Rep. 723; 11 N. W. 284; *Moore v. Locomotive Works*, 14 Mich. 266. Compare *Widiman v. Brown*, 83 Mich. 241; 47 N. W. 231; where after full performance by a builder, payment was refused unless an additional coat of varnish should be put on, and a promise to do so by the builder was held not to be a consideration.

²¹ *Hirsch v. Carpet Co.*, 82 Ill. App. 234; *Abbott v. Doane*, 163 Mass. 433; 47 Am. St. Rep. 465; 34 L. R. A. 33; 40 N. E. 197.

²² *Doherty v. Doe*, 18 Colo. 456; 33 Pac. 165; *Hyman v. Club*, 9 Colo. App. 299; 48 Pac. 671. For a case taking the opposite view see *Goldsborough v. Gable*, 140 Ill. 269;

15 L. R. A. 294; 29 N. E. 722. An agreement to reduce rent when the tenant holds over was held valid in *Moore v. Harter*, 67 O. S. 250; 65 N. E. 883.

²³ *Conkling v. Tuttle*, 52 Mich. 630; 18 N. W. 391. In this case the time was changed, and a consideration may be found therein.

²⁴ *Blodgett v. Foster*, 120 Mich. 392; 79 N. W. 625. In this case the promise for extra compensation was as follows. "In consideration of the faithful performance of the above and foregoing contract by the parties of the first part, which they agree to do, it is hereby agreed by the parties that the prices for lumber shall be one dollar per M. higher than the prices named in the contract."

²⁵ *Goebel v. Linn*, 47 Mich. 489; 41 Am. Rep. 723; 11 N. W. 284.

²⁶ *Moore v. Locomotive Works*, 14 Mich. 266.

²⁷ *Rogers v. Rogers*, 139 Mass. 440; 1 N. E. 122.

have each been explained as new contracts. An attempt is made by some courts to distinguish these cases, holding that if performance is refused for difficulties in performance unforeseen to the party performing when the contract was made,²⁸ or arising out of innocent misstatement by the party promising,²⁹ performance of such contract constitutes a valuable consideration but otherwise not.³⁰ Whatever the rule between the parties, if both acquiesce in the refusal to perform as a final discharge a third party who becomes security for one party to induce the adversary party to perform cannot allege that no consideration exists.³¹

§313. Payment of debt due.

A creditor has a legal right to the payment of debts due him. If such debt is paid to him by his debtor, according to the nature of the obligation, in whole or in part, after it is due, he is receiving only what he is entitled to in law, which is no consideration for a promise in return for such payment.¹ It

²⁸ *Blodgett v. Foster*, 120 Mich. 392; 79 N. W. 625. (Where the lumber proved of the best and poorest grades, the medium grades not being present.)

²⁹ *Osborne v. O'Reilly*, 42 N. J. Eq. 467; 9 Atl. 209. Where A was to excavate for B, and B misstated the character of the underlying rock.

³⁰ *King v. Ry.*, 61 Minn. 482; 63 N. W. 1105. (Where the difficulty in clearing land arose from the ground's being frozen, which might have been expected in Minnesota in winter.)

³¹ *Bank v. Ryan*, 67 O. S. 448; 66 N. E. 526.

¹ *Lynn v. Bruce*, 2 H. Bl. 317; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Beaver v. Fulp*, 136 Ind. 595; 36 N. E. 418; *Davis v. Stout*, 126 Ind. 12; 22 Am. St. Rep. 565; 25 N.

E. 862; *Robert v. Barnum*, 80 Ky. 28; *Watts v. Parks*, (Ky.); 78 S. W. 1125; *Early v. Burt*, 68 Ia. 716; 28 N. W. 35; *Bryan v. Brazil*, 52 Ia. 350; 3 N. W. 117; *Rea v. Owens*, 37 Ia. 262; *Works v. Hershey*, 35 Ia. 340; *Myers v. Byington*, 34 Ia. 205; *Warren v. Hodge*, 121 Mass. 106; *Leeson v. Anderson*, 99 Mich. 247; 41 Am. St. Rep. 597; 58 N. W. 72; *Walz v. Parker*, 134 Mo. 458; 35 S. W. 1149; *Sherman County v. Nichols*, — Neb. —; 91 N. W. 198; *Baldwin Investment Co. v. Bailey*, 45 Neb. 580; 63 N. W. 847; *Isham v. Therasson*, 53 N. J. Eq. 10; 30 Atl. 969; *Snyder v. Ins. Co.*, 59 N. J. L. 69; 34 Atl. 945; *Sully v. Childress*, 106 Tenn. 109; 82 Am. St. Rep. 875; 60 S. W. 499; *Sanford v. Ins. Co.*, 11 Wash. 653; 40 Pac. 609.

follows from an application of this principle that full payment of money due is no consideration for a promise to extend time of payment of another debt,² nor for a promise to release a lien,³ nor for a collateral promise;⁴ nor is part payment of a debt according to the terms of the obligation consideration for a promise to extend the time of payment of the rest of such debt;⁵ nor a consideration for a promise to release the rest,⁶ nor for a promise by a third person,⁷ nor is a promise to pay costs due from one person to another a consideration for a release of other liabilities by the payee.⁸

The rule that payment of a debt due is no consideration is quite technical. While generally enforced by the courts it is not extended beyond its strict terms.⁹ A promise to pay money, not otherwise due and owing is a consideration,¹⁰ as a promise

² *Waltz v. Parker*, 134 Mo. 458; 35 S. W. 1149; *Baldwin Investment Co. v. Bailey*, 45 Neb. 580; 63 N. W. 847; *Krueger v. Klinger*, 10 Tex. Civ. App. 576; 30 S. W. 1087; *Helms v. Crane*, 4 Tex. Civ. App. 89; 23 S. W. 392; *Pomeroy v. Slade*, 16 Vt. 220.

³ *Watts v. Parker*, — Ky. —; 78 S. W. 1125.

⁴ *Tucker v. Bartle*, 85 Mo. 114.

⁵ *Davis v. Stout*, 126 Ind. 12; 22 Am. St. Rep. 565; 25 N. E. 862; *O. S. Kelly Co. v. Chinn* (Ia.) 75 N. W. 315; *Parmelee v. Thompson*, 45 N. Y. 58; 6 Am. Rep. 33; *Henderson v. Brooks* (Tex. Civ. App.); 54 S. W. 305.

⁶ *Fire Ins. Association v. Wickham*, 141 U. S. 564; *Blalock v. Jackson*, 94 Ga. 469; 20 S. E. 346; *Cox v. Adelsdorf*, (Ky.); 51 S. W. 616; *Leeson v. Anderson*, 99 Mich. 247; 41 Am. St. Rep. 597; 58 N. W. 72; *Snyder v. Insurance Co.*, 59 N. J. L., 69; 34 Atl. 945; *Murphy v. Kastner*, 50 N. J. Eq. 214; 24 Atl. 564; *Sanford v. Ins. Co.*, 11 Wash. 653; 40 Pac. 609. A promise by the creditor, made after the

debt is incurred, to give double credit for payments on the debt is void. *Klausman Brewing Co. v. Schoenlau*, 32 Mo. App. 357. Even if the debtor is insolvent payment by him of part of his debt may be a financial advantage but is not a technical consideration. *Pearson v. Thomason*, 15 Ala. 700; 50 Am. Dec. 159. Contra: that under such circumstances a technical consideration exists; *Engbretson v. Seiberling*, — Ia. —; 64 L. R. A. 75; 98 N. W. 319.

⁷ *Sherwin v. Brigham*, 39 O. S. 137; *Johnson v. University*, 41 O. S. 527.

⁸ *Eastman v. Miller*, 113 Ia. 404; 85 N. W. 635.

⁹ *Chicago, etc., Ry. v. Clark*, 178 U. S. 353.

¹⁰ *Citizen's Bank v. Millett*, 103 Ky. 1; 44 L. R. A. 664; 44 S. W. 366; *Taylor v. Crockett*, 123 Mo. 300; 27 S. W. 620; *Pence v. Blackford*, 11 Ohio C. C. 204, (a consideration for a promise by a father to deed land to a son).

See § 283.

to advance capital to a firm,¹¹ or a promise by principal to pay guarantor a certain percentage of profits.¹² Accordingly if the debt or a part thereof is paid before it is due,¹³ or if paid at a different place,¹⁴ or to a different person,¹⁵ as an undertaking to pay promisor's attorney,¹⁶ or if paid in something other than that stipulated for in the contract, but accepted in lieu thereof,¹⁷ or if additional security is given,¹⁸ or if the debt is paid in part by some one other than the debtor,¹⁹ as where A releases a debt due from B in consideration of a promise by C to pay interest to A for life,²⁰ or a third person releases an attachment on the debtor's property,²¹ the promisor has received something that he was not entitled to receive in that form, and at that time and place. Accordingly a consideration exists, in such cases, for a release or an extension of time. Such consideration must, however, be that contracted for by the parties to the contract.²²

This rule applies, moreover, only where the indebtedness is

¹¹ *Schminke v. Their Creditors*, 50 La. Ann. 511; 23 So. 712, the contract was that such promisor might in case of disagreement between the partners assume the liabilities and take over the property of the firm.

¹² *Shelton v. Reynolds*, 111 N. Car. 525; 16 S. E. 272.

¹³ *Spann v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346; *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144; 50 L. R. A. 401; 46 Atl. 347; *Reed v. McGregor*, 62 Minn. 94; 64 N. W. 88; *Thurber v. Smith*, 25 R. I. 60; 54 Atl. 790; *Russell v. Stevenson*, — Wash. —; 75 Pac. 627. Payment within the days of grace is not payment before maturity within the meaning of this rule; *McKamy v. McNabb*, 97 Tenn. 236; 36 S. W. 1091.

¹⁴ *Harper v. Graham*, 20 Ohio, 106.

¹⁵ *Harper v. Graham*, 20 Ohio

106. So an additional promise by the debtor to pay a third person and thus discharge his creditor is a consideration. *Bank v. Brooks*, 64 Kan. 285; 67 Pac. 860.

¹⁶ *Roberts v. Carter*, 31 Ill. App. 142; *Harper v. Graham*, 20 Ohio 106.

¹⁷ *Leeson v. Anderson*, 99 Mich. 247; 41 Am. St. Rep. 597; 58 N. W. 72.

¹⁸ *Laboyteaux v. Swigart*, 103 Ind. 596; 3 N. E. 373.

See § 284.

¹⁹ *Brooks v. White*, 2 Met. (Mass.) 283; 37 Am. Dec. 95. So *Farmer v. Sellers*, 137 Ala. 112; 33 So. 829.

See § 283.

²⁰ *Lodge v. Hulings*, 63 N. J. Eq. 159; 51 Atl. 1015.

²¹ *Bartlett v. Woodworth-Mason Co.*, 69 N. H. 316; 41 Atl. 264.

²² See § 277.

liquidated. If there is a genuine dispute between the parties as to the amount, payment to one of an amount less than that claimed by him is a sufficient consideration for his agreement to release the difference between the amount claimed and the amount paid.²³ A contract entered into between the debtor on one side and more than one of his creditors, whereby the creditors agree to discharge the debtor from liability on his paying a part of the amount due to each is supported by a sufficient consideration, the promise of each creditor to release part of his claim being a consideration for similar promises by the other creditors.²⁴ If a less sum than is due is paid and the transaction amounts to a gift by the creditor to the debtor of the difference the balance of the amount due is discharged.²⁵ Payment of one dollar may discharge a larger debt where the creditor gave the rest of the debt to the debtor.²⁶ The difficulty consists in determining what amounts to a gift. An agreement by a lessor to accept less than the amount of rent reserved in the lease and the acceptance of such less amount may amount to a gift; and it is error to exclude evidence of such transaction from the jury.²⁷ So acceptance of the full amount due from a county treasurer, without interest has been held to be a discharge of a claim for interest.²⁸

²³ Chicago, etc., Ry. v. Clark, 178 U. S. 353; Ostrander v. Scott, 161 Ill. 339; 43 N. E. 1089; Tanner v. Merrill, 108 Mich. 58; 62 Am. St. Rep. 687; 31 L. R. A. 171; 65 N. W. 664; Marion v. Heimbach, 62 Minn. 214; 64 N. W. 386 (obiter, as no contract to release balance was shown); Nassoioy v. Tomlinson, 148 N. Y. 326; 51 Am. St. Rep. 695; 42 N. E. 715.

See § 289.

²⁴ Crawford v. Krueger, 201 Pa. St. 348; 50 Atl. 931; Laird v. Campbell, 92 Pa. St. 470.

²⁵ Holmes v. Holmes, 129 Mich. 412; 95 Am. St. Rep. 444; 89 N. W.

47; Green v. Langdon, 28 Mich. 221; Maloy v. Bernatillo County, 10 N. M. 638; 52 L. R. A. 126; 62 Pac. 1106; McKenzie v. Harrison, 120 N. Y. 260; 17 Am. St. Rep. 638; 8 L. R. A. 257; 24 N. E. 458; Adams v. Cook, 200 Pa. St. 258; 49 Atl. 954.

²⁶ Gray v. Barton, 55 N. Y. 68; 14 Am. Rep. 181.

²⁷ McKenzie v. Harrison, 120 N. Y. 260; 17 Am. St. Rep. 638; 8 L. R. A. 257; 24 N. E. 458.

²⁸ Maloy v. Bernatillo County, 10 N. M. 638; 52 L. R. A. 126; 62 Pac. 1106.

§314. Payment of interest due.

Payment of interest already due is no consideration for a promise to extend the time of payment, since the creditor is already entitled thereto.¹ A promise by the debtor to pay interest at the rate already fixed for such time as the debt should remain unpaid, the debtor having the privilege of paying it whenever he can, and discharging his liability by paying the principal with interest down to the date of payment is no consideration for a promise to extend the time of payment.² So a promise to pay interest on an interest bearing account until paid is no consideration.³ If, however, the extension is for a fixed time and the debtor binds himself to pay interest for the whole of such period, even at the rate already fixed, a consideration exists. The debtor has given up his right to discharge his liability by paying the principal with interest down to the date of payment; a right not always of practical value to debtors but recognized by the law.⁴ So a promise to delay enforcing a debt

¹ *Amberg v. Nachtway*, 92 Ill. App. 608; *Heenan v. Howard*, 81 Ill. App. 629; *Bugh v. Crum*, 26 Ind. App. 465; 84 Am. St. Rep. 307; 59 N. E. 1076; *Alley v. Hopkins*, 98 Ky. 668; 56 Am. St. Rep. 382; 34 S. W. 13.

² *Tatum v. Morgan*, 108 Ga. 336; 33 S. E. 940; *Bunn v. Bank*, 98 Ga. 647; 26 S. E. 63; *English v. Landon*, 181 Ill. 614; 54 N. E. 911; *Whiffen v. Hollister*, 12 S. D. 68; 80 N. W. 156; *Webb v. Pahde* (Tex. Civ. App.); 43 S. W. 19.

³ *Stickler v. Giles*, 9 Wash. 147; 37 Pac. 293.

⁴ *Julien v. Bauer*, 82 Ill. App. 157; *Eaton v. Whitmore*, 3 Kan. App. 760; 45 Pac. 450; *Alley v. Hopkins*, 98 Ky. 668; 56 Am. St. Rep. 382; 34 S. W. 13; s. c., 43 S. W. 168; *Robinson v. Miller*, 2 Bush. (Ky.) 179; *Chute v. Pattee*, 37 Me. 102; *Shayler v. Giddings*, 122 Mich. 359; 81 N. W. 552; *Vereycken v. Vanden Brooks*, 102 Mich 199; 60

N. W. 687; *Moore v. Redding*, 69 Miss. 841; 13 So. 849; *Fowler v. Brooks*, 13 N. H. 240; *Fawcett v. Freshwater*, 31 O. S. 637; *McComb v. Kittridge*, 14 Ohio 348; *Benson v. Phipps*, 87 Tex. 578; 47 Am. St. Rep. 128; 29 S. W. 1061; *Angel v. Miller*, 16 Tex. Civ. App. 679; 39 S. W. 1092; *Robson v. Brown* (Tex. Civ. App.); 57 S. W. 83, 686; *Woodall v. Streeter* (Tex. Civ. App.); 39 S. W. 169; *Nelson v. Flagg*, 18 Wash. 39; 50 Pac. 571. "In case of a debt which bears interest either by convention or by operation of law, when an extension for a definite period is agreed upon by the parties thereto, the contract is that the creditor will forbear suit during the time of the extension, and the debtor foregoes his right to pay the debt before the end of that time. The latter secures the benefit of the forbearance, the former secures an interest-bearing investment for a definite period

until the debtor's death in consideration of being "well paid," has been held to be upon consideration.⁵ In some states, however, no consideration is recognized in extensions of interest-bearing debts for a fixed time.⁶ In states which hold that an extension for a certain time at the same rate of interest lacks consideration, it follows that an extension for a certain time at a lower rate of interest lacks consideration.⁷

A change in the rate or time of paying interest which gives the creditor some legal right not before possessed by him is a consideration for a promise to extend the time of payment. Thus a promise to pay a higher rate of interest than called for by the original contract,⁸ even if lower than that agreed upon for a prior extension, provided it is higher than that fixed by the contract,⁹ a promise to pay interest semi-annually instead

of time, one gives up his right to sue for a period in consideration of a promise to pay interest during the whole of the time; the former secures an interest-bearing investment for a definite period of time, one gives up his right to sue for a period in consideration of a promise to pay interest during the whole of the time; the other relinquishes his right to pay during the same period in consideration of a promise of forbearance. To the question why this is not a contract, we think no satisfactory answer can be given."

Benson v. Phipps, 87 Tex. 578; 47 Am. St. Rep. 128; 29 S. W. 1061. (Citing, *Stallings v. Johnson*, 27 Ga. 564; *Reynolds v. Barnard*, 36 Ill. App. 218; *Crossman v. Wohlleben*, 90 Ill. 537; *Robinson v. Miller*, 2 Bush. (Ky.) 179; *Chute v. Pattee*, 37 Me. 102; *Fowler v. Brooks*, 13 N. H. 240; *Wood v. Newkirk*, 15 O. S. 295; *McComb v. Kittridge*, 14 Ohio 348.) "It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege, at any time, of

getting rid of the payment of interest, by discharging the principal. By this contract, the right to interest is secured for a given period, and the right to pay off the principal, and get rid of paying the interest is also relinquished for such period. Here are all the elements of a binding contract." *McComb v. Kittridge*, 14 Ohio 348; quoted in *Bugh v. Crum*, 26 Ind. App. 465; 84 Am. St. Rep. 307; 59 N. E. 1076.

⁵*Davis v. Teachout*, 126 Mich. 135; 86 Am. St. Rep. 531; 85 N. W. 475.

⁶*Hume v. Mazelin*, 84 Ind. 574; *Starrett v. Burkhalter*, 70 Ind. 285; *Christman v. Tuttle*, 59 Ind. 155; *Bugh v. Crum*, 26 Ind. App. 465; 84 Am. St. Rep. 307; 59 N. E. 1076; *Harburg v. Kumpf*, 151 Mo. 16; 52 S. W. 19.

⁷*Harburg v. Kumpf*, 151 Mo. 16; 52 S. W. 19.

⁸*Lawrence v. Thom*, 9 Wyom. 414; 64 Pac. 339.

⁹*Kearby v. Hopkins*, 14 Tex. Civ. App. 166; 36 S. W. 506.

of annually as provided for by the contract,¹⁰ giving an interest bearing note in payment of interest due on a prior note;¹¹ payment of interest in advance;¹² or before it is due;¹³ are all valuable considerations. An agreement to reduce the rate of interest on an overdue debt, to be paid on demand is valid,¹⁴ since the right forborne is the right to pay the debt with interest under the old contract to the date of payment.

§315. Payment of usurious interest.

Whether payment of usurious interest or a promise to pay usurious interest is a consideration for a promise to extend the time for the payment of a debt is a question upon which there is a general harmony of principle and diversity of result. The latter grows out of the diversity of statutes forbidding usury, and the corresponding difference in legal effect of usury under the different statutes. The same state often illustrates the variance in effect caused by change of statute. Thus in Indiana under the act of 1845 payment of usury was a valuable consideration.¹ Under a subsequent statute imposing a fine for the payment of usury and providing that it could be recovered by the debtor, payment of usury was held to be no consideration.² Under a still later statute allowing recoupment for payment of usury, such payment was held to be a consideration.³

¹⁰ *Scott v. Fisher*, 110 N. C. 311; 28 Am. St. Rep. 688; 14 S. E. 799; as where interest is originally payable annually, payment at intervals of ninety days is a consideration for extension of time. *Commercial Bank v. Wood*, 56 Mo. App. 214.

¹¹ *Bugh v. Crum*, 26 Ind. App. 465; 84 Am. St. Rep. 307; 59 N. E. 1076.

¹² *Young v. Bank*, 102 Ky. 257; 43 S. W. 473; *Owen v. Bray*, 80 Mo. App. 526; *American National Bank v. Love*, 62 Mo. App. 378; *Bank v. Walter*, 104 Tenn. 11; 55 S. W. 301; *State National Bank v. Stratton-White Co.* (Tex. Civ. App.); 50 S. W. 631; *Bank of British*

Columbia v. Jeffs, 15 Wash. 230; 46 Pac. 247; *Binnian v. Jennings*, 14 Wash. 677; 45 Pac. 302; *Parsons v. Harrold*, 46 W. Va. 122; 32 S. E. 1002; *Hallock v. Yankey*, 102 Wis. 41; 72 Am. St. Rep. 861; 78 N. W. 156.

¹³ *Dickerson v. Board of Commissioners*, 6 Ind. 128; 63 Am. Dec. 373; *Lime Rock Bank v. Mallett*, 34 Me. 547; 56 Am. Dec. 673.

¹⁴ *Tousey v. Moore*, 79 Mich. 564; 44 N. W. 958.

¹ *Harbert v. Dumont*, 3 Ind. 346.

² *Shaw v. Benkard*, 10 Ind. 227.

³ *Lemmon v. Whitman*, 75 Ind. 318; 39 Am. Rep. 150.

Under most statutes the actual payment of usury,⁴ as where it is paid in advance,⁵ is a consideration. This rule is applied even if the party making such payment may recoup,⁶ since "the right to plead usury is the personal privilege of the debtor."⁷ If, however, the statute makes payment of usurious interest apply on the principal, payment is no consideration.⁸ Payment of usurious interest according to the terms of the original contract is held not to be a consideration for an agreement to extend time of payment.⁹ A promise to pay usury stands on a different footing. In most jurisdictions such contract is unenforceable and is no consideration.¹⁰ A promise to extend payment on such consideration would therefore not re-

⁴ Knight v. Hawkins, 93 Ga. 709; 20 S. E. 266; Wittmer v. Ellison, 72 Ill. 301; Lemmon v. Whitman, 75 Ind. 318; 39 Am. Rep. 150; Wild v. Howe, 74 Mo. 551; Stilwell v. Aaron, 69 Mo. 539; 33 Am. Rep. 517; overruling, Farmers', etc., Bank v. Harrison, 57 Mo. 506; Wiley v. Hight, 39 Mo. 130; Marks v. Bank, 8 Mo. 318; Fleming v. Barden, 126 N. C. 450; 78 Am. St. Rep. 671; 36 S. E. 17; *sub nomine* Fleming v. Borden, 53 L. R. A. 316; rehearing denied *sub nomine* Fleming v. Borden, 127 N. C. 214; 53 L. R. A. 326; 37 S. E. 219; Hollingsworth v. Tomlinson, 108 N. C. 245; 12 S. E. 989; Osborn v. Low, 40 O. S. 347; Blazer v. Bundy, 15 O. S. 57; Niblack v. Champeny, 10 S. D. 165; 72 N. W. 402; Mann v. Brown, 71 Tex. 241; 9 S. W. 111; Parsons v. Harrold, 46 W. Va. 122; 32 S. E. 1002; Hamilton v. Prouty, 50 Wis. 592; 36 Am. Rep. 866; 7 N. W. 659.

⁵ Hollingsworth v. Tomlinson, 108 N. C. 245; 12 S. E. 989; Bank v. Walter, 104 Tenn. 11; 55 S. W. 301 (overruling, Howell v. Sevier, 1 Lea (Tenn.) 360; 27 Am. Rep. 771); Parson v. Harrold, 46 W. Va. 122; 32 S. E. 1002.

⁶ Lemmon v. Whitman, 75 Ind. 318; 39 Am. Rep. 150.

⁷ "If the contract were absolutely void on account of the usurious taint, we might be forced, possibly, to a different conclusion. But it is only voidable, and that not at the option of the lender. The right of rescission and recoupment is personal to the debtor, his heirs, representatives or sureties. The creditor who has received the usury has no right to restore it or credit it on the debt and thereby release himself from his engagement to give time, and especially after the stipulated time has gone by, on the ground that his agreement was without sufficient consideration." Lemmon v. Whitman, 75 Ind. 318; 39 Am. Rep. 150.

⁸ Polkinghorne v. Hendricks, 61 Miss. 366; Nightingale v. Meginnis, 34 N. J. L. 461; Calvert v. Good, 95 Pa. St. 65; McKamy v. McNabb, 97 Tenn. 236; 36 S. W. 1091; Wilson v. Langford, 5 Humph. (Tenn.) 320.

⁹ Hunt v. Postlewait, 28 Ia. 427; Jones v. Brown, 11 O. S. 601.

¹⁰ Green v. Lake, 2 Mackey (D. C.) 162; Jenness v. Cutler, 12 Kan. 500; Ives v. Bosley, 35 Md. 262; 6

lease a surety.¹¹ A promise to pay usurious interest is most clearly not a consideration when repudiated by the debtor.¹² If under the statute such a promise has any validity, it is a valuable consideration. Thus, when the statute made usury a forfeiture of *all* interest, a usurious promise was no consideration,¹³ but a change of statute making usury a forfeiture only of the excess above the legal rate makes a usurious promise a consideration.¹⁴ Some jurisdictions, however, invoke the theory that usury is a defense personal to the debtor, and hold that the creditor cannot take advantage of the usury,¹⁵ and that accordingly a contract to extend the time of payment in consideration of a promise to pay usury releases a surety.¹⁶ If the usurious contract has any validity, as where the statute avoids the contract only to the extent of the excess above the legal rate,¹⁷ such promise is a valuable consideration.

§316. Performance of joint liability.

If two or more persons are jointly liable on a debt, a release of one of them by the obligee is a waiver of a legal right. Since the obligee could, if necessary or convenient, enforce payment of the entire amount out of the property of any one of them, a payment by any one debtor of part of the debt is only doing part of what he is legally bound to do, and is no consid-

Am. Rep. 411; *Bank v. Lineberger*, 83 N. C. 454; 35 Am. Rep. 582; *Hartman v. Danner*, 74 Pa. St. 36; *Cornwell v. Holly*, 5 Rich. (S. C.) 47.

¹¹ *Silmeyer v. Schaffer*, 60 Ill. 479; *Galbraith v. Fullerton*, 53 Ill. 126; *Patton v. Shanklin*, 14 B. Mon. (Ky.) 15; *Meiswinkle v. Jung*, 30 Wis. 361; 11 Am. Rep. 572.

¹² *Morgan v. Wickliffe*, (Ky.); 61 S. W. 1017; denying rehearing, (Ky.); 61 S. W. 13.

¹³ *Roberts v. Stewart*, 31 Miss. 664.

¹⁴ *Brown v. Proffit*, 53 Miss. 649.

¹⁵ *Turrill v. Boynton*, 23 Vt. 142; *Armistead v. Ward*, 2 Patton & H. (Va.) 504; *Hamilton v. Prouty*, 50 Wis. 592; 36 Am. Rep. 866; 7 N. W. 659.

¹⁶ *Kelly v. Gillespie*, 12 Ia. 55; 79 Am. Dec. 516; *Austin v. Chitenden*, 33 Vt. 553; *Moulton v. Posten*, 52 Wis. 169; 8 N. W. 621.

¹⁷ *Redman v. Deputy*, 26 Ind. 338; *Wood v. Newkirk*, 15 O. S. 295; *McComb v. Kittridge*, 14 Ohio 348.

eration for a contract to release him from further liability.¹ On the same principle a promise by one partner already liable on a partnership debt to discharge such debt is no consideration for an agreement to release the other partner.² So a promise by one holding joint and several obligations to enforce them as several obligations for the share of each obligor,³ a promise by the holder of a partnership note to release one partner therefrom,⁴ or a promise to release a surety,⁵ are all without consideration. Even if the liability is not technically joint, but the creditor has a right to hold either of two or more parties his promise to discharge one of them is without consideration.⁶ Conversely an assumption of joint liability by one not originally liable is unenforceable unless supported by a valuable consideration. Thus where A is indebted to B, C's subsequent promise to become surety for A is unenforceable unless some new consideration intervenes.⁷ So a promise by a subsequent accommodation indorser of a note to a prior accommodation indorser to pay one-half of the note,⁸ has no consideration.

§317. Reciprocal release of contractual rights.

If a contract is existing between two parties, under which each party has rights and liabilities unperformed, a modifica-

¹ *Eagle Mfg. Co. v. Jennings*, 29 Kan. 657; 44 Am. Rep. 668; *Smith v. Bartholomew*, 1 Met. (Mass.) 276; 35 Am. Dec. 365. Release by indorsee, *Bender v. Been*, 78 Ia. 283; 5 L. R. A. 596; 43 N. W. 216. Release of joint principal by surety, *Cheeseman v. Wiggins*, 122 Ind. 352; 23 N. E. 945. Release of surety by payee, *Martin v. Frantz*, 127 Pa. St. 389; 14 Am. St. Rep. 859; 18 Atl. 20.

² *Wadhams v. Page*, 1 Wash. 420; 25 Pac. 462; and see *Motley v. Wickoff*, 113 Mich. 231; 71 N. W. 520, which is, however, rather doubtful on this point. Agreement to release retiring partner and look solely to partner remaining in busi-

ness, *Waltsrom v. Hopkins*, 103 Pa. St. 118.

³ *Davis, etc., Mfg. Co. v. Dix*, 64 Fed. 406.

⁴ *Fowler v. Coker*, 107 Ga. 817; 33 S. E. 661; citing, *Eagle Mfg. Co. v. Jennings*, 29 Kan. 657; 44 Am. Rep. 668; *Maness v. Henry*, 96 Ala. 454; 11 So. 410.

⁵ *Bardwell v. Witt*, 42 Minn. 468; 44 N. W. 983.

⁶ Promise to look to vendee of debtor exclusively, *Pope v. Vajen*, 121 Ind. 317; 6 L. R. A. 688; 22 N. E. 308.

⁷ See § 319.

⁸ *Harrah v. Doherty*, 111 Mich. 175; 69 N. W. 242.

tion of such contract is supported by a sufficient consideration in the mutual waiver of the rights arising under the old contract.¹ Even if the contract is broken, if there are mutual liabilities subsisting between the parties,² or if the party who has broken the contract undertakes other and further obligations than those imposed by the original contract in return for a waiver of liabilities under the broken contract,³ or releases the adversary party from some independent liability,⁴ there is a sufficient consideration for such modification. If A refuses to perform because of breach by B, a new promise by B or a third person to induce A to perform has consideration;⁵ and so where there is a *bona fide* dispute pending, compromise thereof is consideration for a new promise.⁶ Thus where A had delayed performance so that B was discharged from his obligation to perform by a certain time, a promise by A to pay extra compensation if B will perform in the time specified has sufficient consideration.⁷ So where a contractor abandons the work leav-

¹ Jones v. Jones, 1 Colo. App. 28; 27 Pac. 85; Crutchfield v. Dailey, 98 Ga. 462; 25 S. E. 526; Sargent v. Robertson, 17 Ind. App. 411; 46 N. E. 925; Harrod v. State, 24 Ind. App. 159; 55 N. E. 242; Weld v. Nichols, 17 Pick. (Mass.) 538; Blagborne v. Hunger, 101 Mich. 375; 59 N. W. 657; Marshall v. Larkin, 82 Mo. App. 635; Henry v. Vliet, 33 Neb. 130; 29 Am. St. Rep. 478; 49 N. W. 1107; Hildreth v. Academy, 29 N. H. 227; Oregon, etc., Ry. v. Forrest, 128 N. Y. 83; 28 N. E. 137; Kvello v. Taylor, 5 N. D. 76; 63 N. W. 889; Dreifus v. Salvage Co., 194 Pa. St. 475; 75 Am. St. Rep. 704; 45 Atl. 370; Lowry v. Strapp (Tenn. Ch. App.); 53 S. W. 194; Anderson v. McDonald, 31 Wash. 274; 71 Pac. 1037; Hathaway v. Lynn, 75 Wis. 186; 6 L. R. A. 551; 43 N. W. 956; Buechel v. Buechel, 65 Wis. 532; 27 N. W. 318.

² Bishop v. Busse, 69 Ill. 403;

Plano Mfg. Co. v. Kesler, 15 Ind. App. 110; 43 N. E. 925; Courtenay v. Fuller, 65 Me. 156; Byington v. Simpson, 134 Mass. 145; Malone v. Dougherty, 79 Pa. St. 46; Flanders v. Fay, 40 Vt. 316.

³ City of Ft. Madison v. Moore, 109 Ia. 476; 80 N. W. 527; Dreifus v. Salvage Co., 194 Pa. St. 475; 75 Am. St. Rep. 704; 45 Atl. 370.

⁴ Gemberling v. Spaulding, 104 Mich. 217; 62 N. W. 342.

⁵ Brownlee v. Lowe, 117 Ind. 420; 20 N. E. 301; Stewart v. Keteltas, 36 N. Y. 388.

⁶ A agreed to build a refrigerator for B. B objected to the construction of the refrigerator and A then guaranteed that it would work as built. A's promise was held to have a consideration. Thomas v. Barnes, 156 Mass. 581; 31 N. E. 683.

See § 289.

⁷ King v. Ry. Co., 61 Minn. 482; 63 N. W. 1105. For a similar prin-

ing the sub-contractor unpaid, a promise by the owner to pay the sub-contractor for completing his contract rests on consideration.⁸

Another form of stating this rule is that the parties may always rescind a contract executory on both sides and make a new contract.⁹ Thus where A had leased land to B, B to pay a certain number of bushels per acre, and the crop is nearly ruined by storms, they may agree that B shall replant and that A will take as rent one half the crop.¹⁰

§318. Performance with modification.

If the new promise is to do something further than the promisor had already agreed to do, such promise is a consideration for a reciprocal promise. Thus where A was bound not to allow others to use his name in business a further promise not to engage in business himself is a consideration;¹ and so when a surety consents to an extension of time.² Where no time is fixed for the continuance of the contract and it is held revocable at will,³ a promise of additional compensation for further performance is upon consideration.⁴ A substantial change in the form of a pre-existing liability is a consideration, such as a novation,⁵ the exchange of an absolute unliquidated liability

ciple see *Stewart v. Keteltas*, 36 N. Y. 388.

⁸ *Rand v. Mather*, 11 Cush. (Mass.) 1; 59 Am. Dec. 131; *Grant v. Ry. Co.*, 61 Minn. 395; 63 N. W. 1026. *Contra*, *Ellison v. Water Co.*, 12 Cal. 542.

⁹ *Stoudenmeier v. Williamson*, 29 Ala. 558; *Thomason v. Dill*, 30 Ala. 444; *Crutchfield v. Dailey*, 98 Ga. 462; 25 S. E. 526; *Raymond v. Krauskopf*, 87 Ia. 602; 54 N. W. 432; *Munroe v. Perkins*, 9 Pick. (Mass.) 298; 20 Am. Dec. 475; *Rogers v. Rogers*, 139 Mass. 440; 1 N. E. 122; *Blagborne v. Hunger*, 101 Mich. 375; 59 N. W. 657; *Spangler v. Springer*, 22 Pa. St.

454; *Snell v. Bray*, 56 Wis. 156; 14 N. W. 14.

¹⁰ *Raymond v. Krauskopf*, 87 Ia. 602; 54 N. W. 432.

¹ *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545; 59 N. E. 357.

² *Resseter v. Waterman*, 151 Ill. 169; 37 N. E. 875; reversing, 45 Ill. App. 155.

³ *Forbes v. Bushnell*, 47 Minn. 402; 50 N. W. 368; *Coffin v. Landis*, 46 Pa. St. 426; *Irish v. Dean*, 39 Wis. 562.

⁴ *Forbes v. Bushnell*, 47 Minn. 402; 50 N. W. 368.

⁵ *Trudeau v. Poutre*, 165 Mass. 81; 42 N. E. 508.

for a contingent liquidated liability;⁶ an agreement by tenants in common to accept part of the entire estate in severalty and pay a proportionate share of a mortgage on the tract,⁷ or giving several small notes, providing for payment of attorney fees in case of suit, for one larger note involving no such provision.⁸ Payment of one half a judgment by one of several judgment debtors in cash and notes secured by collateral is consideration for a satisfaction of the judgment as to such debtor.⁹ If X a third person gives his note to A, a surety for B to C in consideration of A's paying B's debt to C, a consideration for X's note exists, since A, while legally liable to C for such debt, had a right to await suit by C and in that suit to compel B to pay the debt to the extent of B's property before A's property could be taken.¹⁰

§319. Past consideration.

A past consideration, so-called, is said to be no consideration.¹ This proposition means that if a right has been received or forborne, under circumstances that either never created any legal liability, or if there was a legal liability, have amounted to a discharge, such right or forbearance cannot be a consideration for a promise made after the act or forbearance, and after the liability, if there ever was any, has been discharged.²

⁶ *Turner v. Smith*, 112 Ala. 334; 20 So. 486.

⁷ *Mutual Mills Ins. Co. v. Gordon*, 20 Ill. App. 559. (Consideration for a promise by mortgagee to apportion the mortgage debt in severalty.)

⁸ *Roberts v. Carter*, 31 Ill. App. 142.

⁹ *Brown v. Kern*, 21 Wash. 211; 57 Pac. 798; (citing, *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76; 11 Am. Dec. 247; *Kellogg v. Richards*, 14 Wend. (N. Y.) 116; *Le Page v. McCrea*, 1 Wend. (N. Y.) 164; 19 Am. Dec. 469; *Evans v. Wells*, 22 Wend. (N. Y.) 324; *Lee*

v. Oppenheimer, 32 Me. 253; *Keeler v. Salisbury*, 33 N. Y. 648; *Brooks v. White*, 2 Met. (Mass.) 283; 37 Am. Dec. 95; *Curtiss v. Martin*, 20 Ill. 557.

¹⁰ *Abbott v. Doane*, 163 Mass. 433; 47 Am. St. Rep. 465; 34 L. R. A. 33; 40 N. E. 197.

¹ *Hopkins v. Logan*, 5 M. & W. 241.

² *Wulff v. Lindsay*, — Ariz. —; 71 Pac. 963; *Dillard v. Dillard*, 118 Ga. 97; 44 S. E. 885; *Western Paving Co. v. Ry.*, 128 Ind. 525; 25 Am. St. Rep. 462; 10 L. R. A. 770; 26 N. E. 188; 28 N. E. 88; *Schnell v. Nell*, 17 Ind. 29; 79 Am. Dec.

Thus after a lease has been executed,³ or a debt has been created,⁴ a promise by a third person to guarantee such lease or debt is not supported by the original consideration, nor is a promise to assume such debt supported by such debt as a consideration.⁵ So a promise to indemnify a surety made after he became bound is void.⁶ Examples of past acts which are not considerations for a subsequent express promise are a written contract for the shipment of property, which has been already forwarded under a different oral contract;⁷ a promise

453; Massachusetts, etc., Ins. Co. v. Green, — Mass. —; 70 N. E. 202; Redman v. Hampton, 26 Mo. App. 504; Cleaver v. Lenhart, 182 Pa. St. 285; 37 Atl. 811; McHugh v. County of Schuylkill, 67 Pa. St. 391; 5 Am. Rep. 445; Bunker v. Taylor, 10 S. D. 526; 74 N. W. 450; Whitson v. Fowlkes, 1 Head. (Tenn.) 533; 73 Am. Dec. 184; Davis v. Anderson 99 Va. 620; 39 S. E. 588; Pennybacker v. Maupin, 96 Va. 461; 31 S. E. 607.

³ Griffin v. Hoag, 105 Ia. 499; 75 N. W. 372; Macfarland v. Heim, 127 Mo. 327; 48 Am. St. Rep. 629; 29 S. W. 1030.

⁴ Richardson v. Fields, 124 Ala. 535; 26 So. 981; Summers v. Heard, 66 Ark. 550; 50 S. W. 78; 51 S. W. 1057; Leverone v. Hildreth, 80 Cal. 139; 22 Pac. 72; Comstock v. Breed, 12 Cal. 286; Martin v. Stubbings, 20 Ill. App. 381; Davidson v. King, 51 Ind. 224; Schnell v. Nell, 17 Ind. 29; 79 Am. Dec. 453; Wipperman v. Hardy, 17 Ind. App. 142; 46 N. E. 537; Stevens v. Mayberry, 82 Me. 65; 19 Atl. 92; Tenney v. Prince, 4 Pick. (Mass.) 385; 16 Am. Dec. 347; Rogers v. Stone Co., 130 Mass. 581; 39 Am. Rep. 478; Pratt v. Hedden, 121 Mass. 116; Ellis v. Clark, 110 Mass. 389; 14 Am. Rep. 609; Harrah v. Doherty, 111 Mich. 175; 69 N. W. 242; Kulenkampf v.

Groff, 71 Mich. 675; 15 Am. St. Rep. 283; 1 L. R. A. 594; 40 N. W. 57; Fellows v. Thrall, 85 Mich. 161; 48 N. W. 506; Turle v. Sargent, 63 Minn. 211; 56 Am. St. Rep. 475; 65 N. W. 349; Adams v. Huggins, 78 Mo. App. 219; Moore v. Ry., 31 Mo. App. 145; Pike v. Van Riper, 57 N. J. L. 290; 30 Atl. 529; Hess's Estate, 150 Pa. St. 346; 24 Atl. 676; Martin's Estate, 131 Pa. St. 638; 18 Atl. 987; Gourdin v. Trenholm, 25 S. Car. 362; Baker v. Wahrmund, 5 Tex. Civ. App. 268; 23 S. W. 1023; Goddard's Estate, 66 Vt. 415; 29 Atl. 634; Bank v. Ross, 91 Wis. 320; 64 N. W. 993.

⁵ Richardson v. Fields, 124 Ala. 535; 26 So. 981; Summers v. Heard, 66 Ark. 550; 50 S. W. 78; 51 S. W. 1057; Barstow v. Ry. Co., 57 Ark. 334; 21 S. W. 652. (See especially report of this case in 21 S. W. 652.) Goddard's Estate, 66 Vt. 415; 29 Atl. 634.

⁶ Holloway's Assignee v. Rudy, (Ky.); 60 S. W. 650; *sub nomine*, Trimble v. Rudy, (Ky.); 53 L. R. A. 353.

⁷ Caldwell v. Felton, (Ky.); 51 S. W. 575; Louisville, etc., Ry. v. Cooper, (Ky.); 56 S. W. 144; Hendrick v. Ry., 170 Mass. 44; 48 N. E. 835; Gott v. Dinsmore, 111 Mass. 45; Dale v. See, 51 N. J. L. 378; 14 Am. St. Rep. 688; 5 L. R. A. 583; 18 Atl. 306; Guillaume v. General

by an agent to pay accounts already made by him for his principal under his contract,⁸ or to become liable personally on his principal's pre-existing contract, made by him as agent,⁹ or to return money rightfully expended by him on behalf of his principal;¹⁰ a promise by the pledgee for value of a note to deliver it to the assignee;¹¹ a promise by one to whom money raised by mortgage is paid on a debt to "take care of" a prior encumbrance;¹² a promise after mortgages were given that the first mortgagees would give the second mortgagees a share in the property mortgage after sale and reorganization;¹³ a promise by a mortgagee to allow a subsequent creditor of the mortgagor to share in the security of the mortgage, which promise was made after such creditor had made the loan;¹⁴ a promise after a bond payable to A on order was given not to transfer it unless to B;¹⁵ a promise by a cashier of a bank to hold a partnership fund until the rights of the promisee as a partner were determined;¹⁶ a promise by the owner of a building to a materialman who has furnished materials to the contractor, to notify the material man before he pays the contractor;¹⁷ a promise by C the assignee of A, made after the assignment to him, to pay B a creditor of A's out of the claim when col-

Transportation Co., 100 N. Y. 491; 3 N. E. 489; *Bostwick v. Ry.*, 45 N. Y. 712; *Missouri, etc., Ry. Co. v. Carter*, 9 Tex. Civ. App. 677; 29 S. W. 565.

⁸ *Anderson v. Timberlake*, 114 Ala. 377; 62 Am. St. Rep. 105; 22 So. 431.

⁹ *Anderson v. Timberlake*, 114 Ala. 377; 62 Am. St. Rep. 105; 22 So. 431.

¹⁰ *Templin v. Hobson*, 10 Colo. App. 525; 51 Pac. 1019.

¹¹ *McCormack v. Bank*, 52 Pac. 469; (*Ariz.*)

¹² *Roberts v. Bank*, 8 N. D. 474; 79 N. W. 993; citing, *Ayres v. R. R.*, 52 Ia. 478; 3 N. W. 522; *Royal v. Lindsay*, 15 Kan. 591; *Kellogg v.*

Olmstead, 25 N. Y. 189; *Parmelee v. Thompson*, 45 N. Y. 58; 6 Am. Rep. 33.

¹³ *Robinson v. Ry. Co.*, 135 U. S. 522.

¹⁴ *Boney v. Williams*, 55 N. J. Eq. 691; 38 Atl. 189.

¹⁵ *Johnson v. Washburn*, 98 Ala. 258; 13 So. 48.

¹⁶ *Wheat v. Bank*, 119 Cal. 4; 50 Pac. 842; 51 Pac. 47. Compare *Pollock v. Loan Association*, 51 S. C. 420; 64 Am. St. Rep. 683; 29 S. E. 77. To the same effect is *Carroll Exchange Bank v. Bank*, 58 Mo. App. 17.

¹⁷ *M. T. Jones Lumber Co. v. Villegas*, 8 Tex. Civ. App. 669; 28 S. W. 558.

lected;¹⁸ a promise by the owner of a building to pay for brick properly rejected by the architect under the building contract;¹⁹ a warranty made after the sale is completed;²⁰ or a promise to indemnify against loss therefrom;²¹ a promise made after the sale was completed, whereby the vendee agrees to pay more than the contract price;²² a promise made after the sale of business and good-will not to engage in the same business;²³ a promise by the owner of a bicycle to pay a mortgage given without his authority by one having no interest therein;²⁴ a promise after performance of a contract to do extra work without compensation;²⁵ a promise to indemnify a party to pending litigation;²⁶ a promise to allow back interest on accounts that did not bear interest before a promise to pay it;²⁷ or a promise after a settlement of an estate made by residuary legatees to pay certain indisposed of insurance policies to the widow.²⁸ An advancement by a parent to his child is no consideration for a subsequent note given by the child.²⁹ Payment of an obligation is no consideration for a subsequent note given by the payee to the maker.³⁰ So a promise by an owner of land to pay for buildings erected or other improvements made on such land under circumstances creating no legal liability is void,³¹ as where a mortgagee promised, after entering into possession, to pay for prior repairs made by a les-

¹⁸ *Johnson v. Daniels*, 62 Vt. 417; 19 Atl. 977; (though the fund assigned was earned by A with B's help).

¹⁹ *Brin v. McGregor*, (Tex. Civ. App.); 45 S. W. 923.

²⁰ *Summers v. Vaughan*, 35 Ind. 323; 9 Am. Rep. 741; *Fletcher v. Nelson*, 6 N. D. 94; 69 N. W. 53.

²¹ *Whitson v. Fowlkes*, 1 Head. (Tenn.) 533; 73 Am. Dec. 184.

²² *Howard v. McNeil*, — Ky.—; 78 S. W. 142.

²³ *Cleaver v. Lenhart*, 182 Pa. St. 285; 37 Atl. 811; *Zanturjian v. Boornazian*, — R. I. —; 55 Atl. 199.

²⁴ *Morningstar v. Stratton*, 121 Ala. 437; 25 So. 573.

²⁵ *Widiman v. Brown*, 83 Mich. 241; 47 N. W. 231.

²⁶ *Mitchell v. Bell*, Conf. Rep. (N. C.) 17; 2 Am. Dec. 627.

²⁷ *Smith v. Knight*, 88 Ia. 257; 55 N. W. 189.

²⁸ *Sheley v. Brooks*, 114 Mich. 11; 72 N. W. 37; (unless the settlement was made by fraud or mistake).

²⁹ *Marsh v. Chown*, 104 Ia. 556; 73 N. W. 1046. See *Banning v. Purinton*, 105 Ia. 642; 75 N. W. 639.

³⁰ *Graham v. Alexander*, 123 Mich. 168; 81 N. W. 1084.

³¹ *Carson v. Clark*, 1 Scam. (Ill.) 113; 25 Am. Dec. 79; *Boston v. Dodge*, 1 Blackf. (Ind.) 19; 12 Am.

see with his consent or instructions.³² A promise by a landlord after the lease is given,³³ or contracted for,³⁴ to repair the premises leased is void; and so is a promise to reduce the rent;³⁵ or a promise by a tenant after a lease is made to allow the landlord to seize the tenant's goods for rent before due;³⁶ or a promise by the owner of realty to pay to the owners of an option all expenses incurred by them in boring, where the holders of such option have already been reimbursed therefore by a third person.³⁷

An attempted ratification of a forged instrument is without consideration where no new rights have been acquired in reliance thereon.³⁸ So after a franchise has been given to a street railway company which does not require the company to pave part of the street, an oral contract by such company to pay for such paving cannot be supported by the prior grant of the franchise as a consideration.³⁹

Past services when rendered under such circumstances as to create no legal liability are not a consideration for a subsequent promise.⁴⁰ Illustrations of such services are those rendered by father to son;⁴¹ past services rendered to a father by

Dec. 205; *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272; 4 Am. Dec. 356; *Perkins Estate*, 65 Vt. 313; 26 Atl. 637.

³² *Bedell v. Tracy*, 65 Vt. 494; 26 Atl. 1031.

³³ *Roehrs v. Timmons*, 28 Ind. App. 578; 63 N. E. 481; *Clyne v. Helmes*, 61 N. J. L. 358; 39 Atl. 767; *Peticolas v. Thomas*, 9 Tex. Civ. App. 442; 29 S. W. 166.

³⁴ *Averill v. Sawyer*, 62 Conn. 560; 27 Atl. 73.

³⁵ *Goldsborough v. Gable*, 140 Ill. 269; 15 L. R. A. 294; 29 N. E. 722.

³⁶ *Brayfield v. Cardiff*, 9 Manitoba (Can.) 302.

³⁷ *Williams v. Moore*, 192 Pa. St. 211; 43 Atl. 1022.

³⁸ *Workman v. Wright*, 33 O. S. 405; 31 Am. Rep. 546; *McHugh v. County of Schuylkill*, 67 Pa. St. 391; 5 Am. Rep. 445.

³⁹ *Western Paving Co. v. Ry.*, 128 Ind. 525; 25 Am. St. Rep. 462; 10 L. R. A. 770; 26 N. E. 188; 28 N. E. 88.

⁴⁰ *Wulff v. Lindsay*, — Ariz. —; 71 Pac. 963; *Walker v. Irwin*, 94 Ia. 448; 62 N. W. 785; *Allen v. Bryson*, 67 Ia. 591; 56 Am. Rep. 358; 25 N. W. 820; *Chamberlin v. Whitford*, 102 Mass. 448; *Morse v. Mason*, 103 Mass. 560; *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272; 4 Am. Dec. 356; *Shugart v. Shugart*, — Tenn. —; 76 S. W. 821. So a note given by a candidate for past political services not rendered at his request is void. *Dearborn v. Bowman*, 3 Met. (Mass.) 155.

⁴¹ *Stoneburner v. Motley*, 95 Va. 784; 30 S. E. 364. Citing *Wennall v. Adney*, 3 Bos. & Pul. 247; *Cook*

his daughters without any agreement for compensation;⁴² services rendered by a niece living in the family;⁴³ support furnished a minor daughter by her mother;⁴⁴ or medical attendance rendered to an adult.⁴⁵ A clairvoyant predicted A's death within twelve months. A contract to give to her a note and mortgage executed by her if her prediction came true in consideration of "certain business and test sittings" was held to be without consideration, as it did not appear that any liability was created by the sittings themselves.⁴⁶

If, however, property was advanced,⁴⁷ or services were rendered under such circumstances as to create a legal liability against the promisor,⁴⁸ which is often expressed by saying if the property was advanced the services were rendered at his previous request,⁴⁹ or if they create a liability which is voidable,⁵⁰ they constitute a consideration for a subsequent express promise to pay for them. If money was loaned in reliance on debtor's promise to furnish additional security, such additional security is supported by a valuable consideration and is not merely on past consideration.⁵¹ So if an oral agreement to

v. Bradley, 7 Conn. 57; 18 Am. Dec. 79; Mills v. Wyman, 3 Pick. 207; Hack v. Stewart, 8 Pa. St. 213.

⁴² Fair Haven Marble, etc., Co. v. Owens, 69 Vt. 246; 37 Atl. 749.

⁴³ Robinson v. McAfee, 59 Mich. 375; 26 N. W. 643.

⁴⁴ Perkins v. Westcoat, 3 Colo. App. 338; 33 Pac. 139.

⁴⁵ Mills v. Wyman, 3 Pick. (Mass.) 207; Rankin v. Beale, 68 Mo. App. 325. (No consideration for a subsequent promise by the patient's father to pay therefor.)

⁴⁶ Moore v. Elmer, 180 Mass. 15; 61 N. E. 259. (This was either a promise to make a gift, or else a wager.)

⁴⁷ Smith v. Rankin, 45 Kan. 176; 25 Pac. 586; Citizens' Bank v. Millett, 103 Ky. 1; 44 L. R. A. 664; 44 S. W. 366; Pool v. Horner, 64 Md. 131; 20 Atl. 1036; Chadwick v.

Knox, 31 N. H. 226; 64 Am. Dec. 329.

⁴⁸ National Loan & Investment Co. v. Rockland Co., 94 Fed. 335; 36 C. C. A. 370; Daily v. Minnick, 117 Ia. 563; 60 L. R. A. 840; 91 N. W. 913; Stuht v. Sweesy, 48 Neb. 767; 67 N. W. 748.

⁴⁹ Baker v. Gregory, 28 Ala. 544; 65 Am. Dec. 366; Chadwick v. Knox, 31 N. H. 226; 64 Am. Dec. 329; McMorris v. Herndon, 2 Bail. Law (S. Car.) 56; 21 Am. Dec. 515; Silverthorn v. Wylie, 96 Wis. 69; 71 N. W. 107.

⁵⁰ Jackson v. Hough, 38 W. Va. 236; 18 S. E. 575.

⁵¹ Stroud v. Thomas, 139 Cal. 274; 96 Am. St. Rep. 111; 72 Pac. 1008; Pauly v. Murray, 110 Cal. 13; 42 Pac. 313; Winders v. Sperry, 96 Cal. 194; 31 Pac. 6; Deposit Bank v. Peake, 110 Ky. 579; 62 S. W. 268;

guaranty a debt is made when it is incurred, a subsequent written guaranty based on such promise is valid.⁵² Thus where A had agreed to give his personal draft on B to C to take up B's debt to C and in reliance upon such contract C advances money to B and A gives such draft which is not paid by B, A's liability on such draft is supported by sufficient consideration.⁵³

Some authorities even hold that past services not rendered at the promisor's request are a consideration for a subsequent promise,⁵⁴ or deed.⁵⁵ Still more clearly, if the promisee foregoes a legal right, sufficient consideration exists even if the contract relates in part to past transactions. Thus a waiver by lessee of his right to remove improvements made by him,⁵⁶ or waiver by a contractor of his right to remove windows inserted by him in the wrong house by mistake,⁵⁷ are valuable considerations. Even if the original transaction created a legal liability, still if this liability has been discharged, such prior liability is no consideration. Thus after an insurance policy has been forfeited by non-payment of premiums an agent's promise to accept premiums is without consideration.⁵⁸ So where the principal has paid a note in full, no consideration exists thereon to support a subsequent note given by a guarantor to the holder.⁵⁹ A subscriber to a college, whose liability has never attached by reason of breach of condition as to loca-

Childs v. Wyman, 44 Me. 433; 69 Am. Dec. 111; Robertson v. Rowell, 158 Mass. 94; 35 Am. St. Rep. 466; 32 N. E. 898; Steers v. Holmes, 79 Mich. 430; 44 N. W. 922; Bowen v. Thwing, 56 Minn. 177; 57 N. W. 468; Baker v. Bank, 63 Neb. 801; 89 N. W. 269; McNaught v. McLoughry, 42 N. Y. 22; 1 Am. Rep. 487.

⁵² Wills v. Ross, 77 Ind. 1; 40 Am. Rep. 279.

⁵³ Citizens' Bank v. Millett, 103 Ky. 1; 44 L. R. A. 664; 44 S. W. 366. For a similar case see Placer County Bank v. Freeman, 126 Cal. 90; 58 Pac. 388.

⁵⁴ Lycoming v. Union, 15 Pa. St. 166; 53 Am. Dec. 575.

⁵⁵ Doran v. McConlogue, 150 Pa. St. 98; 24 Atl. 357.

⁵⁶ House v. Jackson, 24 Or. 89; 32 Pac. 1027.

⁵⁷ Drake v. Bell, 61 N. Y. S. 657; 46 App. Div. 275; affirming, 26 N. Y. Misc. 237; 55 N. Y. Supp. 945. A consideration for a promise to pay for painting, plastering and glazing done in the wrong house.

⁵⁸ Lantz v. Ins. Co., 139 Pa. St. 546; 23 Am. St. Rep. 202; 10 L. R. A. 577; 21 Atl. 80.

⁵⁹ Rudolph v. Hewitt, 11 S. D. 646; 80 N. W. 133.

tion is not bound by a promise to pay his original subscription made after it had been located.⁶⁰

§320. Moral obligation.

It is held in many cases, in what on examination prove to be for the most part obiter that a moral obligation is such consideration as will support a subsequent express promise based thereon.¹ This rule in the form given is an unsafe one. If a legal liability once existed, and to this liability some rule of positive law allows a defense which is a bar to an action on the liability though it does not extinguish the debt, an express promise may be based on such liability as a consideration.² The chief examples of such considerations are debts barred by the statute³

⁶⁰ *Schuler v. Myton*, 48 Kan. 282; 29 Pac. 163.

¹ *Hawkes v. Saunders*, 1 Cowp. 289. *Lee v. Muggeridge*, 5 Taunt. 36; *Cardwell v. Strother*, Litt. Sel. Ca. (Ky.) 429; 12 Am. Dec. 326; *Robinson v. Hurst*, 78 Md. 59; 44 Am. St. Rep. 266; 26 Atl. 956. *Sub nomine*, *Mutual Reserve Fund Life Association v. Hurst*, 20 L. R. A. 761; *State v. Reigart*, 1 Gill (Md.) 1; 39 Am. Dec. 628; *Reed v. McGrew*, 5 Ohio 375; *Bailey v. Philadelphia*, 167 Pa. St. 569; 46 Am. St. Rep. 691; 31 Atl. 925; *Ferguson v. Harris*, 39 S. Car. 323; 39 Am. St. Rep. 731; 17 S. E. 782; *McMorris v. Herndon*, 2 Bail. Law (S. Car.) 56; 21 Am. Dec. 515.

² This view was expressed clearly and perhaps for the first time in *Wennall v. Adney*, 3 Bos. & P. 249, and note a. It has been followed in England since then: *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Jennings v. Brown*, 9 M. & W. 495, and in most American states. *Thompson v. Hudgins*, 116 Ala. 93; 22 So. 632; *Peek v. Peek*, 77 Cal. 106; 11 Am. St. Rep. 244; 1 L. R. A. 185; 19

Pac. 227; *Allen v. Bryson*, 67 Ia. 591; 56 Am. Rep. 358; 25 N. W. 820; *Holloway v. Rudy* (Ky.); 60 S. W. 650; *Sub nomine*, *Trimble v. Rudy*, 53 L. R. A. 353; *Warren v. Whitney*, 24 Me. 561; 41 Am. Dec. 406; *Ingersoll v. Martin*, 58 Md. 67; 42 Am. Rep. 322; *Duttera v. Babylon*, 83 Md. 536; 35 Atl. 64; *Wilcox v. Arnold*, 116 N. Car. 708; 21 S. E. 434; *Hamor v. Moore*, 8 O. S. 239; *Smith v. Tripp*, 14 R. I. 112; *Holley v. Adams*, 16 Vt. 206; 42 Am. Dec. 508; *Valentine v. Bell*, 66 Vt. 280; 29 Atl. 251.

³ *Campbell v. Holt*, 115 U. S. 620; *Sturges v. Crowninshield*, 4 Wheat. U. S. 122; *Turlington v. Slaughter*, 54 Ala. 195; *Cook v. Bradley*, 7 Conn. 57; 18 Am. Dec. 79; *Neish v. Gannon*, 198 Ill. 219; 64 N. E. 1000; affirming, 98 Ill. App. 248; *Whittaker v. Crow*, 32 Ill. App. 29; *Jenckes v. Rice*, 119 Ia. 451; 93 N. W. 384; *Hellman v. Kiene*, 73 Ia. 448; 5 Am. St. Rep. 693; 35 N. W. 516; *Stewart v. Garrett*, 65 Md. 392; 57 Am. Rep. 333; 5 Atl. 324; *Koons v. Vauconsant*, 129 Mich. 260; 95 Am. St. Rep. 438; 88 N. W. 630;

of limitations, or by bankruptcy,⁴ or insolvency,⁵ or debts to which infancy may be pleaded as a defense,⁶ or intoxication,⁷ or insanity.⁸ The breach of a contract unenforceable by reason of the Statute of Frauds is a consideration for a written note given therefor.⁹

So a party who has been released from liability on a written instrument by a material alteration thereof,¹⁰ or by extension of time on valuable consideration,¹¹ may without any new consideration bind himself by a subsequent promise to perform such obligation. So a promise to pay usurious interest, though unenforceable *in toto* may in some states be a consideration for a subsequent promise to pay lawful interest.¹²

Outside of cases where there was once such legal liability, though voidable, the doctrine of moral obligation is generally repudiated.¹³ Thus an attempted contract made by a married woman when such contract is void, as at Common Law, is no consideration for a promise made by her after the termination

Hill v. Henry, 17 Ohio 9; Farmers, etc., Bank v. Flint, 17 Vt. 508; 44 Am. Dec. 351; Quaker City National Bank v. Tacoma, 27 Wash. 259; 67 Pac. 710; Marshall v. Holmes, 68 Wis. 555; 32 N. W. 685.

⁴ Mutual Reserve Fund Life Association v. Beatty, 93 Fed. 747; 35 C. C. A. 573; Wills v. Ross, 77 Ind. 1; 40 Am. Rep. 279; Shockey v. Mills, 71 Ind. 288; 36 Am. Rep. 196; Post v. Losey, 111 Ind. 74; 60 Am. Rep. 677; 12 N. E. 121; Tolle v. Smith, 98 Ky. 464; 33 S. W. 410; Rosenfield v. Goldsmith (Ky.); 12 S. W. 928; Edwards v. Nelson, 51 Mich. 121; 16 N. W. 261; Wislizenus v. O'Fallon, 91 Mo. 184; 3 S. W. 837; Bolton v. King, 105 Pa. St. 78.

⁵ Lambert v. Schmalz, 118 Cal. 33; 50 Pac. 13. As for the promise of a third person to pay such debt. Webster v. Le Compte, 74 Md. 249; 22 Atl. 232.

⁶ See § 882.

⁷ See § 907.

⁸ See § 900.

⁹ Anderson v. Best, 176 Pa. St. 498; 35 Atl. 194. But see § 738 *et seq* for an example of the opposite view.

¹⁰ Montgomery v. Crosthwait, 90 Ala. 553; 12 L. R. A. 140; 8 So. 498. For release by alteration see § 1511 *et seq*.

¹¹ Bramble v. Ward, 40 O. S. 267; First National Bank v. Jones, 92 Wis. 36; 65 N. W. 861. For release of a surety by such extension see § 1543.

¹² Cotton States Building Co. v. Jones, 94 Tex. 497; 62 S. W. 741.

¹³ Cook v. Bradley, 7 Conn. 57; 18 Am. Dec. 79; Davis v. Morgan, 117 Ga. 504; 97 Am. St. Rep. 171; 43 S. E. 732; Schnell v. Nell, 17 Ind. 29; 79 Am. Dec. 453; Warren v. Whitney, 24 Me. 561; 41 Am. Dec. 406; Freeman v. Robinson, 38 N. J. L. 383; 20 Am. Rep. 399; Shepard v. Rhodes, 7 R. I. 470; 84 Am. Dec. 573; Cobb v. Cowdery, 40 Vt. 25; 94 Am. Dec. 370.

of the coverture, or a change in the law, has given her capacity to make contracts;¹⁴ nor is a debt once extinguished by a valid release,¹⁵ or by compromise,¹⁶ unless by a conditional compromise where on breach of condition the original liability has revived.¹⁷

Other examples of a moral obligation insufficient as a consideration are a husband's promise to pay to his daughter money which he had received from his wife and which in law had become his own;¹⁸ a father's promise to his dying wife that their son should have certain property;¹⁹ a promise by a son to indemnify a constable in the sale of goods levied on as those of the promisor's father;²⁰ a promise by a father to pay for the past support of his illegitimate child, at Common Law;²¹ a promise to indemnify against loss, due to promisor's mistaken, but honest advice in business, causing loss to the party following it;²² and payment of another's taxes by mistake.²³

Some states still adhere in form to the old English doctrine of moral obligation.²⁴ Thus it was said that if lumber fur-

¹⁴ *Thompson v. Hudgins*, 116 Ala. 93; 22 So. 632; *Maher v. Martin*, 43 Ind. 314; *Holloway v. Rudy*, (Ky.); 60 S. W. 650, *sub nomine*, *Trimble v. Rudy*, 53 L. R. A. 353; *Musick v. Dodson*, 76 Mo. 624; 43 Am. Rep. 780; *Bragg v. Israel*, 86 Mo. App. 338; *Wilcox v. Arnold*, 116 N. Car. 708; 21 S. E. 434; *Aultman v. Rush*, 26 S. Car. 517; 2 S. E. 402; *Hayward v. Barker*, 52 Vt. 429; 36 Am. Rep. 762; *Valentine v. Bell*, 66 Vt. 280; 29 Atl. 251. *Contra* in Pennsylvania, *Trout v. McDonald*, 83 Pa. St. 144; *Brown v. Bennett*, 75 Pa. St. 420, following the English rule, since abandoned, *Lee v. Muggeridge*, 5 Taunt. 36.

¹⁵ *Warren v. Whitney*, 24 Me. 561; 41 Am. Dec. 406; *Hale v. Rice*, 124 Mass. 292; *Valentine v. Foster*, 1 Met. (Mass.) 520; 35 Am. Dec. 377; *Mason v. Campbell*, 27 Minn. 54; 6 N. W. 405; *Shepard v. Rhodes*, 7 R. I. 470; 84 Am. Dec. 573. *Contra*,

Willing v. Peters, 12 Serg. & R. (Pa.) 177, but Pennsylvania adheres in obiter at least to the old English rule.

¹⁶ *Seeley v. Cox*, 28 N. S. 210.

¹⁷ *Zoebisich v. Von Minden*, 120 N. Y. 406; 24 N. E. 795.

¹⁸ *Duttera v. Babylon*, 83 Md. 536; 35 Atl. 64.

¹⁹ *Peek v. Peek*, 77 Cal. 106; 11 Am. St. Rep. 244; 1 L. R. A. 185; 19 Pac. 227.

²⁰ *Nixon v. Vanhise*, 5 N. J. L. (2 Southard) 491; 8 Am. Dec. 618.

²¹ *Easley v. Gordon*, 51 Mo. App. 637. So, *Mercer v. Mercer*, 87 Ky. 30; 7 S. W. 401.

²² *Martin's Estate*, 131 Pa. St. 638; 18 Atl. 987. To the same effect see *Morris v. Norton*, 75 Fed. 912; 21 C. C. A. 553.

²³ *Hobbs v. Greifenhagen*, 91 Ill. App. 400.

²⁴ *Robinson v. Hurst*, 78 Md. 59; 44 Am. St. Rep. 266; 26 Atl. 956.

nished by a material man to the contractor was placed in A's house, it would support a promise by A to pay for it.²⁵ So where A was employed as supervising principal by a sectional school board and began work, and the board of education refused to confirm the election and abolished the office, and A was defeated in a mandamus suit to be certified on the roll of teachers, it was held that after an appropriation had been made to pay A for her time, an injunction against paying such appropriation would not lie, as the appropriation was supported by a moral obligation.²⁶ Thus notes given by a father to his adult children as compensation for services rendered by them for him, for which he was not legally liable were held to be supported by sufficient consideration.²⁷ A partner loaned partnership funds which were lost by reason of such loan. It did not appear that he incurred any legal liability by reason thereof. Subsequently he assigned a life insurance policy to the firm to cover such loss. It was held that as against his administrator, his moral obligation to reimburse the firm was a sufficient consideration to support such assignment.²⁸ In other states this

Sub nomine, Mutual Reserve Fund Life Association v. Hurst, 20 L. R. A. 761; Ellicott v. Turner, 4 Md. 476; State v. Reigart, 1 Gill (Md.) 1; 39 Am. Dec. 628; Hemphill v. McClimans, 24 Pa. St. 367; Stebbins v. Crawford Co., 92 Pa. St. 289; 31 Am. Rep. 687; Leonard v. Duffin, 94 Pa. St. 218; Brooks v. Bank, 125 Pa. St. 394; 17 Atl. 418; Holden v. Banes, 140 Pa. St. 63; 21 Atl. 239; Kelly v. Eby, 141 Pa. St. 176; 21 Atl. 512; Bailey v. Philadelphia, 167 Pa. St. 569; 46 Am. St. Rep. 691; 31 Atl. 925; Ferguson v. Harris, 39 S. Car. 323; 39 Am. St. Rep. 731; 17 S. E. 782.

²⁵ Ferguson v. Harris, 39 S. Car. 323; 39 Am. St. Rep. 731; 17 S. E. 782, but in this case the evidence showed that the lumber was bought on A's credit.

²⁶ Bailey v. Philadelphia, 167 Pa. St. 569; 46 Am. St. Rep. 691; 31 Atl. 925.

²⁷ "He was not legally bound to pay them anything, but if he chose to consider that he, in good conscience, owed them, the moral debt was a consideration for the legal promise expressed in the notes." *In re Sutch's Estate* 201 Pa. St. 305; 50 Atl. 943.

²⁸ Robinson v. Hurst, 78 Md. 59; 44 Am. St. Rep. 266; 26 Atl. 956; *sub nomine*, Mutual Reserve Fund Life Association v. Hurst, 20 L. R. A. 761. In most states no consideration of any sort would have been necessary.

doctrine has been adopted by statute and extended by construction.²⁹

§321. Compromise of disputed claim.

The general rule that the legal right acquired or forborne must be a genuine one to constitute a valuable consideration must be qualified in case of compromises of disputed claims. If a *bona fide* dispute exists as to the validity of a claim, and the parties compromise such dispute by mutual agreement, such compromise is valid; as the mutual releases of rights which are at least apparent, and are upheld in good faith, form a consideration each for the other.¹ If the claims thus compromised

²⁹ Gray v. Hamil, 82 Ga. 375; 6 L. R. A. 72; 10 S. E. 205. (A promise by a partner who had been habitually drunk to allow his partner extra compensation for extra services.)

¹ Miles v. New Zealand Alford Estate Co., L. R. 32 Ch. Div. 266; Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; Northern Liberty Market Co. v. Kelly, 113 U. S. 199; McClure v. McClure, 100 Cal. 339; 34 Pac. 882; Percheron-Norman Horse Co. v. Downen, 18 Colo. 71; 31 Pac. 501; Court Harmony, etc., v. Court Abraham Lincoln, etc., 70 Conn. 634; 40 Atl. 606; Johnson v. Redwine, 98 Ga. 112; 25 S. E. 924; Cassell v. Ross, 33 Ill. 244; 85 Am. Dec. 270; Knotts v. Preble, 50 Ill. 226; 99 Am. Dec. 514; Pool v. Docker, 92 Ill. 501; Murphy v. Murphy, 84 Ill. App. 292; Norton Bros. v. Eastman, 83 Ill. App. 303; Harland v. Staples, 79 Ill. App. 72; Frank v. Heaton, 56 Ill. App. 227; Lawrence v. Coddingtongton, 52 Ill. App. 133; Bement v. May, 135 Ind. 664; 34 N. E. 327; 35 N. E. 387; Everts v. Rose Grove, 77 Ia. 37; 14 Am. St. Rep. 264; 41 N. W. 478; French v. French, 84 Ia. 655; 15 L. R. A. 300; 51 N. W.

145; Sloan v. Davies, 105 Ia. 97; 74 N. W. 922; Fisher v. May, 2 Bibb. (Ky.) 448; 5 Am. Dec. 626; Fain v. Turner, 96 Ky. 634; 29 S. W. 628; Hillenbrand v. Shippen, (Ky.); 58 S. W. 525; Peirce v. Building Co., 9 La. 397; 29 Am. Dec. 448; Adams v. Wilson, 12 Met. (Mass.) 138; 45 Am. Dec. 240; Gloucester, etc., Co. v. Cement Co., 154 Mass. 92; 26 Am. St. Rep. 214; 12 L. R. A. 563; 27 N. E. 1005; Converse v. Blumrich, 14 Mich. 109; 90 Am. Dec. 230; Hansen v. Gaar, 63 Minn. 94; 65 N. W. 254; Carter White Lead Co. v. Kinlin, 47 Neb. 409; 66 N. W. 536; Pitkin v. Noyes, 48 N. H. 294; 97 Am. Dec. 615; Grandin v. Grandin, 49 N. J. L. 508; 60 Am. Rep. 642; 9 Atl. 756; Sears v. Grand Lodge, 163 N. Y. 374; 50 L. R. A. 204; 57 N. E. 618; Wahl v. Barnum, 116 N. Y. 87; 5 L. R. A. 623; 22 N. E. 280; Dunham v. Griswold, 100 N. Y. 224; 3 N. E. 76; Feeter v. Weber, 78 N. Y. 334; White v. Hoyt, 73 N. Y. 505; Craus v. Hunter, 28 N. Y. 389; Stewart v. Ahrenfeldt, 4 Denio (N. Y.) 189; Russell v. Cook, 3 Hill (N. Y.) 504; McClure v. Lorain County, 24 Ohio C. C. 72; Sutton v. Dudley, 193 Pa. St. 194; 44 Atl.

are each genuine and upheld in good faith the fact that one of them is invalid does not avoid the compromise, and the validity or invalidity of the original claim is immaterial.² If it were not for this rule few if any compromises could be upheld.

As illustrations of valid compromises, the compromise of personal damage suits;³ compromise of a claim by a husband for alienation of affections and seduction of his wife;⁴ a contract for settling claims for damage to property, as by collision;⁵ by excavation of adjoining property under the landlord's authority causing injury to the tenant's goods;⁶ by constructing a dam, thereby backing up water;⁷ or where there is a dispute about the cause of the fall of a building;⁸ or as to the rights of adjoining mine owners to cross veins;⁹ contracts for settling disputes as to the amount due between the parties;¹⁰ or for settling

438; *Chahoon v. Hollenback*, 16 Serg. & R. (Pa.), 425; 16 Am. Dec. 587; *Lewis v. Cooper*, *Cooke* (Tenn.) 466; *East Line, etc., R. R. v. Scott*, 72 Tex. 70; 13 Am. St. Rep. 758; 10 S. W. 99; *Green v. Seymour*, 59 Vt. 459; 12 Atl. 206; *Rutherford v. Rutherford*, — W. Va. —; 47 S. E. 240; *Davissou v. Ford*, 23 W. Va. 617; *Bolln v. Metcalf*, 6 Wyom. 1; 71 Am. St. Rep. 898; 42 Pac. 12; 44 Pac. 694.

² *Union Bank v. Geary*, 5 Pet. (U. S.) 99; *Coffee v. Emigh*, 15 Colo. 184; 10 L. R. A. 125; 25 Pac. 83; *Honeyman v. Jarvis*, 79 Ill. 318; *McKinley v. Watkins*, 13 Ill. 140; *Proctor v. Heaton*, 114 Ind. 250; 15 N. E. 21; *Rollins v. Hare*, 15 Ind. App. 677; 44 N. E. 374; *Sweitzer v. Heasley*, 13 Ind. App. 567; 41 N. E. 1064; *Dunbar v. Dunbar*, 180 Mass. 170; 94 Am. St. Rep. 623; 62 N. E. 248; *Hall Mfg. Co. v. Supply Co.*, 48 Mich. 331; 12 N. W. 205; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409; 66 N. W. 536; *Flanagan v. Kilcome*, 58 N. H. 443; *Warren v. Williamson*, 8 Baxt. (Tenn.) 427; *Spence v. Repass*, 94

Va. 716; 27 S. E. 583; *Bolln v. Metcalf*, 6 Wyom. 1; 71 Am. St. Rep. 898; 42 Pac. 12; 44 Pac. 694.

³ *Parker v. Enslow*, 102 Ill. 272; 40 Am. Rep. 588. (A claim for damages for putting gunpowder in smoking tobacco as a practical joke, causing an explosion which injured the claimant.) *Sax v. Ry.*, 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314; *Stearns v. R. R.*, 112 Mich. 651; 71 N. W. 148. (In this case a promise to employ the injured person for life or during his ability to work was upheld.)

⁴ *Sloan v. Davies*, 105 Ia. 97; 74 N. W. 922.

⁵ *The Cayuga*, 59 Fed. 483; 8 C. C. A. 188.

⁶ *Dunton v. Niles*, 95 Cal. 494; 30 Pac. 762.

⁷ *Levis v. Improvement Co.*, 105 Wis. 391; 81 N. W. 669.

⁸ *Brodek v. Farnum*, 11 Wash. 565; 40 Pac. 189.

⁹ *Coffee v. Emigh*, 15 Colo. 184; 10 L. R. A. 125; 25 Pac. 83.

¹⁰ *Williamson v. Yager*, 91 Ky. 282; 34 Am. St. Rep. 184; 15 S. W. 660.

disputes as the validity of transfers of property;¹¹ a dispute over a patent though it proves to be invalid;¹² or a dispute as to mutual accounts,¹³ or a dispute as to the amount really due on an usurious contract;¹⁴ as to a contract for the sale of personality;¹⁵ as to the ownership of property;¹⁶ as to the validity of a note;¹⁷ as to the liability of a surety on a bond;¹⁸ as to liabilities on a broken contract between husband and wife for her support;¹⁹ or as to the liability of a person to support his pauper father,²⁰ are considerations for contracts in compromise thereof. So where one who had stored some cotton in a warehouse and during a fire rescued some bales, agreed to return it to the warehousemen on being paid the value of services rendered by him in saving it, it not being practicable to identify it, a sufficient consideration for such promise exists,²¹ If a claim is doubtful and there is a genuine dispute as to its validity, a tender by the debtor of a certain amount less than that claimed by the adversary party in full of the account is an offer of compromise and if accepted discharges the claim.²² Thus if a claim is unliquidated and a check is tendered in full, and is accepted, it operates as a discharge of the entire debt,²³ even if the party who accepts the check expressly declares that it is merely on account.²⁴ It has been held that an averment

¹¹ *Stoutenberg v. Huisman*, 93 Ia. 213; 61 N. W. 917; *Harris v. Gates*, 121 Mich. 163; 79 N. W. 1098.

¹² *Gloucester, etc., Co. v. Cement Co.*, 154 Mass. 92; 26 Am. St. Rep. 214; 12 L. R. A. 563; 27 N. E. 1005.

¹³ The settlement of a dispute between husband and wife for interest on her money and for rents collected by him is a consideration for her release of dower. *McKenzie v. Sifford*, 48 S. Car. 458; 26 S. E. 706.

¹⁴ *United States, etc., Association's Assignee v. Denny*, (Ky.) 66 S. W. 622.

¹⁵ *Hansen v. Gaar*, 63 Minn. 94; 65 N. W. 254.

¹⁶ *De Marco v. Williams*, (Miss.) 12 So. 552.

¹⁷ *Tyson v. Woodruff*, 108 Ga. 368; 33 S. E. 981.

¹⁸ *Fink v. Bank*, 178 Pa. St. 154; 56 Am. St. Rep. 746; 35 Atl. 636.

¹⁹ *Dunbar v. Dunbar*, 180 Mass. 170; 94 Am. St. Rep. 623; 62 N. E. 248.

²⁰ *Town of Brandon v. Jackson*, 74 Vt. 78; 52 Atl. 114.

²¹ *Seals v. Edmondson*, 73 Ala. 295; 49 Am. Rep. 51.

²² *Tanner v. Merrill*, 108 Mich. 58; 62 Am. St. Rep. 687; 31 L. R. A. 171; 65 N. W. 664.

²³ *Fuller v. Kemp*, 138 N. Y. 231; 20 L. R. A. 785; 33 N. E. 1034.

²⁴ *Nassoij v. Tomlinson*, 148 N. Y. 326; 51 Am. St. Rep. 695; 42 N. E. 715.

that a claim was "in dispute" is insufficient. The averment should be that the claim was "doubtful."²⁵ If, however, the claim is liquidated, and there is no genuine dispute as to its validity, a tender of a less sum than the amount due in full of the entire amount, is, even if accepted, no consideration for an agreement to release the balance.²⁶ In some few jurisdictions a payment in cash of an amount less than is due is a consideration for a promise to release the balance.²⁷ This rule is in force in some states by statute.²⁸

Especial indulgence is shown to family compromises intended to prevent litigation concerning estates.²⁹ If the claim, the waiver of which is relied upon as a consideration, is so clearly unenforceable that it cannot be entertained in good faith, a compromise based on such waiver lacks consideration.³⁰ Thus a dismissal of a groundless and trumped-up contest of a home-stead entry brought to extort money;³¹ compromise of an alleged claim for the seduction of promisee's fiancée;³² an agreement not to issue execution on an alleged judgment which clearly has no existence;³³ or an unwarranted objection to the use by an-

²⁵ *Emmitsburg R. R. v. Donoghue*, 67 Md. 383; 1 Am. St. Rep. 396; 10 Atl. 233.

²⁶ *Meyer v. Green*, 21 Ind. App. 138; 69 Am. St. Rep. 344; 51 N. E. 942; *Thomas v. Gwyn*, 131 N. C. 460; 42 S. E. 904. See § 313.

²⁷ *Clayton v. Clark*, 74 Miss. 499; 60 Am. St. Rep. 521; 37 L. R. A. 771; 21 So. 565; 22 So. 189.

²⁸ *Anderson v. Granite Co.*, 92 Me. 429; 69 Am. St. Rep. 522; 43 Atl. 21.

²⁹ *Hoghton v. Hoghton*, 15 Beav. 278; *Williams v. Williams*, L. R. 2 Ch. App. 294; *Appeal of Wilen*, 105 Pa. St. 121; *Burkholder's Appeal*, 105 Pa. St. 31; *Walworth v. Abel*, 52 Pa. St. 370; *Supreme Assembly of Royal Society v. Campbell*, 17 R. I. 402; 13 L. R. A. 601; 22 Atl. 307; *Farnsworth v. Dinsmore*, 2 Swan (Tenn.) 38; *Trigg v. Read*, 5 Humph. (Tenn.) 529; 42 Am. Dec. 447.

³⁰ *Knotts v. Preble*, 50 Ill. 226; 99 Am. Dec. 514; *Schnell v. Nell*, 17 Ind. 29; 79 Am. Dec. 453; *Peterson v. Breitag*, 88 Ia. 418; 55 N. W. 86; *Price v. Bank*, 62 Kan. 743; 64 Pac. 639; *Creutz v. Heil*, 89 Ky. 429; 12 S. W. 926; *Mercer v. Mercer*, 87 Ky. 30; 7 S. W. 401; *Long v. Towl*, 42 Mo. 545; 97 Am. Dec. 355; *Fitzgerald v. Construction Co.*, 44 Neb. 463; 62 N. W. 899; *Kesler's Estate*, 143 Pa. St. 386; 24 Am. St. Rep. 557; 13 L. R. A. 581; 22 Atl. 892; *Fuller v. Green*, 64 Wis. 159; 54 Am. Rep. 600; 24 N. W. 907.

³¹ *Duck v. Antle*, 5 Okla. 152; 47 Pac. 1056.

³² *Case v. Smith*, 107 Mich. 416; 61 Am. St. Rep. 341; 31 L. R. A. 282; 65 N. W. 279.

³³ *Price v. Bank*, 62 Kan. 743; 64 Pac. 639.

other of a certain name in business,⁸⁴ are not considerations.

V. ADEQUACY.

§322. Adequacy of consideration at law.

Persons competent to contract are free to make such terms as they choose. Accordingly if such persons not acting under mistake, fraud and the like, select as a consideration some right or forbearance which the law recognizes, and receive just what they bargain for, the law will not inquire into the wisdom of accepting such a consideration, or the profit or loss arising out of the transaction. This principle is often expressed by the rule that mere inadequacy of consideration does not affect the validity of the contract.¹ Examples of considerations which the law regards as valuable, though practically of no financial value, are a release of a note held against a decedent whose estate is insolvent,² or where the note is barred by limita-

⁸⁴ *Converse v. Hood*, 149 Mass. 471; 4 L. R. A. 521; 21 N. E. 878.

¹ *McCurry v. Gibson*, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806; *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Webster v. Williams*, 62 Ark. 101; 34 S. W. 537; *Spann v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346; *Cobb v. Heron*, 180 Ill. 49; 54 N. E. 189; affirming, 78 Ill. App. 654; *Oldenburg v. Baird*, 26 Ind. App. 379; 58 N. E. 1073; *Duffy v. Shockey*, 11 Ind. 70; 71 Am. Dec. 348; *State Bank v. Gates*, 114 Ia. 323; 86 N. W. 311; *Rowe v. Barnes*, 101 Ia. 302; 70 N. W. 197; *Price's Administratrix v. Price's Administratrix*, 111 Ky. 771; 66 S. W. 529; *Goodspeed v. Fuller*, 46 Me. 141; 71 Am. Dec. 572; *Nash v. Lull*, 102 Mass. 60; 3 Am. Dec. 435; *Valley City Milling Co. v. Prange*, 123 Mich. 211; 81 N. W. 1074; *Davis v.*

Phillips, 85 Mich. 198; 48 N. W. 513; *Atwater v. Stromberg*, 75 Minn. 277; 77 N. W. 963; *C. H. Brown Banking Co. v. Fink*, 95 Mo. App. 257; 68 S. W. 586; *Earl v. Peck*, 64 N. Y. 596; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; 7 Am. Dec. 513; *Judy v. Louderman*, 48 O. S. 562; 29 N. E. 181; *Hind v. Holdship*, 2 Watts (Pa.) 104; 26 Am. Dec. 107; *Davidson v. Little*, 22 Pa. St. 245; 60 Am. Dec. 81; *Whitefield v. McLeod*, 2 Bay (S. Car.) 380; 1 Am. Dec. 650; *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 147; 9 Am. Dec. 736; *Randall v. Harris*, 6 Yerg. (Tenn.) 508; *Jones v. Degge*, 84 Va. 685; 5 S. E. 799; *Whittaker v. Improvement Co.*, 34 W. Va. 217; 12 S. E. 507.

² *Judy v. Louderman*, 48 O. S. 562; 29 N. E. 181. *Contra*, where the estate is insolvent. *Ferrell v. Scott*, 2 Spears (S. C.) 344; 42 Am.

tions;³ an assignment of rentals, though nothing was in fact collected therefrom;⁴ a transfer of an interest in a partnership even though unprofitable;⁵ a transfer of mortgaged personalty;⁶ the conveyance of a contingent interest which ultimately fails;⁷ a transfer of personal property in consideration of transferee's agreeing to pay transferer's debts in excess of the value of such property;⁸ a transfer of a valid though unprofitable patent right;⁹ payment in current money which afterwards became worthless;¹⁰ a transfer of stock in a corporation whose property is worth little,¹¹ or nothing,¹² or which, though valuable when the contract was made subsequently becomes worthless;¹³ a quitclaim of land releasing the interest of one who has in fact no interest therein;¹⁴ a sale of whatever gravel there is on certain realty even if insufficient for the purposes of the vendee;¹⁵ or

Dec. 371; *Sponhaur v. Malloy*, 21 Ind. App. 287; 52 N. E. 245. A promise by the administrator of an insolvent estate to pay a debt of decedent's personally has no consideration if such debt is not released. *Vogel v. O'Toole*, 2 Ind. App. 196; 28 N. E. 209.

³ *Wilton v. Eaton*, 127 Mass. 174.

⁴ *Cobb v. Heron*, 180 Ill. 49; 54 N. E. 189; affirming 78 Ill. App. 654.

⁵ *Mulhall v. Mulhall*, 3 Okla. 304; 41 Pac. 109.

⁶ *Keyes v. Allen*, 65 Vt. 667; 27 Atl. 319.

⁷ *Weatherford v. Boulware*, 102 Ky. 466; 43 S. W. 729.

⁸ *Tibbett v. Zurbuch*, 22 Ind. App. 354; 52 N. E. 815.

⁹ *Davis v. Phillips*, 85 Mich. 198; 48 N. W. 513; *Van Norman v. Barbeau*, 54 Minn. 388; 55 N. W. 1112.

¹⁰ *Dohoney v. Womack*, 1 Tex. Civ. App. 354; 19 S. W. 883; 20 S. W. 950 (Confederate currency).

¹¹ *Coles v. Kennedy*, 81 Ia. 360; 25 Am. St. Rep. 503; 46 N. W. 1088

(a mine which has not yet begun to pay expenses).

¹² *State Bank v. Gates*, 114 Ia. 323; 86 N. W. 311; *Atwater v. Stromberg*, 75 Minn. 277; 77 N. W. 963; *Van Arsdale v. Brown*, 18 Ohio C. C. 52; 9 Ohio C. D. 488.

¹³ *Pittsburg, etc., Co. v. Stove Co.*, 208 Pa. St. 37; 57 Atl. 77.

¹⁴ *McNeal v. Calkins*, 50 Ill. App. 17 (consideration for a note from grantee); *Mullen v. Hawkins*, 141 Ind. 363; 40 N. E. 797 (consideration for a promise by a third person); *Rowe v. Barnes*, 101 Ia. 302; 70 N. W. 197; *Washington Life Ins. Co. v. Marshall*, 56 Minn. 250; 57 N. W. 658 (consideration for a promise by grantee to pay mortgages on such realty). These cases can be explained by the doctrine of compromise of doubtful claims. See § 321. Compare with sales of public land made by an individual. See § 301.

¹⁵ *Valley City Milling Co. v. Prange*, 123 Mich. 211; 81 N. W. 1074.

a sale of a mining lease, though soon forfeited because the claim was not worked.¹⁶

§323. Adequacy of consideration whose value is fixed by law.

The chief exception at law to the rule that inadequacy of consideration is immaterial exists where the things contracted for on each side are either money or something fixed by law at a certain value in money.¹ Thus a promise to pay one sum of money in exchange for another is without consideration, except insofar as the money to be repaid equals the original sum plus lawful interest.² Thus a consideration of one dollar is no consideration for a promise to pay over a thousand dollars;³ nor is one cent a consideration for a promise to pay six hundred dollars.⁴ However, a release from a promise to pay coin when at a premium is a consideration for a promise to pay the additional amount in currency.⁵ So a promise to extend payment at a lower rate of interest is held to be without consideration if made before maturity and the interest under the new contract would be less than that due when the promise was made.⁶ The correctness of this decision is doubtful. The creditor may for some reason of his own desire to extend the time of payment; and under such extension the debtor has not the option to pay principal and interest to maturity at maturity and thus discharge his debt.⁷ If a substantial change in the method of paying the debt is made the law will not inquire into questions of adequacy. Thus a contract to pay an annuity of sixty-two

¹⁶ C. H. Brown Banking Co. v. Fink, 95 Mo. App. 257; 68 S. W. 586.

¹ Wolford v. Powers, 85 Ind. 294; 44 Am. Rep. 16.

² Schnell v. Nell, 17 Ind. 29; 79 Am. Dec. 453; Hey v. Harding, (Ky.) 53 S. W. 33; Andrews v. Schmidt, 10 N. D. 1; 84 N. W. 568; Shepard v. Rhodes, 7 R. I. 470; 84 Am. Dec. 573. Such promises are generally illegal on the ground of

usury as well as invalid for want of consideration.

³ Shepard v. Rhodes, 7 R. I. 470; 84 Am. Dec. 573.

⁴ Schnell v. Nell, 17 Ind. 29; 79 Am. Dec. 453.

⁵ Smith v. McKinney, 22 O. S. 200. *Contra*, Turner v. Young, 27 Ind. 373; 89 Am. Dec. 508.

⁶ Price v. Mitchell, 23 Wash. 742; 63 Pac. 514.

⁷ See § 314.

dollars and fifty cents quarterly is a consideration for a contract to release four thousand dollars, as it exceeds the legal interest thereon by ten dollars a year.⁸ So a promise to pay fifteen hundred dollars as a conditional subscription for the erection of a church in case ten thousand dollars be raised is supported by a promise to pay the promisor two hundred thirty-seven dollars, already voluntarily paid by him for the erection of a temporary chapel.⁹

So where the law fixes certain fees as compensation for certain work, a contract to do such work for more,¹⁰ or less,¹¹ than his legal fees is invalid. Thus the selection of a notary to protest paper is no consideration for his promise to accept one half his legal fees,¹² and a promise by a county clerk not to charge the fees allowed by law for calling in scrip, made to induce the court to make the order calling in such scrip is without consideration.¹³ A promise to pay a witness more than legal fees for attendance which can be compelled by law lacks consideration.¹⁴ But if the attendance could not be compelled by law, as where the witness comes from another state,¹⁵ or where an expert is retained to prepare the case in advance to be able to testify fully at the trial,¹⁶ a promise to pay more than legal fees is supported by a consideration.¹⁷

⁸ Price's Administratrix v. Price's Administratrix, 111 Ky. 771; 66 S. W. 529.

⁹ Hodges v. O'Brien, 113 Wis. 97; 88 N. W. 901.

¹⁰ Stotesbury v. Smith, 2 Burr. 924; Decatur v. Vermillion, 77 Ill. 315; Burk v. Webb, 32 Mich. 173; Carpenter v. Taylor, 164 N. Y. 171; 58 N. E. 53; Crofut v. Brandt, 58 N. Y. 106; 17 Am. Rep. 213; Gilmore v. Lewis, 12 Ohio 281; Smith v. Whildin, 10 Pa. St. 39; 49 Am. Dec. 572. Such contracts are subject to other objections. The officer does only his legal duty (see § 311); and further, his demanding and receiving excessive fees is usually a crime. See § 412.

¹¹ Duncan v. Scott County, 68 Ark. 276; 57 S. W. 934; Bank v. Hopkins, 8 App. D. C. 146.

¹² Bank v. Hopkins, 8 App. D. C. 146.

¹³ Duncan v. Scott County, 68 Ark. 276; 57 S. W. 934. Such promises are also illegal.

See § 412.

¹⁴ Sweany v. Hunter, 1 Murph. (N. C.) 181.

¹⁵ Armstrong v. Prentice, 86 Wis. 210; 56 N. W. 742.

¹⁶ Barrus v. Phaneuf, 166 Mass. 123; 32 L. R. A. 619; 44 N. E. 141.

¹⁷ As to the legality of such contracts see § 412.

§324. Adequacy of consideration in equity.

Mere inadequacy of consideration is not operative in equity.¹ In connection with other circumstances,² or when so extreme as to suggest fraud,³ it may be an important factor in determining the existence of constructive fraud or undue influence. In this connection it has been treated in a preceding chapter.⁴

¹ See § 225.

³ See § 235.

² See §§ 226-233.

⁴ See Chapter XII.

CHAPTER XV.

THE SUBJECT MATTER.

§325. Nature of subject-matter.

The subject-matter of a contract is the right concerning which the parties make their agreement.¹ Like consideration, it may consist of either an acquisition of a right on the one side, or the forbearance of a right on the other or both at the same time. In the ordinary use of language there is no practical difference between subject-matter and consideration. What one party gives, forbears or promises may be treated equally well as subject-matter or consideration.² Possibly subject-matter may include the consideration on each side, thus being wider than consideration in that it imports what both parties give, forbear or promise. An action on a contract in the limited sense, excluding quasi-contract, is an action to recover damages for breach of an executory promise, or to obtain equitable relief. In such cases, therefore, quite apart from abstract discussion of the correct use of words, the question arises whether any legal right was acquired by the promisor or was forborne by the promisee to induce such promise. This legal right is the consideration.³ The further question may arise whether the act done or to be done by either party is such that the law will permit the parties to contract concerning it. In this sense the right or forbearance under discussion is spoken of as the subject-matter. Accordingly the topic of consideration is the heading under which, as we have seen,⁴ are grouped questions whether the act or abstinence in question concerns a legal right and is recognized by the law as of value, while under the topic of subject-matter

¹ "That concerning which something is done." *Miller v. Miller*, 104 Ia. 186, 189; 73 N. W. 484.

² See § 271.

³ See § 271.

⁴ See § 271.

are grouped questions of impossibility, illegality, and the like.

There are certain acts or abstinences from acting which the courts will not allow to be made the subject of contract, though their acquisition or forbearance would undoubtedly be of financial advantage to one or both parties. These acts or abstinences must be considered from two standpoints; first as to the nature and origin of the rules of law which forbid contracts to be made with reference thereto, and second, as to the effect of such rules on the validity and effect of a contract which the parties attempt to make with reference thereto. Both Common Law and Statute may withdraw the subject from the scope of contract in one of three ways: (1) the contract in question may be forbidden, expressly or impliedly; (2) the act in question may be made a crime; or (3) in some cases the imposition of a penalty may make it impossible at law to contract concerning the subject-matter.⁵ In passing upon the question of the validity of a contract as determined by its subject-matter, it is therefore necessary to determine: (1) whether the contract is (a) valid or (b) invalid; and (2) if invalid whether it is (a) void or (b) illegal. In the wider sense of the term the class of void contracts includes illegal contracts; other contracts void by reason of their subject-matter; and contracts void for other reasons. As used in this chapter, however, the term void contracts includes only such as are unenforceable by reason of their subject-matter but are not illegal. (3) In addition to these topics it is often necessary to consider whether, if the contract is invalid because of its subject-matter any right of action exists by reason of benefits received thereunder. The legality of the contract is determined by the law. On the one hand the frank avowal of an unlawful purpose does not make a contract valid;⁶ or the other, the fact that a lawful contract was believed to be unlawful does not make it invalid.⁷

⁵ These subdivisions of this general topic must be considered in detail. However to avoid unnecessary reduplication of discussion the effect of statute and of Common Law on given subjects, such as gambling contracts or contracts in restraint of trade must be considered together.

⁶ *McGourkey v. Ry.*, 146 U. S. 536.

⁷ *Conaway v. Stealey*, 44 W. Va. 163; 28 S. E. 793.

§326. Contracts unenforceable by Common Law.

In jurisdictions where Common Law crimes exist a contract to perform an act which would be a crime at Common Law is unenforceable.¹ In addition to contracts to commit crimes there is a large class of contracts said to be void as against public policy.² Contracts are against public policy when they tend to injure the state or the public.³ "Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."⁴ The power to refuse to enforce a contract as against public policy is one of limits not clearly defined,⁵ and the courts prefer in cases not settled by recog-

¹ See § 396.

² *Gibbs v. Gas. Co.*, 130 U. S. 408; *Woodstock Iron Co. v. Extension Co.*, 129 U. S. 644; *Gandolfo v. Hartman*, 49 Fed. 181; 16 L. R. A. 277; *Patton v. Gilmer*, 42 Ala. 548; 94 Am. Dec. 665; *Tatum v. Kelley*, 25 Ark. 209; 94 Am. Dec. 717; *Visalia, etc., Co. v. Sims*, 104 Cal. 326; 43 Am. St. 105; 37 Pac. 1042; *Wyman v. Moore*, 103 Cal. 213; 37 Pac. 230; *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207; 28 Pac. 1068; *Gardner v. Tatum*, 81 Cal. 370; 22 Pac. 880; *Santa Clara Mill, etc., Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; 18 Pac. 391; *Swanger v. Maberry*, 59 Cal. 91; *Farmers', etc., Co. v. White*, 5 Colo. App. 1; 31 Pac. 345; *Peck v. Levinger*, 6 Dak. 54; 50 N. W. 481; *Rocco v. Frapoli*, 50 Neb. 665; 70 N. W. 236; *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793; 21 L. R. A. 617; 26 Atl. 978; *Morrill v. Ry.* 55 N. H. 531; *Arnot v. Coal Co.*, 68 N. Y. 558; 23 Am. Rep. 190; *Fowler v. Scully*, 72 Pa. St. 456; 13 Am. Rep. 699; *Seidenbender v. Charles*, 4 Serg. & R. 151; 8 Am. Dec. 682;

McEwen v. Shannon, 64 Vt. 583; 25 Atl. 661. "Many contracts which are not against morality are still void as being against the maxims of sound policy." *Jones v. Randall*, Cowp. 37, 39.

³ *Schmueckle v. Waters*, 125 Ind. 265; 25 N. E. 281; *McNamara v. Gargett*, 68 Mich. 454; 13 Am. St. Rep. 355; 36 N. W. 218; *Fidelity, etc., Trust Co. v. Fridenberg*, 175 Pa. St. 500; 52 Am. St. Rep. 851; 34 Atl. 848; *Foote v. Emerson*, 10 Vt. 344.

⁴ *People v. Gas Trust Co.*, 130 Ill. 268, 294; 17 Am. St. Rep. 319; 8 L. R. A. 497; 22 N. E. 798; quoted in *Robson v. Hamilton*, 41 Or. 239, 245; 69 Pac. 651.

⁵ It is said to be "a very delicate and undefined power." *Richmond v. Ry.*, 26 Ia. 191. "As there is no precise definition of 'public policy,' each case must be adjudged according to its peculiar circumstance, and courts can only justly exercise this delicate and undefined power in cases free from doubt." *South Carolina, etc., R. R. v. Ry.*, 93 Fed. 543, 558; 35 C. C. A. 423.

nized precedents,⁶ to use such power only in clear cases.⁷

The defense of public policy is so often interposed as a last resort⁸ that the courts have become somewhat suspicious of it. The doctrine has been unsuccessfully invoked in actions on the following contracts: A contract by A to locate a business in a given town X, which he otherwise would have located in the town of Y;⁹ a contract by an elevated railroad company in consideration of being allowed a stay of proceedings pending an appeal not to take advantage of the fact that the other party would sell his interest in the realty in dispute;¹⁰ a contract by a sleeping-car company to reserve a berth in a given car for a given trip;¹¹ a bond for faithful discharge of duties by the cashier of a branch bank;¹² a sale of one's right to occupy Indian lands with the consent of the Indians;¹³ and a division of a mining claim between claimants in order to compromise litigation.¹⁴

There may be said to be a strong tendency at modern law to restrict the operation of public policy as avoiding contracts, to cases included under recognized legal principles;¹⁵ or under

⁶ "This court can know nothing of public policy except from the constitution and the laws and the course of administration and decision." *License Tax Cases*, 5 Wall (U. S.) 462, 469; quoted in *Alpers v. Hunt*, 86 Cal. 78, 84; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846; and see *Langdon v. Conlin*, — Neb. —; 60 L. R. A. 429; 93 N. W. 389.

⁷ *Smith v. Du Bose*, 78 Ga. 413; 6 Am. St. Rep. 260; 3 S. E. 309; *Enders v. Enders*, 164 Pa. St. 266; 44 Am. St. Rep. 598; 27 L. R. A. 56; 30 Atl. 129; *Miller v. Roberts*, 18 Tex. 16; 67 Am. Dec. 688; *Barrett v. Carden*, 65 Vt. 431; 36 Am. St. Rep. 876; 26 Atl. 530; *Kellogg v. Larkin*, 3 Pinn (Wis.) 123; 3 Chand. (Wis.) 133; 56 Am. Dec. 164. "Courts will not declare contracts void on grounds of public policy except in cases free from

doubt." *Barrett v. Carden*, 65 Vt. 431, 433; 36 Am. St. Rep. 876; 26 Atl. 530.

⁸ *South Carolina, etc., R. R. v. Ry.*, 93 Fed. 543; 35 C. C. A. 423.

⁹ *Lord v. Board of Trade*, 163 Ill. 45; 45 N. E. 205.

¹⁰ *Hine v. Ry. Co.*, 149 N. Y. 154; 43 N. E. 414.

¹¹ *Pullman Palace Car Co. v. Booth* (Tex. Civ. App.), 28 S. W. 719.

¹² *Morehead Banking Co. v. Tate*, 122 N. Car. 313; 30 S. E. 341.

¹³ *Tye v. Town Co.*, 2 Ind. Ter. 113; 48 S. W. 1021.

¹⁴ *Montana Mining Co. v. Mining Co.* 20 Mont. 394; 51 Pac. 824.

¹⁵ *Blydenstein v. Trust Co.*, 67 Fed. 469; 15 C. C. A. 14; *Hulse v. Machine Co.*, 65 Fed. 864; 13 C. C. A. 180; *Rackemann v. Improvement Co.*, 167 Mass. 1; 57 Am. St. Rep.

statutes. Still contracts clearly injurious to the public interest are held invalid, however novel. Thus where a laborer and his wife, people of no medical training and having several small children, made a contract with a woman in an advanced stage of leprosy to care for her and provide her with board, such contract was held contrary to public policy.¹⁶

If the law-making power speaks on a given subject concerning which it has power under the Constitution to legislate, no further inquiry into public policy on that subject should be made than to determine what the statute provides.¹⁷ Any classification of contracts, invalid as opposed to public policy, is therefore, merely for convenience in discussion. It is impossible to lay down in advance an exhaustive classification, which will include all possible cases. Further, many of the classes of cases hereinafter given are greatly modified by statute, so that they cannot literally be classed as contracts invalid by the Common Law. They are discussed in that connection, however, since they owe their original invalidity to the Common Law.

§327. Contracts unenforceable by written law.

Subject to the restrictions of the Constitution,¹ the legislature

427; 44 N. E. 990; *Wolff v. Loan Association*, 67 Mo. App. 678; *Hine v. Ry. Co.*, 149 N. Y. 154; 43 N. E. 414; *Brown v. Dail*, 117 N. Car. 41; 23 S. E. 45; *Conemaugh Gas Co. v. Gas Co.*, 186 Pa. St. 443; 65 Am. St. Rep. 865; 40 Atl. 1000.

¹⁶ *Baltimore v. Improvement Co.*, 87 Md. 352; 67 Am. St. Rep. 344; 40 L. R. A. 494; 39 Atl. 1081.

¹⁷ *United States v. Freight Association*, 166 U. S. 290; *Enders v. Enders* 164 Pa. St. 266; 44 Am. St. Rep. 598; 27 L. R. A. 56; 30 Atl. 129. "Our ideas of 'public policy' are such as may be gathered from the constitution and the laws and the course of administration and

decision. When the will of the people has become crystallized into legislative enactment, and a given subject has been surrounded by regulations, limitations and restrictions, the courts are bound to consider them as indicating a definite policy and to yield obedience thereto. In the practical administration of justice the expressed will of the people overrides and controls the individual opinions of the judges and finds expression in decisions in harmony therewith." *Baum v. Baum*, 109 Wis. 47, 53; 83 Am. St. Rep. 854; 53 L. R. A. 650; 85 N. W. 122.

¹ See Chap. LXXXII.

may protect public safety, health and morals.² If in the exercise of this power the legislature prohibits certain classes of contracts or declares them void, such contracts are of course void and unenforceable.³ The intention of the legislature to withdraw the given subject-matter from the scope of contract may be expressed in several different ways. (1) The act in question may be made criminal. Contracts to perform such acts will be unenforceable.⁴

§328. Classes of written law which affect contract.

Whatever class or kind of domestic written law is violated, the contract is equally invalid. Contracts in violation of the Constitution of the United States,¹ or a federal statute,² or treaty,³ or the Constitution of a state,⁴ or a state statute,⁵ or a city ordinance,⁶ are equally invalid.

² Chicago, etc., Ry. v. Nebraska, 170 U. S. 57.

³ Bull v. Harragan, 17 B. Mon. (Ky.) 352; State v. Edwards, 86 Me. 102; 41 Am. St. Rep. 528; 25 L. R. A. 504; 29 Atl. 947; Carley v. Gitchell, 105 Mich. 38; 55 Am. St. Rep. 428; 62 N. W. 1003; Doran v. Phillips, 47 Mich. 228; 10 N. W. 350; Pearson v. Kendricks, 75 Miss. 416; 23 So. 290; American Fire Ins. Co. v. Bank, 73 Miss. 469; 18 So. 931; Bowdre v. Carter, 64 Miss. 221; Pollard v. Ins. Co., 63 Miss. 244; 56 Am. Rep. 805; Ft. Edward v. Fish, 156 N. Y. 363; 50 N. E. 973; Markley v. Mineral City, 58 O. S. 430; 65 Am. St. Rep. 776; 51 N. E. 28; Birkett v. Chatterton, 13 R. I. 299; 43 Am. Rep. 30; Short v. Mining Co., 20 Utah 20; 45 L. R. A. 603; 57 Pac. 720.

⁴ See §§ 395, 396.

¹ Gandolfo v. Hartman, 49 Fed. 181; 16 L. R. A. 277; Patton v.

Gilmer, 42 Ala. 548; 94 Am. Dec. 665.

² Jones v. Blacklidge, 9 Kan. 562; 12 Am. Rep. 503.

³ Gandolfo v. Hartman, 49 Fed. 181; 16 L. R. A. 277.

⁴ Garms v. Jensen, 103 Cal. 374; 37 Pac. 337.

⁵ Person v. Jones, 12 Ga. 371; 58 Am. Dec. 476; Handy v. Publishing Co., 41 Minn. 188; 16 Am. St. Rep. 695; 4 L. R. A. 466; 42 N. W. 872; Cherokee, etc., Association v. Cass, etc., Co., 138 Mo. 394; 40 S. W. 107; Wilson v. Parrish, 52 Neb. 6; 71 N. W. 1010; Woodworth v. Bennett, 43 N. Y. 273; 3 Am. Rep. 706; Haworth v. Montgomery, 91 Tenn. 16; 18 S. W. 399.

⁶ Miller v. Ammon, 145 U. S. 421; Denning v. Yount, 62 Kan. 217; 50 L. R. A. 103; 61 Pac. 803; Milne v. Davidson, 5 Martin N. S. (La.) 409; 16 Am. Dec. 189.

§329. Contract to perform act forbidden by written law.

(2) The act in question may be forbidden either expressly or implied. Contracts to perform such acts will be unenforceable.¹ Thus a statute forbidding a common carrier to issue bills of lading in advance of the receipt of the goods makes void a contract whereby in consideration of indemnity the common carrier undertakes so to do.² So a contract for selling tickets through brokers at less than the established rate in violation of the Interstate Commerce Law;³ a contract requiring the chairman of a political committee to disburse money, contrary to statute;⁴ a public contract requiring money to be paid over to a public agent who is not empowered to receive it;⁵ a contract to employ a minor in an employment at which minors are forbidden to work,⁶ to work in excess of the statutory number of

¹ Church v. Proctor, 66 Fed. 240; 13 C. C. A. 426; Kraemer v. Earl, 91 Cal. 112; 27 Pac. 735; Raleigh, etc., R. R. Co. v. Swanson, 102 Ga. 754; 39 L. R. A. 275; 28 S. E. 601; Persons v. Jones, 12 Ga. 371; 58 Am. Dec. 476; Linn v. Bank, 1 Scam. (Ill.) 87; 25 Am. Dec. 71; Wright v. Gardner, 98 Ky. 463; 35 S. W. 1116; denying rehearing of, 98 Ky. 454; 33 S. W. 622; Milne v. Davidson, 5 Martin, N. S. (La.) 409; 16 Am. Dec. 189; State v. Edwards, 86 Me. 102; 41 Am. St. Rep. 528; 25 L. R. A. 504; 29 Atl. 947; Cherokee, etc., Association v. Cass, etc., Co., 138 Mo. 394; 40 S. W. 107; Sedalia Board of Trade v. Brady, 78 Mo. App. 585; Wilson v. Parrish, 52 Neb. 6; 71 N. W. 1010; State v. Holcomb, 46 Neb. 612; 65 N. W. 873; Gulick v. Ward, 10 N. J. L. 87; 18 Am. Dec. 389; Ft. Edward v. Fish, 156 N. Y. 363; 50 N. E. 973; affirming 86 Hun. 548; Woodworth v. Bennett, 43 N. Y. 273; 3 Am. Rep. 706; Markley v. Mineral City, 58 O. S. 430; 65 Am.

St. Rep. 776; 51 N. E. 28; Morris Run Coal Co. v. Coal Co., 68 Pa. St. 173; 8 Am. Rep. 159; Hibernia Turnpike Road v. Henderson, 8 S. & R. (Pa.) 219; 11 Am. Dec. 593; Birkett v. Chatterton, 13 R. I. 299; 43 Am. Rep. 30; Haworth v. Montgomery, 91 Tenn. 16; 18 S. W. 399; Johnson v. Cooper, 2 Yerg. (Tenn.) 524; 24 Am. Dec. 502; Ohio, etc., Co. v. Merchants', etc., Co., 11 Humph. (Tenn.) 1; 53 Am. Dec. 742; St. Louis, etc., Ry. Co. v. Williams (Tex. Civ. App.), 32 S. W. 225; Short v. Mining Co., 20 Utah 20; 45 L. R. A. 603; 57 Pac. 720.

² Jemison v. R. R., 125 Ala. 378; 28 So. 51.

³ Raleigh, etc., R. R. v. Swanson, 102 Ga. 754; 39 L. R. A. 275; 28 S. E. 601.

⁴ Sedalia Board of Trade v. Brady, 78 Mo. App. 585.

⁵ State v. Holcomb, 46 Neb. 612; 65 N. W. 873.

⁶ Birkett v. Chatterton, 13 R. I. 299; 43 Am. Rep. 30; (no recovery for wages allowed).

hours per day;⁷ to sell bonds below par, contrary to statute;⁸ to acquire public lands in a manner forbidden by statute;⁹ or taking a note in payment of a tax, which the law requires to be paid in cash,¹⁰ are all invalid. So the Federal Bankruptcy Statute makes void a contract of assignment for the benefit of creditors.¹¹ So under statutes forbidding discrimination in rates for life insurance between persons of the same class a contract of insurance by the terms of which the insured is to be a member of an advisory board and as such is to have special advantages is invalid.¹² But such a statute does not prevent issuing a policy for one year with the privilege of taking a policy to run for life at the end of the year.¹³ So a contract to rebuild a dam is invalid where, contrary to statute, the specifications therefor have not been approved by the state board of civil engineers.¹⁴ So a clause in an insurance policy in type smaller than that provided by statute, limiting the liability of the insurer, is void.¹⁵ A statute forbidding a railroad company to sell its road or any part thereof does not forbid a lease, with a clause for a sale as soon as good title can be made.¹⁶ A contract which violates a city ordinance, but contains a clause permitting changes in such illegal specification necessary to make it legal is not illegal.¹⁷ On the other hand, a statute

⁷ *Short v. Mining Co.*, 20 Utah 20; 45 L. R. A. 603; 57 Pac. 720; compare *Commonwealth v. Mfg. Co.*, 120 Mass. 383.

⁸ *Ft. Edward v. Fish*, 156 N. Y. 363; 50 N. E. 973.

⁹ *Kraemer v. Earl*, 91 Cal. 112; 27 Pac. 735; *Carley v. Gitchell*, 105 Mich. 38; 55 Am. St. Rep. 428; 62 N. W. 1003.

¹⁰ *Doran v. Phillips*, 47 Mich. 228; 10 N. W. 350. But such statute does not prevent the treasurer from paying the tax as a loan to the debtor, and taking a note therefor payable to him individually. *Hatch v. Reid*, 112 Mich. 430; 70 N. W. 889.

¹¹ *In re Curtis*, 91 Fed. 737.

¹² *State Life Ins. Co. v. Strong*, 127 Mich. 346; 86 N. W. 825.

¹³ *Bankers' Life Ins. Co. v. Howland*, 73 Vt. 1; 57 L. R. A. 374; 48 Atl. 435.

¹⁴ *William Wilcox Mfg. Co. v. Brazos*, 74 Conn. 208; 50 Atl. 722.

¹⁵ If any part of the clause relied upon is in type smaller than the legal size the entire clause is void. *National Life Association v. Berkeley*, 97 Va. 571; 34 S. E. 469.

¹⁶ *United States Trust Co. v. Trust Co.*, 88 Fed. 140; 31 C. C. A. 427.

¹⁷ *Higgins v. Quigley*, 23 Ind. App. 348; 54 N. E. 136.

forbidding a debtor to agree to pay the taxes on a mortgage does not prevent a vendee under an executory contract of sale from so agreeing;¹⁸ a statute making other money than gold legal-tender does not forbid a contract for payment in gold,¹⁹ and a statute making it a misdemeanor for any one instrumental in obtaining a pension for another to receive more than twenty-five dollars for such services does not forbid A, who has obtained a pension through the instrumentality of his son, B, from agreeing to give him the entire amount received as such pension on consideration of B's supporting A for life and burying him on his death.²⁰

§330. Legislative intent controls.

Contracts to perform acts which are made crimes are held unenforceable because it must ordinarily be the intention of the legislature not to permit an action against one for not doing what would make him liable to criminal punishment. This rule is therefore subject to this qualification: if the act specified is made a crime in order to protect the adversary party to the contract, the statute will be applied with that purpose in view, and the contract will not be held void to the prejudice of the party to be protected.¹ The same principle applies where the act contracted for is forbidden by law. The intention of the legislature in forbidding such act must be considered in determining whether a contract to do such act is unenforceable. Thus where the director of a bank borrowed an excessive amount, the bank was allowed to recover, as the contract was

¹⁸ Longmaid v. Coulter, 123 Cal. 208; 55 Pac. 791.

¹⁹ Dorr v. Hunter, 183 Ill. 432; 56 N. E. 159. (Citing, McGoon v. Shirk, 54 Ill. 408; 5 Am. Rep. 112; Bronson v. Rodes, 7 Wall, 229; Belford v. Woodward, 158 Ill. 122; 29 L. R. A. 593; 41 N. E. 1097; Gregory v. Morris, 96 U. S. 619; Rae v. Guaranty Co., 178 Ill. 369; 53 N.

E. 220; affirming, 76 Ill. App. 548.)

²⁰ Schwab v. Ginkinger, 181 Pa. St. 8; 37 Atl. 125.

¹ Gray v. Roberts, 2 A. K. Marsh. (Ky.) 208; 12 Am. Dec. 383; Lester v. Bank, 33 Md. 558; 3 Am. Rep. 211; Sinnott v. Bank, 164 N. Y. 386; 58 N. E. 286; Musser v. Chase, 29 O. S. 577.

for its protection.² So where one debtor borrowed more than one-tenth of the paid-in capital of a bank, contrary to statute, he was nevertheless held liable for such debt.³ If a national bank takes a mortgage on realty in violation of the National Banking Act, only the United States can interpose objection; and if it does not see fit to punish the bank therefor, the mortgagor cannot avoid his liability on the ground of the illegality of the transaction.⁴ So an executed contract of sale made with an individual who unlawfully uses the addition "& Co." though he has no partner is valid.⁵ So under a statute forbidding an attorney to make a contract to divide his fee with the person who procures the business for him, a contract whereby a broker with the knowledge of his customers places in the hands of an attorney, on a contingent fee, their claims for excessive duties, the broker to have a part of the attorney's fee, may be enforced by the broker after the attorney has collected his fee, the statute applying only to the lawyer and not to the layman.⁶ A contract is unenforceable which violates the spirit and intent of a statute, though not the express words thereof.⁷ Thus contracts to allow bondholders to vote at stockholders' meetings,⁸ or to pay money for organizing a corporation in evasion of the statutes

² *Lester v. Bank*, 33 Md. 558; 3 Am. Rep. 211. So a certified check in the hands of a *bona fide* holder is valid though certified in violation of a criminal statute, when there were no funds to the credit of the drawer; *Union Trust Co. v. Bank*, — Mich. —; 99 N. W. 399.

³ *Murry v. Leiter*, 190 Ill. 414; 60 N. E. 851.

⁴ *Schuyler National Bank v. Gadsden*, 191 U. S. 451; *National Bank v. Whitney*, 103 U. S. 99.

⁵ *Sinnott v. Bank*, 164 N. Y. 386; 58 N. E. 286.

⁶ *Irwin v. Curie*, 171 N. Y. 409; 58 L. R. A. 830; 64 N. E. 161.

⁷ *Altenberg v. Grant*, 85 Fed. 345; 29 C. C. A. 185; *Woods v. Arm-*

strong, 54 Ala. 150; 25 Am. Rep. 671; *McNulta v. Bank*, 164 Ill. 427; 56 Am. St. Rep. 203; 45 N. E. 954; affirming, 63 Ill. App. 593; *Durkee v. People*, 155 Ill. 354; 46 Am. St. Rep. 340; 40 N. E. 626; affirming, 53 Ill. App. 396; *Bowman v. Phillips*, 41 Kan. 364; 13 Am. St. Rep. 292; 3 L. R. A. 631; 21 Pac. 230; *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793; 21 L. R. A. 617; 26 Atl. 978.

⁸ *Durkee v. People*, 155 Ill. 354; 46 Am. St. Rep. 340; 40 N. E. 626; affirming, 53 Ill. App. 396.

⁹ *McNulta v. Bank*, 164 Ill. 427; 56 Am. St. Rep. 203; 45 N. E. 954; affirming, 63 Ill. App. 593.

of incorporation,⁹ violate the spirit though not the letter of the statute and are unenforceable. So a covenant not to rent property to a Chinaman is void as repugnant to the Fourteenth Amendment to the United States Constitution and to the treaty with China.¹⁰

§331. Law imposing penalty.

(3) A contract to do an act, upon the doing of which the law imposes a penalty, is generally unenforceable.¹ Thus under a statute imposing a penalty on an agent's granting a rebate of a premium to one effecting insurance an agent cannot recover on a note given for the amount of the premium less the rebate.² The repeal of the statute imposing the penalty does not make prior contracts valid.³

¹⁰ *Gandolfo v. Hartman*, 49 Fed. 181; 16 L. R. A. 277.

¹ *Bartlett v. Vinor*, Carth. 251; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258; *Jemison v. R. R. Co.*, 125 Ala. 378; 28 So. 51; *Youngblood v. Savings Co.*, 95 Ala. 521; 36 Am. St. Rep. 245; 20 L. R. A. 58; 12 So. 579; *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671; *O'Donnell v. Sweeney*, 5 Ala. 467; 39 Am. Dec. 336; *Berka v. Woodward*, 125 Cal. 119; 73 Am. St. Rep. 31; 45 L. R. A. 420; 57 Pac. 777; *Gardner v. Tatum*, 81 Cal. 370; 22 Pac. 880; *Swanger v. Mayberry*, 59 Cal. 91; *Funk v. Gallivan*, 49 Conn. 124; 44 Am. Rep. 210; *Poplin v. Clausen* (Ind. Terr. App.); 38 S. W. 974; *Winchester, etc., Co. v. Veal*, 145 Ind. 506; 41 N. E. 334; 44 N. E. 353; *Dillon v. Allen*, 46 Ia. 299; 26 Am. Rep. 145; *Vanmeter v. Spurrier*, 94 Ky. 22; 21 S. W. 337; *Sharp v. Teese*, 9 N. J. L. (4 Halst.) 352; 17 Am. Dec. 479; *Columbia*

Bank v. Haldeman, 7 W. & S. (Pa.) 233; 42 Am. Dec. 229; *Seidenbinder v. Charles*, 4 S. & R. (Pa.) 151; 8 Am. Dec. 682; *Mitchell v. Smith*, 1 Binney (Pa.) 110; 2 Am. Dec. 417; *Ohio, etc., Ins. Co. v. Merchants', etc., Co.*, 11 Humph. (Tenn.) 1; 53 Am. Dec. 742; *Wilson v. Spencer*, 1 Rand (Va.) 76; 10 Am. Dec. 491. "That there can be no recovery on a contract made in violation of a statute as between the parties thereto, the violation of which is prohibited by a penalty, is a principle well recognized by the courts. This is true although the statute does not in terms pronounce the contract void or expressly prohibit the same." *Sandage v. Mfg. Co.*, 142 Ind. 148, 156; 51 Am. St. Rep. 165; 34 L. R. A. 363; 41 N. E. 380.

² *Heffron v. Daly*, — Mich. —; 95 N. W. 714.

³ *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671.

§332. Legislative intent in imposing penalty controls.

This rule is not, however an arbitrary one, but rests solely on the reason that the penalty is imposed to prevent the performance of the act in question. The validity of the contract depends on the intention of the legislature as determined from the entire act. If the object of the statute is to prevent the performance of the act specified,¹ or to protect the general public,² a contract in violation of the statute is invalid. There are, however, cases in which a penalty does not invalidate the contract whereby it is incurred. The question is entirely one of legislative intent.³ (a) A statute solely for the benefit of revenue, which imposes penalties or fines for its violation, does not of itself make void contracts entered into in violation thereof,⁴ as in case of sale by an unlicensed peddler.⁵ Such construction has been placed on the United States revenue laws, with reference to license fees for the sale of liquor,⁶ or to license fees for a real estate broker,⁷ and recovery has been allowed on contracts violating such statutes.⁸

(b) If the penalty is imposed for the protection of one party to the contract, the statute must not be so construed as to make such contract void so as to injure the interests of such party. Thus a statute which imposes a penalty on effecting insurance in a foreign company until it has complied with the statutes for admission to do business in the state is intended for the

¹ See cases cited § 331.

² *Taliaferro v. Moffett*, 54 Ga. 150.

³ *Allegheny Co. v. Allen*, 69 N. J. 270; 55 Atl. 724, affirming 68 N. J. L. 68; 52 Atl. 298.

⁴ *Johnson v. Hudson*, 11 East. 180; *Smith v. Mawhood*, 14 M. & W. 452; *Vermont, etc., Co. v. Hoffman (Ida.)*, 37 L. R. A. 509; 49 Pac. 314; *Lindsey v. Rutherford*, 17 B. Mon. (Ky.) 245; *Banks v. McCosker*, 82 Md. 518; 51 Am. St. Rep. 478; 34 Atl. 539; *Corning v. Abbott*, 54 N. H. 469; *Ruckman v.*

Bergholz, 37 N. J. L. 437; *Fairly v. Wappoo Mills*, 44 S. Car. 227; 29 L. R. A. 215; 22 S. E. 108; *Aiken v. Blaisdell*, 41 Vt. 655. *Contra*, *Holt v. Green*, 73 Pa. St. 198; 13 Am. Rep. 737.

⁵ *Banks v. McCosker*, 82 Md. 518; 51 Am. St. Rep. 478; 34 Atl. 539.

⁶ *Corning v. Abbott*, 54 N. H. 469.

⁷ *Ruckman v. Bergholz*, 37 N. J. L. 437.

⁸ *Contra*, *Holt v. Green*, 73 Pa. St. 198; 13 Am. Rep. 737.

benefit of the policy-holders and must not be construed so as to make their contracts void.⁹ Statutes requiring foreign corporations to comply with certain formalities in order to obtain certificates authorizing them to do business in that state, and imposing a penalty or making it a misdemeanor to do business without such permission, are held in some jurisdictions to make void contracts entered into by such corporations before obtaining such certificate.¹⁰ Such corporation cannot sue on a bond to secure it against the defalcation of its manager,¹¹ nor can an insurance company enforce notes given to it by its agents for uncollected premiums,¹² nor can it collect from its agent premiums collected by him,¹³ nor can it, if a mutual insurance company, collect assessments from resident members.¹⁴ In other jurisdictions, such statutes are held to be designed to protect residents of the state, and hence such contracts are not void to their prejudice;¹⁵ and it is even held that the corporation may enforce such contracts.¹⁶ A statute imposing a penalty on the sale of lots on an unrecorded plot is intended primarily for the benefit of the vendee, to protect his title. Such

⁹ *Manhattan Ins. Co. v. Ellis*, 32 O. C. 388; *Union Mutual Life Ins. Co. v. McMillen*, 24 O. S. 67.

¹⁰ *McCanna, etc., Co. v. Citizens'*, etc., Co., 76 Fed. 420; 35 L. R. A. 236; *Claffin v. Credit System Co.*, 165 Mass. 501; 52 Am. St. Rep. 528; 43 N. E. 293; *Henni v. Loan Association*, 61 Neb. 744; 87 Am. St. Rep. 519; 86 N. W. 475; *Myers Mfg. Co. v. Wetzel* (Tenn. Ch. App.), 35 S. W. 896.

¹¹ *McCanna, etc., Co. v. Citizens'*, etc., Co., 76 Fed. 420; 35 L. R. A. 236.

¹² *New Hampshire Ins. Co. v. Kennedy*, 96 Tenn. 711; 36 S. W. 709.

¹³ *Thorne v. Ins. Co.*, 80 Pa. St. 15.

¹⁴ *Seamans v. Zimmerman*, 91 Ia. 363; 59 N. W. 290; *Seamans v. Temple Co.*, 105 Mich. 400; 55 Am.

St. Rep. 457; 28 L. R. A. 430; 63 N. W. 408; *Commonwealth, etc., Ins. Co. v. Hayden*, 60 Neb. 636; 83 Am. St. Rep. 545; 83 N. W. 922; *Swing v. Munson*, 191 Pa. St. 582; 71 Am. St. Rep. 772; 43 Atl. 342; *Rose v. Kimberly*, 89 Wis. 545; 46 Am. St. Rep. 855; 27 L. R. A. 556; 62 N. W. 526.

¹⁵ *Manhattan Ins. Co. v. Ellis*, 32 O. S. 388; *Union, etc., Ins. Co. v. McMillen*, 24 O. S. 67.

¹⁶ *Fritts v. Palmer*, 132 U. S. 282; *State, etc., Ins. Association v. Brinkley, etc., Co.*, 61 Ark. 1; 54 Am. St. Rep. 191; 29 L. R. A. 712; 31 S. W. 157; *Spinney v. Miller*, 114 Ia. 210; 89 Am. St. Rep. 351; 86 N. W. 317; *Garrett Ford Co. v. Mfg. Co.*, 20 R. I. 187; 78 Am. St. Rep. 852; 88 L. R. A. 545; 37 Atl. 948; *Milan, etc., Co. v. Gorton*, 93 Tenn. 590; 26 L. R. A. 135; 27 S.

sale and conveyance is therefore not illegal or void.¹⁷ Statutes requiring a note given for a patent right to have the words "given for a patent right" on its face, are usually held constitutional.¹⁸ A statute providing that a note given to an itinerant vendor for goods sold by him shall have the words "peddler's note" upon its face is valid and does not affect the rights of the owner of a patent.¹⁹ Where such statutes impose a penalty for such omission, or make it a misdemeanor, some courts treat a note or contract from which such provision is omitted as illegal,²⁰ while others treat such contracts as valid.²¹ Where the statute expressly makes such note void, it is held that the purpose is to prevent the vendee from being cut off from setting up his equities by a transfer to a *bona fide* holder. Accordingly while recovery cannot be had upon the note, it can be had upon the original consideration therefor;²² and the assignee of such note may, after an adverse judgment on the note, sue as assignee of the original consideration.²³ However, such statute does not apply to sales of exclusive rights to sell patented articles in a

W. 971; Edison, etc., Co. v. Canadian, etc., Co., 8 Wash. 370; 40 Am. St. Rep. 910; 24 L. R. A. 315; 36 Pac. 260; Dearborn Foundry Co. v. Augustine, 5 Wash. 67; 31 Pac. 327; Toledo, etc., Lumber Co. v. Thomas, 33 W. Va. 566; 25 Am. St. Rep. 925; 11 S. E. 37.

¹⁷ Pangborn v. Westake, 36 Ia. 546; Watrous v. Blair, 32 Ia. 58; Bemis v. Becker, 1 Kan. 217; Mason v. Pitt, 21 Mo. 391; Strong v. Darling, 9 Ohio 201. *Contra*, Downing v. Ringer, 7 Mo. 585.

¹⁸ Sandage v. Mfg. Co., 142 Ind. 148; 51 Am. St. Rep. 165; 34 L. R. A. 363; 41 N. E. 380; New v. Walker, 108 Ind. 365; 58 Am. Rep. 40; 9 N. E. 386; Mason v. McLeod, 57 Kan. 105; 57 Am. St. Rep. 327; 41 L. R. A. 548; 45 Pac. 76; Tod v. Wick, 36 O. S. 370; Haskell v. Jones, 86 Pa. St. 173. *Contra*, Hol-

lida v. Hunt, 70 Ill. 109; 22 Am. Rep. 63.

¹⁹ Bohon v. Brown, 101 Ky. 354; 72 Am. St. Rep. 420. *Sub nom.*, Union National Bank v. Brown, 38 L. R. A. 503; 41 S. W. 273.

²⁰ Sandage v. Mfg. Co., 142 Ind. 148; 51 Am. St. Rep. 165; 34 L. R. A. 363; 41 N. E. 380; New v. Walker, 108 Ind. 365; 58 Am. Rep. 40; 9 N. E. 386; Breechbill v. Randall, 102 Ind. 528; 52 Am. Rep. 695; 1 N. E. 362; Pinney v. Bank, — Kan. —; 75 Pac. 119. The vendee for whose protection the requirement is imposed may avoid the contract if such requirement is omitted. Mason v. McLeod, 57 Kan. 105; 57 Am. St. Rep. 327; 41 L. R. A. 548; 45 Pac. 76.

²¹ Tod v. Wick, 36 O. S. 370.

²² Roth v. Bank, 70 Ark. 200; 91 Am. St. Rep. 80; 66 S. W. 918.

certain territory unless it specifically includes such sales.²⁴ A statute providing a method of solemnizing a marriage, and imposing a penalty in case of marriage not complying with such formalities, does not make such marriage void.²⁵ To have this effect the statute must provide that a marriage not in statutory form is void.

(c) If the statute which forbids the act and imposes the penalties discloses legislative intent to provide completely for its violation, the courts do not add an additional penalty which will affect other persons, often innocent, by making contracts void.²⁶ A statute imposing a fine on persons doing business on Sunday must be read in connection with a prior statute providing on what terms one may avoid a Sunday contract, and does not make such contracts void irrespective of compliance with such terms.²⁷

§333. Law requiring license.

(4) If a statute imposes a license fee on certain occupations, or on the sale of certain articles, for the benefit of the general public, to protect them from imposition, a contract in violation of such statute is generally held to be unenforceable.¹ Thus a contract whereby A agrees to allow B to do business under A's license is invalid.² So a contract involving the assignment of a license to sell liquor is invalid.³ Contracts in violation of such statutes are clearly invalid if the licensing statute imposes

²³ *Roth v. Bank*, 70 Ark. 200; 91 Am. St. Rep. 80; 66 S. W. 918.

²⁴ *People's State Bank v. Jones*, 26 Ind. App. 583; 84 Am. St. Rep. 310; 58 N. E. 852.

²⁵ *Renfrow v. Renfrow*, 60 Kan. 277; 72 Am. St. Rep. 350; 56 Pac. 534.

²⁶ *Hanover National Bank v. Bank*, 109 Fed. 421; 48 C. C. A. 482; *Wetherell v. Hollister*, 73 Conn. 622; 48 Atl. 826; *Allegheny Co. v. Allen*, 69 N. J. 270; 55 Atl.

724; [affirming 68 N. J. L. 68; 52 Atl. 298]; *Tod v. Wick*, 36 O. S. 370; *Vining v. Bricker*, 14 O. S. 331; *Rossman v. McFarland*, 9 O. S. 369.

²⁷ *Wetherell v. Hollister*, 73 Conn. 622; 48 Atl. 826.

¹ *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671; *Puckett v. Alexander*, 102 N. Car. 95; 3 L. R. A. 43; 8 S. E. 767.

² *Ritchie v. Smith*, 6 C. B. 462.

a penalty⁴ in such manner as to make such contract invalid,⁵ or specifically forbids making such contracts until the license is paid,⁶ or makes it illegal to contract without a license,⁷ or makes the contract void,⁸ or forbids recovery of commissions.⁹ Where such is the object of the statute an unlicensed broker,¹⁰ as a real estate broker,¹¹ or a commercial broker,¹² or an unlicensed insurance broker¹³ cannot recover commissions, even for services rendered in co-operation with a licensed broker.¹⁴ An unlicensed attorney¹⁵ or physician¹⁶ cannot recover for services. So a contract between an attorney and one not an

³ Koppitz-Melchers Brewing Co. v. Behm, 130 Mich. 649; 90 N. W. 676.

⁴ Taylor v. Coke Co., 10 Exch. 293; D'Allex v. Jones, 37 Eng. L. & Eq. 475; Taliaferro v. Moffett, 54 Ga. 150; Randall v. Tuell, 89 Me. 443; 38 L. R. A. 143; 36 Atl. 910; Black v. Life Association, 95 Me. 35; 54 L. R. A. 939; 49 Atl. 51; Saule v. Ryan (Tenn. Ch. App.); 53 S. W. 977.

⁵ See § 332.

⁶ Brown v. Fertilizer Co., 124 Ala. 221; 26 So. 891; Richardson v. Brix, 94 Ia. 626; 63 N. W. 325; Bull v. Harragan, 17 B. Mon. (Ky.) 349; Johnston v. Dahlgren, 166 N. Y. 354; 59 N. E. 987; Singer Mfg. Co. v. Draper, 103 Tenn. 262; 52 S. W. 879.

⁷ Hustis v. Pickands, 27 Ill. App. 270; Buckley v. Humason, 50 Minn. 195; 36 Am. St. Rep. 637; 16 L. R. A. 423; 52 N. W. 385.

⁸ Bowdre v. Carter, 64 Miss. 221; 1 So. 162.

⁹ Smith v. Lindo, 4 C. B. N. S. 395.

¹⁰ Cope v. Rowlands, 2 Mees. & W. 149; Douthart v. Congdon, 197 Ill. 349; 90 Am. St. Rep. 167; 64 N. E. 348; Tedrick v. Hiner, 61 Ill.

189; Hustis v. Pickands, 27 Ill. App. 270; Harding v. Hagar, 60 Me. 340; 63 Me. 515.

¹¹ Richardson v. Brix, 94 Ia. 626; 63 N. W. 325; Denning v. Yount, 62 Kan. 217; 50 L. R. A. 103; 61 Pac. 803; Yount v. Denning, 52 Kan. 629; 35 Pac. 207; Buckley v. Humason, 50 Minn. 195; 36 Am. St. Rep. 637; 16 L. R. A. 423; 52 N. W. 385; Johnson v. Hulings, 103 Pa. St. 498; 49 Am. Rep. 131; Stevenson v. Ewing, 87 Tenn. 46; 9 S. W. 230. In Prince v. Church, 20 Mo. App. 332, it was held that a real estate agent could recover a commission for a sale made without a license, though it was a misdemeanor. Similar views are found in the following cases involving brokers: Murray v. Doud, 167 Ill. 368; 59 Am. St. Rep. 297; 47 N. E. 717; affirming, 63 Ill. App. 247; Shepler v. Scott, 85 Pa. St. 329; Chadwick v. Collins, 26 Pa. St. 138.

¹² Holt v. Green, 73 Pa. St. 198; 13 Am. Rep. 737.

¹³ Black v. Life Association, 95 Me. 35; 54 L. R. A. 939; 49 Atl. 51.

¹⁴ Pratt v. Burdon, 168 Mass. 596; 47 N. E. 419.

attorney, whereby the latter is to secure clients and hunt up testimony for the former in consideration of a share in the fees, has been held contrary to public policy.¹⁷ As these statutes are to protect the public and not the physician, or other person who is required to procure a license, they must be enforced to that end. Such a physician may be liable for malpractice.¹⁸ Where an institution for the cure of the drug habit agrees to cure A or return to B the consideration paid by him for A, B was allowed to recover on failure to cure A, though neither the institution nor its employees had a license to practice medicine.¹⁹

A contract for employing as a public school teacher, one who has no certificate of authority to teach in that county has been held unenforceable.²⁰ If an unlicensed vendor or merchant does business in violation of the statute, his contracts of employment²¹ or of sale, whether executed²² or executory,²³ are unenforceable. A contract of sale in violation of such statute delivering possession to vendee and reserving title to vendor will not be enforced by the courts, and the vendor cannot recover in an action of replevin.²⁴ So an unlicensed innkeeper cannot recover for board and lodging,²⁵ or enforce a lien.²⁶ Some courts have held that an unlicensed merchant cannot recover on an

¹⁵ *Tedrick v. Hiner*, 61 Ill. 189. A firm of attorneys, one of whom has not paid his license fee, cannot recover on a contract with the firm for legal services, nor can their assignee. *McIver v. Clarke*, 69 Miss. 408; 10 So. 581.

¹⁶ *D'Allex v. Jones*, 37 Eng. L. & Eq. 475; (following the views expressed in *Cope v. Rowlands*, 2 M. & W. 149, which disapproved; *Gremare v. Le Clerc Bois Valon*, 2 Camp. 144). *Gardner v. Tatum*, 81 Cal. 370; *Orr v. Meek*, 111 Ind. 40; *Puckett v. Alexander*, 102 N. Car. 95; 3 L. R. A. 43; 8 S. E. 767.

¹⁷ *Alpers v. Hunt*, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846; *Langdon v. Conlin*, —

Neb. —; 60 L. R. A. 429; 93 N. W. 389.

¹⁸ *Musser v. Chase*, 29 O. S. 577.

¹⁹ *Wellman v. Jones*, 124 Ala. 580; 27 So. 416.

²⁰ *Hosmer v. Sheldon School District*, 4 N. Dak. 197; 50 Am. St. Rep. 639; 25 L. R. A. 383; 59 N. W. 1035.

²¹ *Watkins Medical Co. v. Paul*, 87 Ill. App. 278.

²² *Puckett v. Fore*, 77 Miss. 391; 27 So. 381; *Johnson v. Jennings*, 72 Miss. 349; 16 So. 791.

²³ *Singer Mfg. Co. v. Draper*, 103 Tenn. 262; 52 S. W. 879.

²⁴ *Singer Mfg. Co. v. Draper*, 103 Tenn. 262; 52 S. W. 879.

insurance policy covering goods used in such business.²⁷ Recovery can be had if the contract is outside the unlicensed business.²⁸ Under this statute an unlicensed bank can recover upon a bill of lading assigned to it.²⁹ No recovery can be had on a contract for the use of an unlicensed stallion, the owner being by statute liable to indictment and fine for not procuring the license;³⁰ so where the statute requiring the name of the stallion to be filed with the register of the county where the stallion is owned or kept, has not been complied with.³¹

However, some courts are unwilling to declare executed contracts of sale void because vendor had not obtained a license, if the statute does not expressly declare them void.³² Thus under a statute making it a misdemeanor to loan money without first obtaining a license to carry on such business, it has been held that recovery may be had upon a loan made by an unlicensed agent.³³ This result is reached in some cases by a very strict construction of the statute. A statute imposing a penalty on "carrying to sell or exposing for sale" without a license was held not to avoid the sale itself.³⁴ The repeal of the act requiring a license does not make prior sales valid,³⁵ even if the ordinance imposing the license is repealed after the services

²⁵ *Randall v. Tuell*, 89 Me. 443; 38 L. R. A. 143; 36 Atl. 910.

²⁶ *Stanwood v. Woodward*, 38 Me. 192.

²⁷ *American Fire Ins. Co. v. Bank*, 73 Miss. 469; 18 So. 931. (Under § 3401 of the Mississippi Code, making contract with reference to such business void if no license is obtained.)

²⁸ *Harness v. Williams*, 64 Miss. 600; 1 So. 759.

²⁹ *People's Bank v. R. R. Co.*, 65 Miss. 365; 4 So. 115.

³⁰ *Smith v. Robertson*, 106 Ky. 472; 45 L. R. A. 510; 50 S. W. 852. (Citing, *Law v. Hodgson*, 2 Campb. 147; *Swords v. Owen*, 43 How. Pr. (N. Y.) 176; *Hallett v.*

Novion, 14 Johns. (N. Y.) 273; *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671.)

³¹ *Nelson v. Beck*, 89 Me. 264; 36 Atl. 374

³² *Mandelbaum v. Gregovitch*, 17 Nev. 87; 45 Am. Rep. 433; 28 Pac. 121; *Jones v. Berry*, 33 N. H. 209.

³³ *Vermont, etc., Co. v. Hoffman*, 5 Ida. 376; 95 Am. St. Rep. 186; 37 L. R. A. 509; 49 Pac. 314.

³⁴ *Jones v. Berry*, 33 N. H. 209, (the vendor being allowed to recover the price.)

³⁵ *Anding v. Levy*, 57 Miss. 51; 34 Am. Rep. 435. (Point omitted in Am. Rep.) *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449. (Point omitted in Am. Rep.)

are rendered but before the suit is brought.³⁶ Thus no recovery can be had, after the repeal of a statute making the sale of liquor unlawful, for unlawful sales prior to the statute,³⁷ even on an express promise made thereafter.³⁸ A contract for transferring a business, for the prosecution of which a license is necessary, has been held valid though the vendee has not such license when the sale is made.³⁹

§334. Law requiring inspection.

Contracts for the sale of goods in violation of inspection laws are invalid.¹ A sale of liquor which is not inspected as required by law, gives no right of action for recovery of the price.² Statutes which require that each package of commercial fertilizer sold must have a tag attached showing the chemical composition,³ or must be inspected,⁴ or both inspected and

³⁶ Denning v. Yount, 62 Kan. 217; 50 L. R. A. 103; 61 Pac. 803.

³⁷ Robinson v. Barrows, 48 Me. 186.

³⁸ Ludlow v. Hardy, 38 Mich. 690.

³⁹ Sale of a physician's practice, McNichol v. Ryan, 34 N. B. 391; McCurry v. Gibson, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806; Tichenor v. Newman, 186 Ill. 264; 57 N. E. 826. Assignment of retail liquor business and license. Germantown Brewing Co. v. Booth, 162 Pa. St. 100; 29 Atl. 386. In Pierce v. Pierce, 17 Ind. App. 107; 46 N. E. 480, that part of the contract requiring a transfer of the license was held illegal but the rest was held separable and hence valid.

¹ Church v. Proctor, 66 Fed. 240; 13 C. C. A. 426; Gaulding Fertilizer Co. v. Driver, 99 Ga. 623; 25 S. E. 922; Richmond v. Foss, 77 Me. 590; Durgin v. Dyer, 68 Me. 143; Buxton v. Hamblen, 32 Me. 448; Prescott v. Battersby, 119 Mass.

285; Sawyer v. Smith, 109 Mass. 220; Libbey v. Downey, 5 All. (Mass.) 299; Miller v. Post, 1 All. (Mass.) 434. To the same effect, except that defendant failed to plead illegality, Granger v. Ilsley, 2 Gray (Mass.) 521.

² But such statute does not apply where a sale is made, otherwise lawful, of liquor uninspected because no official inspector had been appointed. Smith v. Kibbee, 9 O. S. 563.

³ Brown v. Fertilizer Co., 124 Ala. 221; 26 So. 891; McConnell v. Kitchens, 20 S. Car. 430; 47 Am. Rep. 845. Slight and immaterial variance between the guaranteed analysis and that made by the state chemist does not make a contract of sale illegal. Spinks v. Guano Co., 108 Ga. 614; 33 S. E. 906.

⁴ Woods v. Armstrong, 54 Ala. 150; 25 Am. Rep. 671; Gaulding Fertilizer Co. v. Driver, 99 Ga. 623; 25 S. E. 922.

stamped,⁵ are generally held to make sales in violation of such statutes void, so that the vendor cannot recover.⁶

§335. Contract to violate foreign law.

It has been stated rather loosely that a contract to violate the law of a foreign country is valid,¹ at least when such law is a revenue law.² An analysis of the cases on which this alleged rule rests discloses that for the most part they do not involve the validity of a contract between A and B whereby A is required to violate the laws of a foreign state; but merely discuss whether a sale by B to A, otherwise valid, is invalid because A intends to use the property thus sold to him in violating the law of a foreign state.³ Thus, A sold B an engine and boiler, taking back a mortgage for the purchase price. By agreement steam was gotten up in the boiler so that B could import them into another country as second-hand machinery at a reduced duty, which B succeeded in doing. Such mortgage was held valid.⁴ The modern rule is that a contract which tends to the violation of a foreign law is invalid.⁵ Thus a contract whereby A and B agreed to enlist men in Canada for the United States army during the Civil War was held invalid and A was not allowed to recover money advanced to B thereunder.⁶ This rule is so often assumed that the discussion in any particular case turns on the question whether the particular contract tends to a violation of foreign law.⁷ The rule that a contract which tends to violate the law of a foreign state is invalid must not be confused with the doctrine that the validity of a contract is controlled by the law of the place of performance.⁸ Thus a contract may be in-

⁵ *Atlanta Guano Co. v. Phipps* (Tenn. Ch. App.), 41 S. W. 1087.

⁶ *Contra*, *Niemeyer v. Wright*, 75 Va. 239; 40 Am. Rep. 720.

¹ *Halman v. Johnson, Cowp.* 341; *McIntyre v. Parks*, 3 Met. (Mass.) 207.

² *King v. Renaissance*, 5 La. Ann. 25; 52 Am. Dec. 577.

³ See Ch. XXXI.

⁴ *Gosline v. Dunbar*, 32 N. B. 325.

⁵ *Graves v. Johnson*, 156 Mass. 211; 32 Am. St. Rep. 446; 15 L. R. A. 834; 30 N. E. 818; *Hall v. Costello*, 48 N. H. 176; 2 Am. Rep. 207; *Atlanta Guano Co. v. Phipps* (Tenn. Ch. App.); 41 S. W. 1087.

⁶ *Hall v. Costello*, 48 N. H. 176; 2 Am. Rep. 207.

⁷ See § 336; Ch. XXXI.

⁸ See Ch. LXXX.

valid as in violation of the law of another state, and yet not subject to a statute of such other state allowing a party who has paid money under such contract to recover the same.⁹

§336. Contract for illegal sale of intoxicating liquor in foreign state.

Questions as to violation of foreign law are often presented where A has sold intoxicating liquor to B in a state where such sale is legal, and B means to resell it in a state where such sale is illegal. The rules which determine the validity of the sale by A to B are the same as those governing other contracts collateral to a crime of small magnitude. If A does not know and has no reasonable ground for knowing of B's illegal intent, A can enforce the contract of sale.¹ Mere knowledge by vendor of vendee's unlawful intent seems enough to make the original sale unlawful in some jurisdictions.² Statutes may make such sale illegal irrespective of vendor's knowledge of vendee's intent.³ Apart from statute even if the vendor has some reason to believe that the vendee means to make an unlawful use of the goods sold he can recover if he does not know of such intention in fact.⁴ To go to the other extreme, if the vendor by his contract with the vendee contemplates and aids in a violation of the laws of another state, such contract is invalid.⁵ Thus the contract of sale is invalid if the vendor by means of false invoices,⁶ false marking,⁷ deceptive packing,⁸ advice as to method

⁹ *Wind v. Iler*, 93 Ia. 316; 27 L. R. A. 219; 61 N. W. 1001; *Bolinger v. Wilson*, 76 Minn. 262; 77 Am. St. Rep. 646; 79 N. W. 109.

¹ *Holden v. Brooks*, 66 N. H. 184; 20 Atl. 247; *Buck v. Albee*, 27 Vt. 190.

² *Wilson v. Stratton*, 47 Me. 120; *Zerritt v. Bartlett*, 21 Vt. 184.

³ *Pollard v. Allen*, 96 Me. 455; 52 Atl. 924; *Knowlton v. Doherty*, 87 Me. 518; 47 Am. St. Rep. 349; 33 Atl. 18.

⁴ *Adams v. Coulliard*, 102 Mass. 167; *Finch v. Mansfield*, 97 Mass.

89; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205. If he has reasonable cause to know of vendee's illegal intent the original contract of sale is invalid. *Suit v. Woodhall*, 113 Mass. 391.

⁵ *Waymell v. Reed*, 5 T. R. 599; *Fisher v. Lord*, 63 N. H. 514; 3 Atl. 927; *Gaylord v. Soragen*, 32 Vt. 110; 76 Am. Dec. 154.

⁶ *Kohn v. Milcher*, 43 Fed. 641; 10 L. R. A. 439.

⁷ *Gaylord v. Soragen*, 32 Vt. 110; 76 Am. Dec. 154.

⁸ *Biggs v. Lawrence*, 3 T. R. 454;

of avoiding seizure,⁹ or assistance in evading a penalty,¹⁰ and the like, aids in the illegal intent. It has, however, been held that packing bottles of liquor in plain boxes¹¹ or shipping it in "fake barrels"¹² does not of itself make the sale illegal unless in pursuance of an intent to aid the vendee in violation of the law. Where the dividing point is to be inserted between these extremes is a question on which the courts are not harmonious. The weight of authority is that vendor's knowledge of vendee's intent to resell unlawfully does not of itself make the original sale illegal.¹³ Some cases hold that while the vendor's mere knowledge of the unlawful intent of the vendee does not make the contract of sale invalid,¹⁴ yet if the vendor intends to aid the vendee in the commission of the unlawful act, the contract of sale is invalid, even if the vendor makes the sale primarily for gain and only incidentally to aid the unlawful purpose.¹⁵ It thus appears that a contract to violate foreign law stands on the same footing as a contract to violate domestic law,¹⁶ and that there is the same conflict of authority on the question when a collateral contract is so closely connected with

Clugas v. Penaluna, 4 T. R. 466;
Waymell v. Reed, 5 T. R. 599;
Feineman v. Sachs, 33 Kan. 621; 52
Am. Rep. 547; 7 Pac. 222; *Fisher v.*
Lord, 63 N. H. 514; 3 Atl. 927;
Aiken v. Blaisdell, 41 Vt. 655.

⁹ *Banchor v. Mansel*, 47 Me. 58.

¹⁰ *Foster v. Thurston*, 11 Cush.
 (Mass.) 322; *Hubbell v. Flint*, 13
Gray (Mass.) 277.

¹¹ *Williams v. Davidson*, 64 Kan.
 707; 68 Pac. 650.

¹² *McWhorter v. Blulhenthal*, 136
Ala. 568; 33 So. 552.

¹³ *Tegler v. Shipman*, 33 Ia. 194;
 11 Am. Rep. 118; *Westheimer v.*
Weisman, 60 Kan. 753; 57 Pac. 969;
 reversing on other grounds, 8 Kan.
App. 75; 54 Pac. 332; *Samuel Bow-*
man Distilling Co. v. Nutt, 34 Kan.
 724; 10 Pac. 163; *Feineman v.*
Sachs, 33 Kan. 621; 52 Am. Rep.
 547; 7 Pac. 222; *Gambis v. Suther-*

land, 101 Mich. 355; 59 N. W. 652;
Backman v. Wright, 27 Vt. 187.

¹⁴ *Dater v. Earl*, 3 Gray (Mass.)
 482; *Hill v. Spear*, 50 N. H. 253;
 9 Am. Rep. 205.

¹⁵ *Graves v. Johnson*, 156 Mass.
 211; 32 Am. St. Rep. 446; 15 L. R.
 A. 834; 30 N. E. 818. This view of
 the law requires careful investiga-
 tion of the "delicate shades" of
 mental attitude of the vendor
 towards the unlawful purpose of the
 vendee. In *Graves v. Johnson supra*,
 214, the court said, "If the buyer
 knows that the seller while aware
 of his intent is indifferent to it or
 disapproves it, it may be doubtful
 whether the connection is sufficient"
 to make the contract of sale invalid.

¹⁶ "The question is to be decided
 on principles which we presume
 would prevail generally in the ad-
 ministration of the Common Law in

the illegal purpose as to be itself illegal. By statute in some states a contract for the sale of intoxicating liquors in violation of the law governing the sale thereof is invalid.¹⁷

§337. Arrangement of topics.

The distinction between illegal and void contracts will be reserved until after a discussion of the types of illegal and void contracts.¹ The void contracts will be first considered,² and then the illegal,³ as far as the two classes can be distinguished from each other. As will be seen⁴ from a comparison of the views of different states, contracts held to be merely void in some jurisdictions are held in others to be illegal. Further, some contracts such as usury are anomalous since the statute which forbids them provides specifically for the effect of such contracts; and such provisions as to effect are different from those which the common law would provide in case of either illegal or void contracts. The effect of illegal and void contracts and the distinction between them,⁵ the effect of performance,⁶ and the validity of contracts which are collateral to illegal and void transactions,⁷ will finally be considered.

this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. . . . Of course it would be possible for an independent state to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbor's laws. But in fact no state pursues such a course of barbarous isolation. As a general

proposition it is admitted that an agreement to break the laws of a foreign country would be invalid." *Graves v. Johnson*, 156 Mass. 211; 32 Am. St. Rep. 446; 15 L. R. A. 834; 30 N. E. 818.

¹⁷ *Shawyer v. Chamberlain*, 113 Ia. 742; 86 Am. St. Rep. 411; 84 N. W. 661.

¹ See Ch. XXIX.

² See Ch. XVI-XX.

³ See Ch. XXI-XXVIII.

⁴ See Ch. XVI, XIX, XXIV.

⁵ See Ch. XXIX.

⁶ See Ch. XXX.

⁷ See Ch. XXXI.

CHAPTER XVI.

VOID CONTRACTS—CHAMPERTY, MAINTENANCE AND BARRATRY.

§338. Original common-law theory of champerty.

The Common Law had an intense aversion to interference by one person in the litigation of another not in a near relation. This tendency manifested itself in many different ways. It forbade assignment of contract rights except those governed by the law merchant.¹ It forbade the conveyance of land held adversely; a principle which is still in effect in many jurisdictions.² With this general tendency firmly rooted in the law, there was no question about the general principle that contracts whereby a stranger to litigation took any part therein were contrary to public policy. The various forms of these objectionable contracts were grouped under maintenance, champerty and barratry. The reasons underlying this rule are stated elsewhere.³ They belong to an order of things that has long since

¹ See § 1256.

² *Pearson v. Adams*, 129 Ala. 157; 29 So. 977; *Chevalier v. Carter*, 124 Ala. 520; 26 So. 901; *Stringfellow v. Ry.*, 117 Ala. 250; 22 So. 997; *Foy v. Cochran*, 88 Ala. 353; 6 So. 685; *Franklin v. Mill Co.*, 88 Ala. 318; 6 So. 685; *Poe v. Davis*, 29 Ala. 676; *Merwin v. Morris*, 71 Conn. 555; 42 Atl. 855; *Coogler v. Rogers*, 25 Fla. 853; 7 So. 391; *Heard v. Phillips*, 101 Ga. 691; 44 L. R. A. 369; 31 S. E. 216; *Higgins v. Howard* (Ky.), 61 S. W. 1016; *Fain v. Miles* (Ky.), 60 S. W. 939; *Meek v. Packett Co.* (Ky.), 60 S. W. 484; *West v.*

Chamberlain, 109 Ky. 194; 58 S. W. 584; *Keaton v. Sublett*, 109 Ky. 106; 58 S. W. 528; *Adkins v. Whalen*, 87 Ky. 153; 12 Am. St. Rep. 470; 7 S. W. 912; *Archibald v. R. R.*, 157 N. Y. 574; 52 N. E. 567; *Arents v. Ry.*, 156 N. Y. 1; 50 N. E. 422; *Church v. Schoonmaker*, 115 N. Y. 570; 22 N. E. 575; *Church v. Becker*, 115 N. Y. 562; 22 N. E. 748; *Galbraith v. Paine*, — N. D. —; 96 N. W. 258; *Fitzgerald v. Miller*, 7 S. D. 61; 63 N. W. 221; *Saylor v. Stewart*, 2 Heisk. (Tenn.) 510; *Wentworth v. Abbets*, 78 Wis. 63; 46 N. W. 1044.

³ See § 1256.

passed away. There is apparently small danger that great men may buy up pretended claims and sue upon them, using their personal influence to secure their success. Accordingly the contracts which fall within this principle are far narrower in extent than at the original Common Law. The principle is for the most part dwindling and shrinking. The difficulty of stating it at Modern Law, and the lack of uniformity among modern cases are due to two causes: the uncertainty as to how far the Common Law precedents should be followed in a changed order of things; and, in modifying the Common Law rules to suit modern ideas of policy, the lack of agreement as to what a sound modern policy is.

§339. General nature of maintenance and champerty.

“Maintenance is . . . an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it.”¹ It was a crime at Common Law.

¹ Black. Com. Bk. IV. 134: “Maintenance, Manutentia is derived of the verbe *Manutenere*, and signifieth in Law, a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of Common right, *Culpa est rei se immiscere ad se non pertinenti*; and it is twofold, One in the Countrey, and another in the Court. For quarrels and sides in Court, the Statutes have inflicted grievous punishments. But this kincke of maintenance of quarrels and sides in the country, is punishable only at the suit of the King, as it hath beene resolved. And this Maintenance is called *Manutenentia*, or *Manutentio ruralis*, for example, as to take possessions, or to keepe possessi ns, whereof Littleton here speaketh, or the like. The other is called *Curialis*, because it is done

pendente placito, in the Courts of Justice; and this was an offense at the Common Law, and is threefold. First, to maintaine to have part of the Land, or anything out of the Land, or part of the Debt, or other thing in plea or suit; and this is called *Cambipartia*, Champertie. The second is, when one maintaineth the one side, without having any part of the thing in Plea, or suit; and this Maintenance is twofold, general maintenance and special maintenance; whereof you shall reade at large in our Bookes, which were too long here to be inserted. The third is when one laboureth the Jury, if it be but to appeare, or if he instruct them, or put them in fear, or the like, he is a maintainer, and he is in law called an Embraceor, and an action of Maintenance lieth against him; and if he

Considered in its relation to contracts, some courts still refuse to enforce a contract in performing which one party must be guilty of maintenance.² Thus a contract by one not an attorney and not a relation of certain heirs, to get them to sue to contest a will and to aid them therein, and to receive for his services "a sum equal to" a given fraction of what should be recovered, was held void.³ Even under such statute one may sue to protect his own interest and so may aid in a suit necessarily brought in the name of another. Thus a vendor of realty who has a lien for his purchase money may agree with his vendee to aid in a suit to recover the value of the timber taken from such land by trespassers, one-half of such recovery to be paid to vendor and credited as part of the purchase price.⁴

"A man may, however, maintain the suit of his near kinsman, servant or poor neighbor out of charity and compassion, with impunity."⁵ A parent may supply his daughter with funds to sue, as for breach of promise and seduction.⁶ So it is not maintenance for a wife to aid her husband.⁷

Such aid must, however, not be given as a speculation.⁸ In other states it is held that maintenance at Common Law does

take money, a *decies tantum* may be brought against him. And whether the jury passe for his side or no, or whether the Jurie give any verdict at all, yet shall he be punished as a maintainer or Embraceor, either at the suit of the King or partie." Co. Litt. 368b. See *Hovey v. Hobson*, 51 Me. 62.

² By local statute. *Lynn v. Moss* (Ky.), 23 Ky. L. Rep. 214; 62 S. W. 712.

³ *Lynn v. Moss* (Ky.), 23 Ky. L. Rep. 214; 62 S. W. 712.

⁴ *Hall v. Deaton*, 24 Ky. L. Rep. 314; 68 S. W. 672.

⁵ Black. Com. Bk. IV. 135.

⁶ *Graham v. McReynolds*, 90 Tenn. 673; 18 S. W. 272. (By statute the father might have sued in his own name without showing loss of service.)

⁷ *Ex parte Hiers*, 67 S. C. 108; 45 S. E. 146.

⁸ *In re Evans*, 22 Utah 366; 83 Am. St. Rep. 794; 53 L. R. A. 952; 62 Pac. 913.

⁹ *Wood v. Casserleigh*, 30 Colo. 287; 97 Am. St. Rep. 138; 71 Pac. 360 (affirming 14 Colo. App. 265; 59 Pac. 1024); *Currency Mining Co. v. Bentley*, 10 Colo. App. 271; 50 Pac. 920. "The ancient English doctrines of champerty and maintenance have not found favor in the United States." *Roberts v. Cooper*, 20 How. (U. S.) 467. "The whole doctrine of maintenance and champerty is a relic of a state of things long since passed away." *Duke v. Harper*, 2 Mo. App. 1, 10 (affirmed, 66 Mo. 51; 27 Am. Rep. 314).

not exist.⁹ In such states lending money to carry on litigation in consideration of a share in the recovery;¹⁰ or furnishing documentary evidence and agreeing to pay expenses of litigation for a contingent fee, the claim being a valid one,¹¹ do not amount to maintenance.

"Champerty, *campi-partitio*, is a species of maintenance and punished in the same manner; being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them if they prevail at law; whereupon the champertor is to carry on the parties' suit at his own expense."¹² In some states champerty at Common Law is not recognized;¹³ in others, it is.¹⁴ Champerty as appearing in the form of an assignment of a chose in action is discussed subsequently.¹⁵

§340. Contract for compensation contingent on amount of recovery.

If X undertakes to aid A, as attorney, in recovering a claim from B, and X is to be compensated in an amount contingent on the amount recovered, such contract is valid in many states,¹

¹⁰ *Brown v. Bigné*, 21 Or. 260; 28 Am. St. Rep. 752; 14 L. R. A. 745; 28 Pac. 11.

¹¹ *Wood v. Casserleigh*, 30 Colo. 287; 97 Am. St. Rep. 138; 71 Pac. 360 (affirming 14 Colo. App. 265; 59 Pac. 1024); (decided under a statute); *O'Driscoll v. Doyle*, 31 Colo. 193; 73 Pac. 27.

¹² *Black. Com. Bk. IV. 135; Hovey v. Hobson*, 51 Me. 62; *Widley v. Crane*, 63 Mich. 720; 39 N. W. 327; *Nickels v. Kane*, 82 Va. 309.

¹³ *Gilman v. Jones*, 87 Ala. 691; 4 L. R. A. 113; 5 So. 785; 7 So. 48; *Kutcher v. Love*, 19 Colo. 542; *Casserleigh v. Wood*, 14 Colo. App. 265; 59 Pac. 1024; *Currency Mining Co. v. Bentley*, 10 Colo. App. 271; 50

Pac. 920; *Irwin v. Currie*, 171 N. Y. 409; 58 L. R. A. 830; 64 N. E. 161.

¹⁴ *Johnson v. Van Wyck*, 4 App. D. C. 294; 41 L. R. A. 520; *Hamilton v. Gray*, 67 Vt. 233; 48 Am. St. Rep. 811; 31 Atl. 315; *Kelly v. Kelly*, 86 Wis. 170; 56 N. W. 637; *Allard v. Lamirande*, 29 Wis. 502; *Stearns v. Felker*, 28 Wis. 594; *Martin v. Veeder* 20 Wis. 466; *Miller v. Larson*, 19 Wis. 463; *Barker v. Barker*, 14 Wis. 131.

¹⁵ See § 1256.

¹ *Stanton v. Embrey*, 93 U. S. 548; *Wright v. Tebbitts*, 91 U. S. 252; *Wylie v. Coxe*, 15 How. (U. S.) 415; *Fletcher v. McArthur*, 117 Fed. 393; 54 C. C. A. 567; *Gilman v. Jones*, 87 Ala. 691; 4 L. R. A.

while in others it is unenforceable.² Thus a contract by a married woman suing for alimony, that her attorneys shall receive a certain portion of the alimony obtained is champert-

113; 5 So. 785; 7 So. 48; Ware v. Russell, 70 Ala. 174; 45 Am. Rep. 82; Davis v. Webber, 66 Ark. 190; 74 Am. St. Rep. 81; 45 L. R. A. 196; 49 S. W. 822; Cockrill v. Sanders (Ark.), 8 S. W. 831; Jacks v. Thweatt, 39 Ark. 340; Brodie v. Watkins, 33 Ark. 545; 34 Am. Rep. 49; Ballard v. Carr, 48 Cal. 74; Richardson v. Rowland, 40 Conn. 565; Moses v. Bagley, 55 Ga. 283; Phillips v. Commissioners, 119 Ill. 626; 10 N. E. 230; Commissioners v. Coleman, 108 Ill. 591; Walsh v. Shumway, 65 Ill. 471; Neal v. Franklin County, 43 Ill. App. 267; Dunne v. Herrick, 37 Ill. App. 180; Tron v. Lewis, 31 Ind. App. 178; 66 N. E. 490; Wallace v. Ry., 112 Ia. 565; 84 N. W. 662; Rickel v. Ry., 112 Ia. 148; 83 N. W. 957; Dunham v. Bentley, 103 Ia. 136; 72 N. W. 437; Knadler v. Sharp, 36 Ia. 232; Aultman v. Waddle, 40 Kan. 195; 19 Pac. 730; Manning v. Sprague, 148 Mass. 18; 12 Am. St. Rep. 508; 1 L. R. A. 516; 18 N. E. 673; Blaisdell v. Ahern, 144 Mass. 393; 59 Am. Rep. 99; 11 N. E. 681; Scott v. Harmon, 109 Mass. 237; 12 Am. Rep. 685; Tapley v. Coffin, 12 Gray (Mass.) 420; Denman v. Johnston, 85 Mich. 387; 48 N. W. 565; Canty v. Lattner, 31 Minn. 239; 17 N. W. 385; Moody v. Harper, 38 Miss. 599; Duke v. Harper, 66 Mo. 51; 27 Am. Rep. 314; Schomp v. Schenck, 40 N. J. L. 195; 29 Am. Rep. 219; Wheeler v. Riviere, (Tex. Civ. App.), 49 S. W. 697; Croco v. R. R., 18 Utah 311; 44 L. R. A. 285; 54 Pac. 985; Nickels v. Kane, 82 Va. 309; Lewis v. Broun, 36 W. Va. 1; 14

S. E. 444; Gilbert-Arnold Land Co. v. O'Hare, 93 Wis. 194; 67 N. W. 38; Dockery v. McLellan, 93 Wis. 381; 67 N. W. 733; Allard v. Lamirande, 29 Wis. 502; Martin v. Veeder, 20 Wis. 466. "Wisely or unwisely, a point on which opinions may fairly differ, the law has long been settled that contracts for such (*i. e.*, contingent) fees are lawful and enforceable by the courts, and something more than the mere contingency of the compensation is necessary to make them champertous." Williams v. Philadelphia, 208 Pa. St. 282, 288; 57 Atl. 578. Such contracts are made valid by statute in some jurisdictions, as by statute allowing the attorney and client to fix his compensation by agreement. Croco v. R. R., 18 Utah 311; 44 L. R. A. 285; 54 Pac. 985; Potter v. Mining Co., 22 Utah 273; 61 Pac. 999. In New Jersey an attorney, as distinguished from an advocate, is allowed to contract for a percentage of the amount recovered. Schomp v. Schenck, 40 N. J. L. 195; 29 Am. Rep. 219; *in re Fitzsimons*, 174 N. Y. 15; 66 N. E. 554 (by statute).

² Brindley v. Brindley, 121 Ala. 429; 25 So. 751; Dumas v. Smith, 17 Ala. 305; Leonard v. Boyd, 24 Ky. L. Rep. 1320; 71 S. W. 508; Miles v. Collins, 1 Met. (Ky.) 308; Wildey v. Crane, 63 Mich. 720; 30 N. W. 327; Orr v. Tanner, 12 R. I. 94. Statutes make such contracts illegal in some states. Byrne v. Ry., 55 Fed. 44 (Tennessee statute); Roberts v. Yancey, 94 Ky. 243; 42 Am. St. Rep. 357; 21 S. W. 1047.

ous.³ The position taken in some states is that a contract giving the attorney a part of the recovery is valid,⁴ unless there is an additional provision that the client shall not be liable in case there is no recovery.⁵ A contract between a litigant and one not an attorney for a contingent recompense in consideration of aid in litigation is valid in some states, if not resorted to as a means of stirring up litigation.⁶ Such contracts are held invalid in other states, however,⁷ and seem less favored than contracts between attorney and client for contingent fees. Thus a contract whereby one injured in a railroad accident employed a doctor to explain his injuries to the company and agreed to pay him in proportion to the amount paid on such claim by the company is void.⁸ At Common Law the king could make or receive assignments of contract rights. The ordinary rules of champerty did not apply to him. At

³ *Brindley v. Brindley*, 121 Ala. 429; 25 So. 751; *Neuman v. Freitas*, 129 Cal. 283; 50 L. R. A. 548; 61 Pac. 907; *McCurdy v. Dillon*, — Mich. —; 98 N. W. 746; *Lynde v. Lynde*, 64 N. J. E. 736; 97 Am. St. Rep. 692; 58 L. R. A. 471; 52 Atl. 694. This class of cases is governed by special considerations.

(a) Such a contract may be invalid as tending to prevent reconciliation. *McCurdy v. Dillon*, — Mich. —; 98 N. W. 746. See *Jordan v. Westerman*, 62 Mich. 170; 4 Am. St. Rep. 836; 28 N. W. 826.

(b) As the woman is still married, she may not be competent to contract. *McCabe v. Britton*, 79 Ind. 224.

(c) If by statute the court may make allowance to her for attorney's fees, such a contract may be a fraud on the court. *McCabe v. Britton*, 79 Ind. 224; *Jordan v. Westerman*, 62 Mich. 170; 4 Am. St. Rep. 836; 28 N. W. 826.

⁴ *Hadlock v. Brooks*, 178 Mass. 425; 59 N. E. 1009; *Scott v. Har-*

mon, 109 Mass. 237; 12 Am. Rep. 685; *Tapley v. Coffin*, 12 Gray (Mass.) 420.

⁵ *Gargano v. Pope*, 184 Mass. 571; 69 N. E. 343; *Lancy v. Havender*, 146 Mass. 615; 16 N. E. 464; *Belding v. Smythe*, 138 Mass. 530; *Ackert v. Barker*, 131 Mass. 436; *Thurston v. Percival*, 1 Pick. (Mass.) 415; *Lathrop v. Bank*, 9 Met. (Mass.) 489; *Call v. Calef*, 13 Met. (Mass.) 362; *Rindge v. Coleraine*, 11 Gray (Mass.) 157; *Butler v. Legro*, 62 N. H. 350; 13 Am. St. Rep. 573.

⁶ *Browne v. Bigné*, 21 Or. 260; 28 Am. St. Rep. 752; 14 L. R. A. 745; 28 Pac. 11.

⁷ *Hutley v. Hutley*, L. R. 8 Q. B. 112; *Wheeler v. Pounds*, 24 Ala. 472; *Gilbert v. Holmes*, 64 Ill. 548; *Munday v. Whissenhurst*, 90 N. Car. 458; *Barnes v. Strong*, 54 N. Car. 100.

⁸ *Thomas v. Caulkett*, 57 Mich. 392; 58 Am. Rep. 369; 24 N. W. 154.

Modern Law this some general principle applies to contracts made by the state. Whatever the validity of a contract to pay contingent fees made by a natural person, a contract made by a state, to pay a contingent to its own agent for claims collected by him is valid.⁹ Thus a contract by a public corporation employing a person to discover property not listed for taxation and agreeing to pay him one per cent. of collections made by reason of his services is valid.¹⁰

§341. Contract for contingent fees and payment of costs.

If the attorney in his contract with his client not only agrees to take a contingent fee but also agrees to pay the costs himself or to indemnify his client against them if unsuccessful, such contract is generally held to be champertous and void.¹ The fact that in case of failure the attorney is to receive a nominal recompense such as one dollar does not prevent such contract from being champertous.² Some authorities, however, treat

⁹ *Shinn v. Cunningham*, 120 Ia. 383; 94 N. W. 941; *Davis v. Commonwealth*, 164 Mass. 241; 30 L. R. A. 743; 41 N. E. 292; Opinion of the Justices, — N. H. —; 54 Atl. 950.

¹⁰ *Shinn v. Cunningham*, 120 Ia. 383; 94 N. W. 941. A similar question was discussed in *Disbrow v. Cass County*, 119 Ia. 538; 93 N. W. 585; but not decided since not properly raised by the pleadings.

¹ *Peck v. Heurich*, 167 U. S. 624; *Peck v. Heurich*, 6 App. D. C. 273; *Johnson v. Van Wyck*, 4 App. D. C. 294; 41 L. R. A. 520; *Taylor v. Hinton*, 66 Ga. 743; *Geer v. Frank*, 179 Ill. 570; 45 L. R. A. 110; 53 N. E. 965; affirming 79 Ill. App. 195 (disapproving *Newkirk v. Cone*, 18 Ill. 449); *Jewel v. Neidy*, 61 Ia. 299; 16 N. W. 141; *Atchison, etc., Ry. v. Johnson*, 29 Kan. 218; *Rust v. Larue*, 4 Litt. (Ky.) 411; 14 Am. Dec. 172; *Lancy v. Havender*,

146 Mass. 615; 16 N. E. 464; *Oma-ha, etc., Ry. v. Brady*, 39 Neb. 27; 57 N. W. 767; *Fowler v. Callan*, 102 N. Y. 395; 7 N. E. 169; *Weakly v. Hall*, 13 Ohio 167; 42 Am. Dec. 194; *Martin v. Clarke*, 8 R. I. 389; 5 Am. Rep. 586; *In re Evans*, 22 Utah 366; 83 Am. St. Rep. 794; 53 L. R. A. 952; 62 Pac. 913; *Nelson v. Evans*, 21 Utah 202; 60 Pac. 557; *Croco v. Ry.*, 18 Utah 311; 44 L. R. A. 285; 54 Pac. 985; *Dockery v. McLellan*, 93 Wis. 381; 67 N. W. 733. A contract of this sort made with one not an attorney is invalid. *Williams v. Fowle*, 132 Mass. 385. So as to a contract with a deputy sheriff to collect notes at his own expense, his sole compensation being one-half of all he collects. *Hamilton v. Gray*, 67 Vt. 233; 48 Am. St. Rep. 811; 31 Atl. 315.

² *Kelly v. Kelly*, 86 Wis. 170; 56 N. W. 637.

such contracts as valid.³ A loan by attorney to client to enable him to pay costs, or an advance of costs by attorney, the client to reimburse him thereafter, does not make the contract champertous.⁴ Thus where A as attorney had rendered services in obtaining a judgment for his client B, it was held a valid contract where B assigned A one half of such judgment for his services, B agreeing to collect the judgment, advance all costs and expenses, and in case of failure A to pay B one half of the costs thus advanced.⁵ The object both of the Common Law rule and the statutes is "to prevent strangers from obtruding themselves into suits and promoting vexatious litigation."⁶ Accordingly a contract to pay the expenses of litigation made by one who has, independent of such contract, an interest in the subject-matter of the litigation is not champertous.⁷ Thus in an action by a taxpayer, for the benefit of himself and other taxpayers, including his attorney a contract by the attorney to protect his client against costs is valid;⁸ and so is a contract whereby creditors agree to bear the costs of an action in their debtor's name to recover property to be subjected to their debts.⁹ If the interest of the attorney is created by the contract whereby he agrees to pay costs, it is champertous.¹⁰ Still assigning half of a judgment recovered, to the attorney, as compensation for services rendered in recovering it and to be ren-

³ *Davis v. Davis*, 89 Fed. 532; *Dunne v. Herrick*, 37 Ill. App. 180; *Fowler v. Callan*, 102 N. Y. 395; 7 N. E. 169.

⁴ *Kutcher v. Love*, 19 Colo. 542; 36 Pac. 152; *Newkirk v. Cone*, 18 Ill. 449; *McDonald v. R. R.*, 29 Ia. 170; *Wallace v. Ry.*, 112 Ia. 565; 84 N. W. 662; *Quint v. Mining Co.*, 4 Nev. 304; *Potter v. Mining Co.*, 22 Utah 273; 61 Pac. 999; *Allard v. Lamirande*, 29 Wis. 502.

⁵ *Reece v. Kyle*, 49 O. S. 475; 16 L. R. A. 723; 31 N. E. 747.

⁶ *Currency Mining Co. v. Bentley*, 10 Colo. App. 271; 50 Pac. 920.

⁷ *Currency Mining Co. v. Bentley*, 10 Colo. App. 271; 50 Pac. 920; *Frost v. Paine*, 12 Me. 111; *Knight v. Sawin*, 6 Me. 361; *Williams v. Fowle*, 132 Mass. 385; *Call v. Calef*, 13 Met. (Mass.) 362; *Campbell v. Jones*, 4 Wend. (N. Y.) 306; *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194; 67 N. W. 38; *Davies v. Stowell*, 78 Wis. 334; 10 L. R. A. 190; 47 N. W. 370.

⁸ *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194; 67 N. W. 38.

⁹ *Aultman v. Waddle*, 40 Kan. 195; 19 Pac. 730.

¹⁰ *Geer v. Frank*, 179 Ill. 570; 45 L. R. A. 110; 53 N. E. 965; affirming 79 Ill. App. 195.

dered in enforcing it, gives him such interest therein that it is not champerty for him to agree to pay one half of the costs.¹¹

§342. Contract transferring control of case to attorney.

If the contract between attorney and client contains a clause forbidding or restricting the client from settling or dismissing the case without the consent of his attorney, the entire contract is champertous and void.¹ Thus a contract whereby A agrees to bring a suit for B at A's cost, A to receive "an amount equal to one-half of whatever sum may be collected," B not to settle the claim without A's consent, and if he does so, B to pay A seventy-five dollars, is invalid.²

§343. Necessity of providing for litigation.

Some courts have laid down the rule that a contract, to be champertous must provide for prosecuting or defending a suit.¹ On this theory contracts for collecting claims from a government, as from the United States,² for a certain part of the amount recovered, have been held not to be champertous.³

¹¹ *Reece v. Kyle*, 49 O. S. 475; 16 L. R. A. 723; 31 N. E. 747.

¹ *Davis v. Webber*, 66 Ark. 190; 74 Am. St. Rep. 81; 45 L. R. A. 196; 49 S. W. 822; *Newman v. Freitas*, 129 Cal. 283; 50 L. R. A. 548; 61 Pac. 907; *North Chicago Street Ry. v. Ackley*, 171 Ill. 100; 44 L. R. A. 177; 49 N. E. 222; reversing 58 Ill. App. 572; *Davis v. Chase*, 159 Ind. 242; 95 Am. St. Rep. 294; 64 N. E. 88, 853; *Huber v. Johnson*, 68 Minn. 74; 64 Am. St. Rep. 456; 70 N. W. 806; *Lewis v. Lewis*, 15 Ohio 715; *Key v. Vattier*, 1 Ohio 132.

² *Huber v. Johnson*, 68 Minn. 74; 64 Am. St. Rep. 456; 70 N. W. 806.

³ *Stotsenburg v. Marks*, 79 Ind. 193; *Burnham v. Heselton*, 84 Me. 578; 24 Atl. 955. *Contra*, that a champertous contract need not provide for bringing a suit. *Hamil-*

ton v. Gray, 67 Vt. 233; 48 Am. St. Rep. 811; 31 Atl. 315. (A contract to collect a claim at the collector's expense for half of what he collected.)

² *Central, etc., Co. v. Pettus*, 113 U. S. 116; *Taylor v. Bemiss*, 110 U. S. 42; *McPherson v. Cox*, 96 U. S. 404; *Wright v. Tebbitts*, 91 U. S. 252; *Trist v. Child*, 21 Wall. (U. S.) 441. Such as contracts to collect claims before the Court of Alabama Claims. *Manning v. Perkins*, 85 Me. 172; 26 Atl. 1015; *Manning v. Sprague*, 148 Mass. 18; 12 Am. St. Rep. 508; 1 L. R. A. 516; 18 N. E. 673.

³ While this theory has been invoked in the cases cited, most of them would not have been champertous had the claim been against a private citizen and had litigation been provided for.

§344. Barratry.

Common barratry is "the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise."¹ A contract whereby A, who has hunted up the claims of a great number of landowners against a railway for failure to fence the right of way, agrees that he will pay the costs of litigating such suits for a part of the recovery, no liability to attach if there is no recovery, is barratrous as well as champertous.² An attorney who knew of A's plan and rendered services in a great number of cases thus obtained by A under A's employment is a party to such unlawful scheme and cannot recover,³ nor can he recover in *quantum meruit*.⁴ A contract by A, an attorney, to pay B a contingent fee out of fees to be paid by X to A if B will induce X to employ A, has been held valid in some cases,⁵ and invalid in others.⁶

§345. Effect of champertous contract.

A champertous contract cannot be enforced by either of the parties thereto.¹ They are thus clearly void, but whether

¹ Black. Com. Bk. IV. 134.

² Gammons v. Johnson, 76 Minn. 76; 78 N. W. 1035.

³ Gammons v. Honerud, 82 Minn. 264; 84 N. W. 911; Gammons v. Gulbranson, 78 Minn. 21; 80 N. W. 779.

⁴ Gammons v. Gulbranson, 78 Minn. 21; 80 N. W. 779.

⁵ Vocke v. Peters, 58 Ill. App. 338. So a contract under which A, an attorney, sends to B, another attorney, a claim of X against Y, that Y shall be forced into bankruptcy, and if A were appointed assignee, he and B would divide commissions and attorneys' fees, is valid. Redick v. Woolworth, 17 Nev. 260; 52 Am. Rep. 410.

⁶ Alpers v. Hunt, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483;

24 Pac. 846. Such contracts are liable not only to the objection of barratry, but to the objection that it may be hiring B to abuse the confidence X reposes in him. See § 406.

¹ Peck v. Heurich, 167 U. S. 624; Johnson v. Van Wyck, 4 App. D. C. 294; 41 L. R. A. 520; Taylor v. Hinton, 66 Ga. 743; Geer v. Frank, 179 Ill. 570; 45 L. R. A. 110; 53 N. E. 965; affirming 79 Ill. App. 195; following Thompson v. Reynolds, 73 Ill. 11; and correcting Newkirk v. Cone, 18 Ill. 449; Jewel v. Neidy, 61 Ia. 299; 16 N. W. 141; Atchison, etc., Ry. v. Johnson, 29 Kan. 218; Rust v. Larue, 4 Litt. (Ky.) 412; 14 Am. Dec. 172; Omaha, etc., Ry. v. Brady, 39 Neb. 27; 57 N. W. 767; Barnes v. Strong, 1 Jones Eq. (N. Car.) 100; Weakly

illegal or not is a question on which the courts are not harmonious. Some courts hold that champertous covenants are not only void, but illegal, and invalidate other covenants in the same contract otherwise unenforceable:² and do not allow an attorney who has rendered services under a champertous contract to recover on a *quantum meruit*.³ Other courts apparently treating such contracts as merely void, allow recovery on a *quantum meruit*.⁴

§346. Right of adversary party to take advantage of champerty.

If A has a claim against B, and A makes a champertous contract with his attorney X with reference to such claim, the question is often raised whether B can use such champertous contract as a defense to A's action against him. The weight of authority is that such champertous contract is no defense as long as A remains the real party in interest, as the action does not tend to enforce the champertous contract.¹ In some states

v. Hall, 13 Ohio 167; 42 Am. Dec. 194; Martin v. Clarke, 8 R. I. 389; 5 Am. Rep. 586; *In re Evans*, 22 Utah 366; 83 Am. St. Rep. 794; 53 L. R. A. 952; 62 Pac. 913; Croco v. Ry., 18 Utah 311; 44 L. R. A. 285; 54 Pac. 985; Hamilton v. Gray, 67 Vt. 233; 48 Am. St. Rep. 811; 31 Atl. 315.

² Geer v. Frank, 179 Ill. 570; 45 L. R. A. 110; 53 N. E. 965; *affirming* 79 Ill. App. 195; Davis v. Chase, 159 Ind. 242; 64 N. E. 88.

³ Ackert v. Barker, 131 Mass. 436; Jordan v. Westerman, 62 Mich. 170; 4 Am. St. Rep. 836; 28 N. W. 826; Butler v. Legro, 62 N. H. 350; 13 Am. St. Rep. 573.

⁴ Goodman v. Walker, 30 Ala. 500; 68 Am. Dec. 134; Davis v. Webber, 66 Ark. 190; 74 Am. St. Rep. 81; 45 L. R. A. 196; 49 S. W. 822; Rust v. Larue, 4 Litt. (Ky.) 412; 14 Am. Dec. 172; Stearns v. Felker, 28 Wis. 594.

¹ Elborough v. Ayers, L. R. 10 Eq. 367; Hilton v. Woods, L. R. 4 Eq. 432; Burnes v. Scott, 117 U. S. 582; Boone v. Chiles, 10 Pet. (U. S.) 177; Courtright v. Burnes, 13 Fed. 317; Sibley v. Alba, 95 Ala. 191; 10 So. 831; Missouri Pacific Ry. v. Smith, 60 Ark. 221; 29 S. W. 752; Walsh v. Allen, 6 Colo. App. 303; 40 Pac. 473; Ellis v. Smith, 112 Ga. 480; 37 S. E. 739; Reed v. Janes, 84 Ga. 380; 11 S. E. 401; Boone v. Clark, 129 Ill. 466; 5 L. R. A. 276; 21 N. E. 850; Zeigler v. Mize, 132 Ind. 403; 31 N. E. 945; Cleveland, etc., Ry. v. Davis, 10 Ind. App. 342; 36 N. E. 778; rehearing denied, 37 N. E. 1069; Lacey v. Davis, — Ia. —; 98 N. W. 366; Hyatt v. Ry., 68 Ia. 662; 27 N. W. 815; Small v. R. R., 55 Ia. 582; 8 N. W. 437; Allison v. R. R., 42 Ia. 274; Atchison, etc., Ry. v. Johnson, 29 Kan. 218; Hall v. Deaton, (Ky.), 68 S. W. 672; Akers v.

B may have A's action dismissed on showing the existence of the champertous contract.² If, however, the champertous contract between A and X, the attorney, is such that A, though the nominal plaintiff, is not the real party in interest, his interest being assigned to X, B may interpose this as a defense, not properly on account of the champerty, but because the action must be brought by, and in the name of, the real party in interest.³ So if X, the attorney, sues in his own name on A's cause of action which has not been actually assigned to X, B may interpose this fact as a defense as the action is not brought by the real party in interest.⁴

If A has a champertous contract with X whereby A in consideration of X's aiding him in recovering a claim from B, agrees by a champertous contract to give A a part of the proceeds,⁵ and B has knowledge thereof, it has been held that B may ignore such champertous contract and settle with A regardless of X's claim.⁶ A contrary opinion, however, has been entertained.⁷ Where in settling with A, B agrees to pay A's attorney fee, B cannot thereafter object that A had a champertous contract with his attorney.⁸

Martin, 110 Ky. 335; 61 S. W. 465; Wehmhoff v. Rutherford, 98 Ky. 91; 32 S. W. 288; Gilkeson Sloss Commission Co. v. Bond, 44 La. Ann. 841; 11 So. 220; Euneau v. Rieger, 105 Mo. 659; 16 S. W. 854; Pike v. Martindale, 91 Mo. 268; 1 S. W. 858; Chamberlain v. Grimes, 42 Neb. 701; 60 N. W. 948; Omaha, etc., Ry. v. Brady, 39 Neb. 27; 57 N. W. 767; Connecticut, etc., Ins. Co. v. Way, 62 N. H. 622; Pennsylvania Co. v. Lombardo, 49 O. S. 1; 14 L. R. A. 785; 29 N. E. 573; Key v. Snow. 90 Tenn. 663; 18 S. W. 251; Potter v. Mining Co., 22 Utah 273; 61 Pac. 999; Croco v. Ry., 18 Utah 311; 44 L. R. A. 285; 54 Pac. 985; Davis v. Settle, 43 W. Va. 17; 26 S. E. 557.

² Greeman v. Cohee, 61 Ind. 201; Kelly v. Kelly, 86 Wis. 170; 56 N. W. 637; Barker v. Barker, 14 Wis. 131. So under statute. Weedon v. Wallace, Meigs (Tenn.) 286; Vincent v. Ashley, 5 Humph. (Tenn.) 593; Webb v. Armstrong, 5 Humph. (Tenn.) 379.

³ Stewart v. Welch, 41 O. S. 483.

⁴ Brown v. Ginn, 66 O. S. 316; 64 N. E. 123.

⁵ This does not mean that merely giving part of the proceeds is of itself champerty. See § 340.

⁶ Atchison, etc., Ry. v. Johnson, 29 Kan. 218.

⁷ Ross v. Ry., 55 Ia. 691; 8 N. W. 644.

⁸ Hyatt v. Ry., 68 Ia. 662; 27 N. W. 815.

CHAPTER XVII.

CONTRACTS WAIVING RIGHTS.

§347. Contract renouncing in advance right to invoke redress at law.

The law does not allow parties to make contracts whereby they bargain away in advance the right to resort to the courts for the protection of their rights and the determination of their liabilities.¹ Thus a clause in a contract that a suit thereon may be brought only in the United States Circuit Court,² or only in a certain county in the state,³ or that no action thereon shall be brought in the United States courts or removed to such

¹ The *Excelsior*, 123 U. S. 40; *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445 (reversing 30 Wis. 496; 11 Am. Rep. 580); *Supreme Council v. Garrigus*, 104 Ind. 133; 54 Am. Rep. 298; 3 N. E. 818; *Ison v. Wright*, 21 Ky. Law Rep. 1368; 55 S. W. 202; *Jones v. Brown*, 171 Mass. 318; 50 N. E. 648; *Hall v. Ins. Co.*, 6 Gray (Mass.) 185; *Murney v. Ins. Co.*, 63 Mich. 633; 6 Am. St. Rep. 338; 30 N. W. 350; *Reichard v. Ins. Co.*, 31 Mo. 518; *Home Fire Ins. Co. v. Kennedy*, 47 Neb. 138; 53 Am. St. Rep. 521; 66 N. W. 278; *Seward v. Rochester*, 109 N. Y. 164; 16 N. E. 348; *Myers v. Jenkins*, 63 O. S. 101; 81 Am. St. Rep. 613; 57 N. E. 1089; *B. & O. R. R. v. Stankard*, 56 O. S. 224; 60 Am. St. Rep. 745; 49 L. R. A. 381; 46 N. E. 577; *Savage v. Savings Association*, 45 W. Va. 275; 31 S. E. 991. "The whole state has an interest in all its inhabitants

and it is to its interest that the rights of all should be protected and enforced according to the course of jurisprudence it has provided; and for that reason its courts are always open for the redress of wrongs, and no person can by contract in advance deprive himself of the right to appeal to them." *Myers v. Jenkins*, 63 O. S. 101, 120; 81 Am. St. Rep. 613; 57 N. E. 1089.

² *Mutual Reserve Fund Life Association v. Woolen Mills*, 82 Fed. 508; 27 C. C. A. 212. (Citing *Nute v. Ins. Co.*, 6 Gray 174; *Amesbury v. Ins. Co.*, 6 Gray 596; *Reichard v. Ins. Co.*, 31 Mo. 518; *Indiana Mut. F. Ins. Co. v. Routledge*, 7 Ind. 25; *Scott v. Avery*, 5 H. L. Cas. 811.)

³ *Savage v. Savings Association*, 45 W. Va. 275; 31 S. E. 991. (Citing *Nute v. Ins. Co.*, 6 Gray 174; *Hall v. F. Ins. Co.*, 6 Gray 185; *Reichard v. Ins. Co.*, 31 Mo. 518.)

court,⁴ is invalid. A state may, however, revoke the license of a foreign corporation for exercising its right of removal to the United States courts.⁵ However, a contract executed in Italy between a citizen of Italy and citizens of New York, to be performed, partly in Italy and partly in the United States, and containing a provision that any dispute arising thereunder should be determined only by "the civil authorities of Florence, Italy," was held to be valid as to such provision.⁶ A clause in a Lloyd's policy of insurance that no action should be brought thereon except against the general manager as attorney in fact, and that all the underwriters would abide the result of such action as fixing their individual liabilities, has been held valid.⁷ A contract not to appeal a cause is held to prevent the appellate court from hearing such cause;⁸ but such contract is construed very strictly, and a contract not to appeal does not preclude a writ of error.⁹ Such promise is at any rate invalid without a consideration.¹⁰ Contracts made in advance to waive error have been held valid,¹¹ as a clause in a lease,¹² or in a cognovit note,¹³ waiving error.

§348. Contracts in advance for arbitration of entire subject-matter.

A provision in a contract that the entire subject-matter of disputes thereunder shall be submitted to arbitration cannot

⁴ Home Ins. Co. v. Morse, 20 Wall. (U. S.) 445 (reversing 30 Wis. 496; 11 Am. Rep. 580); Barron v. Burnside, 121 U. S. 186.

⁵ Doyle v. Ins. Co., 94 U. S. 535.

⁶ Mittenthal v. Mascagni, 183 Mass. 19; 97 Am. St. Rep. 404; 60 L. R. A. 812; 66 N. E. 425.

⁷ Gilchrist v. Transportation Co., 21 Ohio C. C. 19; 11 Ohio C. D. 350.

⁸ Stedeker v. Bernard, 93 N. Y. 589; Hostetter's Appeal, 92 Pa. St. 132. A waiver of the right of appeal, inserted in a lease, was held valid in Strojny v. Merofchinski, 9 Kulp. (Pa.) 444. *Contra*, Mul-

drow v. Norris, 2 Cal. 74; 56 Am. Dec. 313; Fahs v. Darling, 82 Ill. 142.

⁹ Putnam v. Churchill, 4 Mass. 516.

¹⁰ Southern Ry. Co. v. Glenn, 98 Va. 309; 36 S. E. 395.

¹¹ McCafferty v. Celluloid Co., 104 Fed. 305; 43 C. C. A. 540.

¹² Groll v. Gegenheimer, 147 Pa. St. 162; 23 Atl. 440.

¹³ Boyles v. Chytraus, 175 Ill. 370; 51 N. E. 563 (affirming 66 Ill. App. 592); Krickow v. Mfg. Co., 87 Ill. App. 653; Caruthers v. Niblack, 73 Ill. App. 197.

be interposed as a defense to an action on the contract.¹ So a clause in an insurance contract providing that the decision of a tribunal of the insuring corporation shall be final as to all questions arising thereunder is invalid and does not preclude a resort to the courts on such contract.² So provisions in the charter and by-laws of a corporation that all disputes between it and its stockholders shall be submitted to arbitration are void.³ So an agreement to leave all disputes under a building

¹The *Excelsior*, 123 U. S. 40; *Mitchell v. Dougherty*, 90 Fed. 639; 33 C. C. A. 205; *Supreme Council v. Garrigus*, 104 Ind. 133; 54 Am. Rep. 298; 3 N. E. 818; *Hartford Fire Ins. Co. v. Bourbon County Court*, 72 S. W. 739; *Ison v. Wright*, (Ky.), 55 S. W. 202; *Jones v. Brown*, 171 Mass. 318; 50 N. E. 648; *Miles v. Schmidt*, 168 Mass. 339; 47 N. E. 115; *White v. R. R.*, 135 Mass. 216; *Vass v. Wales*, 129 Mass. 38; *Pearl v. Harris*, 121 Mass. 390; *Phoenix Ins. Co. v. Zlotky*, — Neb. —; 92 N. W. 736; *Hartford Fire Ins. Co. v. Hon*, — Neb. —; 60 L. R. A. 436; 92 N. W. 746; *Home Fire Ins. Co. v. Kennedy*, 47 Neb. 138; 66 N. W. 278; *March v. Ry.*, 40 N. H. 548; 77 Am. Dec. 732; *Seward v. Rochester*, 109 N. Y. 164; 16 N. E. 348; *Haggart v. Morgan*, 5 N. Y. 422; 55 Am. Dec. 350; *Pittsburgh, etc., Ry. v. Garrett*, 50 O. S. 405; 34 N. E. 493; *Needy v. Ins. Co.*, 197 Pa. St. 460; 47 Atl. 739; *Mentz v. Ins. Co.*, 79 Pa. St. 478; 21 Am. Rep. 80; *Gray v. Wilson*, 4 Watts (Pa.) 39. In *Miles v. Schmidt*, 168 Mass. 339; 47 N. E. 115, the court said: "Perhaps if the question were a new one no objection would be found to permitting the parties to select their own tribunals for the settlement of civil controversies even though the result might be to oust the courts of jurisdiction in such cases. But the

law is settled otherwise in this state." Similar views were expressed in *Condon v. Ry.*, 14 Gratt. (Va.) 302, where the principle was held established but not to be extended. There is some authority for holding that an action will lie on the covenant to arbitrate, for at least nominal damages. *Nute v. Ins. Co.*, 6 Gray (Mass.) 182; *Haggart v. Morgan*, 5 N. Y. 422; 55 Am. Dec. 350. *Contra*, *Munson v. Straits of Dover S. S. Co.*, 99 Fed. 787.

²*Supreme Council, etc., v. For-singer*, 125 Ind. 52; 21 Am. St. Rep. 196; 9 L. R. A. 501; 25 N. E. 129; *Bauer v. Sampson Lodge*, 102 Ind. 262; 1 N. E. 571; *Stephenson v. Ins. Co.*, 54 Me. 55; *Reed v. Ins. Co.*, 138 Mass. 572; *Whitney v. Accident Association*, 52 Minn. 378; 54 N. W. 184; *Randall v. Ins. Co.*, 10 Mont. 340; 24 Am. St. Rep. 50; 25 Pac. 953; *German-American Ins. Co. v. Etherton*, 25 Neb. 505; 41 N. W. 406; *Myers v. Jenkins*, 63 O. S. 101; 81 Am. St. Rep. 613; 57 N. E. 1089; *B. & O. R. R. v. Starkard*, 56 O. S. 224; 60 Am. St. Rep. 745; 49 L. R. A. 381; 46 N. E. 577; *Mentz v. Ins. Co.*, 79 Pa. St. 478; 21 Am. Rep. 80.

³*State v. Timber Co.*, 106 La. 621; 87 Am. St. Rep. 309; 31 So. 172; *Pepin v. Societè St. Jean Baptiste*, 23 R. I. 81; 91 Am. St. Rep. 620; 49 Atl. 387; *Daniher v. Grand Lodge*, 10 Utah 110; 37 Pac. 245.

contract to the determination of the architect is not valid.⁴

An exception to the general rule in many jurisdictions exists in the case of voluntary beneficial associations. In voluntary unincorporated benevolent associations it is held that contracts whereby the amount and even the existence of any claim of a member against the order is left solely with the tribunals of such order are valid;⁵ and so with the mutual fire insurance companies.⁶

§349. Contracts for arbitration of particular fact, or as condition precedent.

No reasons of public policy prevent parties from agreeing on a means of having some fact in dispute determined by an agent of both parties as a condition precedent to litigation.¹ Thus a clause in an insurance policy providing that the amount of

⁴ *Hurst v. Litchfield*, 39 N. Y. 377.

⁵ *Rood v. Association*, 31 Fed. 62; *Robinson v. Templar Lodge*, 117 Cal. 370; 59 Am. St. Rep. 193; 49 Pac. 170; *Hembeau v. Knights of Macca-bees*, 101 Mich. 161; 45 Am. St. Rep. 400; 49 L. R. A. 592; 59 N. W. 417; *Canfield v. Knights of Macca-bees*, 87 Mich. 626; 24 Am. St. Rep. 186; 13 L. R. A. 625; 49 N. W. 875; *Van Poucke v. Society*, 63 Mich. 378; 29 N. W. 863. Such provision is merely declaratory of the Common Law, since otherwise claimant in suing would be both plaintiff and defendant. *Perry v. Cobb*, 88 Me. 435; 49 L. R. A. 389; 34 Atl. 278. *Contra*, *Supreme Council v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196; 9 L. R. A. 501; 25 N. E. 129; *Myers v. Jenkins*, 63 O. S. 101; 81 Am. St. Rep. 613; 57 N. E. 1089; *Pepin v. Societé St. Jean Baptiste*, 23 R. I. 81; 91 Am. St. Rep. 620; 49 Atl. 387; *Fox v. Accident Association*, 96 Wis. 390;

71 N. W. 363. So in *Mullen v. Order of Foresters*, 70 N. H. 327; 47 Atl. 257; it seems to be held that after appeal is exhausted the beneficiary may appeal to the courts.

⁶ *Raymond v. Ins. Co.*, 114 Mich. 386; 72 N. W. 254.

¹ *Scott v. Avery*, 5 H. L. Cas. 811; *Hamilton v. Ins. Co.*, 136 U. S. 242; *Mundy v. Ry.*, 67 Fed. 633; 14 C. C. A. 583; *Hall v. Ins. Co.*, 57 Conn. 105; 17 Atl. 356; *Hutchinson v. Ins. Co.*, 153 Mass. 143; 10 L. R. A. 558; 26 N. E. 439; *Wood v. Humphrey*, 114 Mass. 185; *Wolff v. Ins. Co.*, 50 N. J. L. 453; 14 Atl. 561; *Delaware & Hudson Canal Co. v. Coal Co.*, 50 N. Y. 250; *Kane v. Stone Co.*, 39 O. S. 1; *Mansfield, etc., Ry. v. Veeder*, 17 Ohio 385; *Easton v. Canal Co.*, 13 Ohio 79; *North Lebanon Ry. v. McGrann*, 33 Pa. St. 530; 75 Am. Dec. 624; *Faunce v. Burke*, 16 Pa. St. 469; 55 Am. Dec. 519. *Contra*, that such covenants are unenforceable,

the loss shall be fixed by arbitration,² or that resort to the tribunals of the insuring company must be had as a condition precedent to litigation,³ or that the claimant must exhaust all means of appeal provided by his contract,⁴ is valid. A provision that the decision of the tribunal of the first resort shall be final until reversed, requires appeal as provided for in the by-laws before resorting to the courts.⁵ Under this holding, a local body which has promised to pay the benefits in proper cases, may escape all liability by finding that claimant is not entitled to benefits and giving claimant such transcript of the proceedings as is necessary to enable him to appeal; although by refusal of the higher officers of the order to entertain the

even if to arbitrate the amount of the loss. *Schrandt v. Young*, 62 Neb. 254; 86 N. W. 1085. That such provision may be revoked even after loss, and suit is such a revocation. *Needy v. Ins. Co.*, 197 Pa. St. 460; 47 Atl. 739.

²*Hamilton v. Ins. Co.*, 136 U. S. 242; *Carroll v. Ins. Co.*, 72 Cal. 297; 13 Pac. 863; *Adams v. Ins. Co.*, 70 Cal. 198; 11 Pac. 627; *Old Saucelito, etc., Co. v. Assurance Co.*, 66 Cal. 253; 5 Pac. 232; *Southern Mutual Ins. Co. v. Turnley*, 100 Ga. 296; 27 S. E. 975; *George Dee & Sons Co. v. Ins. Co.*, 104 Ia. 167; 73 N. W. 594; *Zalesky v. Ins. Co.*, 102 Ia. 613; 71 N. W. 566; *Caledonia Ins. Co. v. Traub*, 83 Md. 524; 35 Atl. 13; *Lamson, etc., Co. v. Ins. Co.*, 171 Mass. 433; 50 N. E. 943; *Hutchinson v. Ins. Co.*, 153 Mass. 143; 10 L. R. A. 558; 26 N. E. 439; *Perry v. Cobb*, 88 Me. 435; 49 L. R. A. 389; 34 Atl. 278; *Chipewa Lumber Co. v. Ins. Co.*, 80 Mich. 116; 44 N. W. 1055; *Hamburg v. Ins. Co.*, 68 Minn. 335; 71 N. W. 388; *Mosness v. Ins. Co.*, 50 Minn. 341; 52 N. W. 932; *Gasser v. Sun Fire Office*, 42 Minn. 315; 44

N. W. 252; *Wolff v. Ins. Co.*, 50 N. J. L. 453; 14 Atl. 561; *Pioneer Mfg. Co. v. Assurance Co.*, 106 N. Car. 28; 10 S. E. 1057; *Phoenix Ins. Co. v. Carnahan*, 63 O. S. 258; 58 N. E. 805; *Scottish, etc., Ins. Co. v. Clancy*, 71 Tex. 5; 8 S. W. 630; *Montgomery v. Ins. Co.*, 108 Wis. 146; 84 N. W. 175; *Chapman v. Ins. Co.*, 89 Wis. 572; 28 L. R. A. 405; 62 N. W. 422.

³*Harrington v. Workingmen's Benevolent Association*, 70 Ga. 340; *Supreme Council, etc., v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196; 9 L. R. A. 501; 25 N. E. 129; *Bauer v. Sampson Lodge*, 102 Ind. 262; 1 N. E. 571; *Jeane v. Grand Lodge, etc.*, 86 Me. 434; 30 Atl. 70; *Cotter v. Grand Lodge, etc.*, 23 Mont. 82; 57 Pac. 650; *Levy v. Iron Hall*, 67 N. H. 593; 38 Atl. 18; *Myers v. Jenkins*, 63 O. S. 101; 81 Am. St. Rep. 613; 57 N. E. 1089.

⁴*Myers v. Jenkins*, 63 O. S. 101; 81 Am. St. Rep. 613; 57 N. E. 1089.

⁵*Levy v. Magnolia Lodge*, 110 Cal. 297; 42 Pac. 887; *Supreme Council v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196; 9 L. R. A. 501; 25 N. E. 129.

appeal, it fails other than on its merits.⁶ It seems to be held that if claimant is given a hearing on the merits of his case, and is allowed appeal in due form and ultimately fails on the merits before the tribunals of the order, he cannot invoke the jurisdiction of the courts of law.⁷

So a clause in a building contract providing that questions as to the change in the contract price due to alterations,⁸ or as to the amount of work done,⁹ and as to the performance of the contract¹⁰ shall be left to the determination of the engineer or architect is valid. Such contracts, cannot leave the decision to the arbitrary or fraudulent decision of such architect, engineer and the like. If he refuses to give his certificate without just cause, recovery may be had, notwithstanding its absence.¹¹ Yet it seems that if the contract provides that his certificate shall be conclusive even on the question of the architect's good faith, such provision is valid.¹²

A covenant in a contract that the decision of one of the parties thereto as to the sufficiency of performance shall be conclusive, is valid.¹³ So a contract between a railway and its surgeon that the amount of his fees shall ultimately be determined by the chief surgeon and other officials,¹⁴ or between landlord and

⁶ *Myers v. Jenkins*, 63 O. S. 101; 81 Am. St. Rep. 613; 57 N. E. 1089.

⁷ *Myers v. Jenkins*, 63 O. S. 101; 81 Am. St. Rep. 613; 57 N. E. 1089.

⁸ *Seim v. Krause*, 13 S. D. 530; 83 N. W. 583. (Even under a statute making void "every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals.")

⁹ *National Contracting Co. v. Power Co.*, 170 N. Y. 439; 63 N. E. 450.

¹⁰ *Tullis v. Jacson* (1892), 3 Ch. 441; *Hot Springs, etc., Co. v. Maker*, 48 Ark. 522; 3 S. W. 639; *Stose v. Heissler*, 120 Ill. 433; 60 Am. Rep. 563; 11 N. E. 161; *Han-*

ley v. Walker, 79 Mich. 607; 8 L. R. A. 207; 45 N. W. 57; *Williams v. Ry.*, 112 Mo. 463; 34 Am. St. Rep. 403; 20 S. W. 631; *Chism v. Schipper*, 51 N. J. L. 1; 14 Am. St. Rep. 668; 2 L. R. A. 544; 16 Atl. 316; *Wangler v. Smith*, 90 N. Y. 38; *O'Reilly v. Kearnes*, 52 Pa. St. 214; *Boettler v. Tendrick*, 73 Tex. 488; 5 L. R. A. 270; 11 S. W. 497; *Tetz v. Butterfield*, 54 Wis. 242; 11 N. W. 531.

¹¹ See § 1467.

¹² *Tullis v. Jacson* (1892), 3 Ch. 441.

¹³ *Electric Lighting Co. v. Elder*, 115 Ala. 138; 21 So. 983. See § 1390.

¹⁴ *Union Pacific Ry. v. Anderson*, 11 Colo. 293; 18 Pac. 24.

tenant for determining the value of tenant's improvements by arbitration,¹⁵ or between adjoining lot owners to arbitrate trespasses of cattle,¹⁶ are valid. Even in cases where some particular fact is to be decided by some specified person, many jurisdictions hold that if such fact is one which really involves the question at issue between the parties, they may make the decision of the third party valid *prima facie* but not conclusively.¹⁷ Thus the engineer's estimate may be made by contract *prima facie* correct, but not conclusive;¹⁸ and so may his construction of the contract.¹⁹ So an agreement between an employee and the guaranty insurance company which insures his employer against loss that a voucher or other evidence of payment by the insurer to the employer shall be conclusive against such employee as to the fact and extent of his liability to the company, is invalid; though such voucher might by such contract be made *prima facie* evidence.²⁰

§350. Contracts in the nature of compromise and arbitration contracts.

Where there is no attempt to bargain away rights in advance, but the parties are attempting to adjust by mutual agreement the rights and liabilities arising out of a subsisting invasion of a legal right, such contract is upheld if otherwise valid.¹

¹⁵ Hood v. Hartshorn, 100 Mass. 117; 1 Am. Rep. 89.

¹⁶ Berry v. Carter, 19 Kan. 135.

¹⁷ Baltimore, etc., Ry. v. Scholes, 14 Ind. App. 524; 56 Am. St. Rep. 307; 43 N. E. 156; Fidelity, etc., Co. v. Crays, 76 Minn. 450; 79 N. W. 531; Wortman v. Ry., 22 Mont. 266; 56 Pac. 316.

¹⁸ Baltimore, etc., Ry. v. Scholes, 14 Ind. App. 524; 56 Am. St. Rep. 307; 43 N. E. 156.

¹⁹ Wortman v. Ry., 22 Mont. 266; 56 Pac. 316.

²⁰ Fidelity, etc., Co. v. Crays, 76 Minn. 450; 79 N. W. 531; Fidelity, etc., Co. v. Eickhoff, 63 Minn. 170;

56 Am. St. Rep. 464; 30 L. R. A. 586; 65 N. W. 351.

¹ Northern Liberty Market Co. v. Kelly, 113 U. S. 199; McClure v. McClure, 100 Cal. 339; 34 Pac. 822; Wood v. Bangs, 2 Penn. (Del.) 435; 48 Atl. 189; Bement v. May, 135 Ind. 664; 34 N. E. 327; 35 N. E. 387; Heffelfinger v. Hummel, 90 Ia. 311; 57 N. W. 872; Fain v. Turner, 96 Ky. 634; 29 S. W. 628; Mills v. Lee, 6 T. B. Mon. (Ky.) 91; 17 Am. Dec. 118; Gloucester, etc., Co. v. Cement Co., 154 Mass. 92; 26 Am. St. Rep. 214; 12 L. R. A. 563; 27 N. E. 1005; Green v. Lancaster Co., 61 Neb. 473; 85 N. W. 439; Treat

Thus a contract not to contest the validity of a patent,² or to arbitrate questions of alimony and the custody and maintenance of the children,³ are valid. But a contract to arbitrate an existing right of action has some peculiarities which may here be briefly noted. A submission may be revoked before the award is published,⁴ even if the individual opinions of the arbitrators are known,⁵ unless by statute,⁶ or made a rule of court.⁷ So death revokes submission prior to the award,⁸ except where it is made a rule of court.⁹ A written submission cannot be revoked orally.¹⁰ So a submission under seal cannot be revoked orally.¹¹ If supported by a further consideration than the mutual promises to arbitrate it may be irrevocable. Thus where an action had been dismissed, costs paid, and testimony before the arbitrators transcribed, the submission cannot be revoked when the evidence is almost all in.¹² A deposit to secure payment of an award is forfeited by revocation of the submission and may be applied to the costs and expenses incurred by the adversary party.¹³ After the award is

v. Price, 47 Neb. 875; 66 N. W. 834; Baird v. Baird, 145 N. Y. 659; 28 L. R. A. 375; 40 N. E. 222; Wittowsky v. Baruch, 127 N. Car. 313; 37 S. E. 449; Continental National Bank v. McGeoch, 92 Wis. 286; 66 N. W. 606; See § 321.

² Philadelphia, etc., Co. v. Davis, etc., Co., 77 Fed. 879; Dunham v. Bent, 72 Fed. 60.

³ Masterson v. Masterson, 22 Ky. L. Rep. 1193; 60 S. W. 301.

⁴ Fooks v. Lawson, 1 Marv. (Del.) 115; 40 Atl. 661; Harrison v. Ins. Co., 112 Ia. 77; 83 N. W. 820; Minneapolis, etc., Ry. v. Cooper, 59 Minn. 290; 61 N. W. 143; Sartwell v. Sowles, 72 Vt. 270; 82 Am. St. Rep. 943; 48 Atl. 11; Rison v. Moon, 91 Va. 384; 22 S. E. 165.

⁵ Butler v. Greene, 49 Neb. 280; 68 N. W. 496.

⁶ Harrison v. Ins. Co., 112 Ia. 77; 83 N. W. 820.

⁷ Zehner v. Lehigh, etc., Co., 187 Pa. St. 487; 67 Am. St. Rep. 586; 41 Atl. 464; Riley v. Jarvis, 43 W. Va. 43; 26 S. E. 366.

⁸ Gregory v. Trust Co., 36 Fed. 408; Gregory v. Pike, 94 Me. 27; 46 Atl. 793; Farmer v. Frey, 4 McCord (S. C.) 160. *Contra*, Ins. Co. v. Coit, 12 Ind. App. 161; 39 N. E. 766.

⁹ Freeborn v. Denman, 8 N. J. L. 116; Moore v. Webb, 6 Heisk. (Tenn.) 301; Wheatley v. Martin, 6 Leigh (Va.) 62.

¹⁰ Mand v. Patterson, 19 Ind. App. 619; 49 N. E. 974; Brown v. Leavitt, 26 Me. 251; Mullins v. Arnold, 4 Sneed (Tenn.) 262; McFarlane v. Cushman, 21 Wis. 401.

¹¹ Wallis v. Carpenter, 13 All. (Mass.) 19.

¹² McCune v. Lytle, 197 Pa. St. 404; 47 Atl. 190.

¹³ Union Ins. Co. v. Trust Co., 157

published the agreement to submit cannot be revoked.¹⁴

§351. Contracts concerning jurisdiction.

Jurisdiction over a given subject-matter cannot be created by contract.¹ Thus a contract for trying an action at law in a court of equity,² or to allow a probate court to pass on the accounts of a guardian appointed by another state,³ or to convert a maritime lien, within the jurisdiction of the Federal courts alone, into a lien cognizable by the state courts,⁴ or to make valid a judgment rendered when the court is not legally in session,⁵ are all invalid and ineffectual to confer jurisdiction.

So no contract between the parties can give an appellate court jurisdiction over a cause of which it has no jurisdiction independent of such contract;⁶ as an agreement to waive an

N. Y. 633; 44 L. R. A. 227; 52 N. E. 671.

¹⁴Connecticut Fire Ins. Co. v. O'Fallon, 49 Neb. 740; 69 N. W. 118; Hewitt v. Ry., 57 N. J. Eq. 511; 42 Atl. 325.

¹Home Ins. Co. v. Morse, 20 Wall. (U. S.) 445; Olds Wagon Works v. Benedict, 67 Fed. 1; Scatcherd Lumber Co. v. Rike, 113 Ala. 555; 59 Am. St. Rep. 147; 21 So. 136; Feillett v. Engler, 8 Cal. 76; Whipple v. Stevenson, 25 Colo. 447; 55 Pac. 188; McKinnon v. Hall, 10 Colo. App. 291; 50 Pac. 1052; O'Brien v. Harris, 105 Ga. 732; 31 S. E. 745; Parsons v. Millar, 189 Ill. 107; 59 N. E. 606; Biegler v. Trust Co., 164 Ill. 197; 45 N. E. 512; Robertson v. Wheeler, 162 Ill. 566; 44 N. E. 870; Smith v. Myers, 109 Ind. 1; 58 Am. Rep. 375; 9 N. E. 692; Doctor v. Hartman, 74 Ind. 221; Banks v. Fowler, 3 Litt. (Ky.) 332; Hadaway v. Hynson, 89 Md. 305; 43 Atl. 806; Rochepot Bank v. Doak, 75 Mo. App. 332; Seeser v. Southwick, 66

Mo. App. 667; Crawford Co. v. Hathaway, 61 Neb. 317; 85 N. W. 303; denying rehearing, 84 N. W. 271; Armstrong v. Mayer, 60 Neb. 423; 83 N. W. 401; Anderson v. Story, 53 Neb. 259; 73 N. W. 735; Batchelder v. Currier, 45 N. H. 460; Collins, v. Keller, 58 N. J. L. 429; 34 Atl. 753; Wheelock v. Lee, 74 N. Y. 495; McCleary v. McLain, 2 O. S. 368; Gilliland v. Sellers, 2 O. S. 223; Torbet v. Coffin, 6 Ohio 33; Baker v. Mitchell, 105 Tenn. 610; 59 S. W. 137; Sanders v. Pierce, 68 Vt. 468; 35 Atl. 377; Yates v. County Court, 47 W. Va. 376; 35 S. E. 24.

²Fitts v. Shaw, 22 R. I. 17; 46 Atl. 42.

³Anderson v. Story, 53 Neb. 259; 73 N. W. 735.

⁴Scatcherd Lumber Co. v. Rike, 113 Ala. 555; 59 Am. St. Rep. 147; 21 So. 136.

⁵American Fire Ins. Co. v. Pappe, 4 Okla. 110; 43 Pac. 1085.

⁶Mills v. Brown, 16 Pet. (U. S.) 525; Shipman v. Coal Exchange, 70

order granting an appeal,⁷ or to waive notice of appeal;⁸ or to waive filing a transcript of the judgment of the lower court;⁹ or to appeal where the lower court has not entered final judgment;¹⁰ or to agree to an appeal after the time fixed by statute;¹¹ or to change the case presented by the record;¹² or to give the Supreme Court power to review a question of fact, conclusively determined by the finding of the lower court.¹³ So a contract that a demurrer to the original declaration which was overruled, shall stand overruled as to the amended declaration gives the Supreme Court no jurisdiction to pass on such demurrer.¹⁴ So the parties cannot consent to having a judge act, who is personally disqualified by the Constitution and the statute to take part in the decision.¹⁵

Jurisdiction of the person of the parties may, on the other

Fed. 652; 17 C. C. A. 313; *Smith v. Smith*, 24 Colo. 113; 48 Pac. 811; *Arapahoe County v. McIntire*, 23 Colo. 137; 46 Pac. 638; *Richards v. Ry.*, 124 Ill. 516; 16 N. E. 909; *Tucker v. Sellers*, 130 Ind. 514; 30 N. E. 531; *Hartzell v. Magee*, 60 Kan. 646; 57 Pac. 502; *Hendrick v. Lumber Co.*, 113 Mich. 52; 71 N. W. 483; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *Parker v. Zeisler*, 139 Mo. 298; 40 S. W. 881; *Luther v. Brown*, 132 Mo. 70; 33 S. W. 442; *Wasson v. Heffner*, 13 O. S. 573; *In re Ry. Co.*, 103 Wis. 191; 78 N. W. 753; *Hyde v. Bank*, 96 Wis. 406; 71 N. W. 659.

⁷ *Gagneaux v. Desonier*, 104 La. 648; 29 So. 282.

⁸ *State Savings Bank v. Ratcliffe*, 111 Ia. 662; 82 N. W. 1011; *Sawtelle v. Weymouth*, 14 Wash. 21; 43 Pac. 1101.

⁹ *Harris v. People*, 148 Ill. 96; 35 N. E. 756; *Moore v. People*, 148 Ill. 48; 35 N. E. 755.

¹⁰ *Hession v. Wilmington*, 2 Marv. (Del.) 1; 42 Atl. 422.

¹¹ Implied consent from voluntary appearance does not confer ju-

risdiction. *Mitts v. Smith*, 61 Kan. 861; 60 Pac. 822; *Hartzell v. Magee*, 60 Kan. 646; 57 Pac. 502; *King v. Penn*, 43 O. S. 57; 1 N. E. 84; *Kenyon v. Probate Ct.*, 17 R. I. 652; 24 Atl. 149. Nor does written agreement. *Flory v. Wilson*, 83 Ind. 391; *Hartzell v. Magee*, 60 Kan. 646; 57 Pac. 502; *Higgins v. Haley*, 28 La. Ann. 216; *Randolph v. Mauck*, 78 Mo. 468; *Cogswell v. Hogan*, 1 Wash. 4; 23 Pac. 835.

¹² *Arapahoe County v. McIntire*, 23 Colo. 137; 46 Pac. 638.

¹³ *Kohn v. Bank*, 165 Ill. 316; 40 N. E. 208; affirming 60 Ill App. 304.

¹⁴ *Hendrick v. Lumber Co.*, 113 Mich. 52; 71 N. W. 483.

¹⁵ *Case v. Hoffman*, 100 Wis. 351; 44 L. R. A. 728; 74 N. W. 220; vacating 100 Wis. 314; 44 L. R. A. 728; 72 N. W. 390. (In this case the disqualified judge was one of a court composed of several judges; but his vote was the deciding one.) Citing *Queen v. Suffolk*, Justices, 18 Q. B. 416; *People v. Bork*, 96 N. Y. 188; *Oakley v. Aspinwall*, 3 N. Y.

hand, be conferred by agreement, express or implied.¹⁶ Thus parties may agree to a change of venue to a court having jurisdiction of the subject-matter though not of their persons without such agreement;¹⁷ or a grantee of a bankrupt charged with taking by a conveyance in fraud of creditors may submit to the jurisdiction of the court of bankruptcy;¹⁸ or a debtor may waive issuing and service of process and confess judgment.¹⁹

§352. Contracts concerning procedure and remedies.

The extent to which parties may go in modifying the course of procedure in civil actions by private contract may be indicated by saying that they can waive merely private rights and can confer jurisdiction of the person; but they cannot confer jurisdiction of the subject-matter nor can they modify rules imposed for the public good or the benefit of the court, nor can they require a court to give remedies other than given by the system of jurisprudence which the court administers.¹ Thus a contract extending the time for filing a bill of exceptions is invalid where the jurisdiction of the court to allow a bill of exceptions as part of the record expires with the time limited by statute;² but if the court has jurisdiction to allow

547; *Moses v. Julian*, 45 N. H. 52; 84 Am. Dec. 114.

¹⁶ *Whyte v. Gibbes*, 20 How. (U. S.) 541; *In re Riker*, 109 Fed. 63; 48 C. C. A. 220; *State v. Baten*, 48 La. Ann. 1538; 21 So. 119; *Allured v. Voller*, 107 Mich. 476; 65 N. W. 285; *Wessinger v. Implement Co.*, 75 Miss. 64; 21 So. 757; *Allen v. Miller*, 11 O. S. 374; *Pendleton v. Light Co.*, 121 N. Car. 20; 27 S. E. 1003; *Agee v. Dement*, 1 *Humph. (Tenn.)* 332; *Darby v. Gilligan*, 43 W. Va. 755; 6 L. R. A. 740; 28 S. E. 737.

¹⁷ *Wessinger v. Implement Co.*, 75 Miss. 64; 21 So. 757; overruling *Wilson v. Rodewald*, 49 Miss. 506;

Scott Hardware Co. v. Riddle, 84 Mo. App. 275.

¹⁸ *In re Riker*, 109 Fed. 63; 48 C. C. A. 220.

¹⁹ *State v. Baten*, 48 La. Ann. 1538; 21 So. 119. *Contra*, by the Louisiana constitution of 1898, § 91. *Goodwill v. Elkins*, 51 La. Ann. 521; 25 So. 317.

¹ It is often difficult to determine whether the contract is binding of its own force or because the agreement of the parties is adopted and acted on by the court; and whether the court might not have ignored the agreement.

² *Spencer v. State*, 34 Tex. Crim. Rep. 238; 30 S. W. 46; affirmed on

a bill after such time a contract extending the time is valid.³

So the parties cannot agree to substitute a memorandum of evidence for a formal bill of exceptions,⁴ or to modify a formal bill of exceptions by private agreement, thus presenting for review a case not passed on by the trial court.⁵ As a rule requiring briefs to be filed three days before hearing is made for the benefit of the court, the parties cannot waive it.⁶

The parties cannot fix remedies in advance. Hence a covenant in a mortgage providing for the appointment of a receiver,⁷ or a contract that in one suit the same judgment shall be entered as in another suit pending,⁸ are both invalid. On the other hand, the parties may by agreement waive a jury in a civil action, if not restricted by statute,⁹ and may do so by a provision in a contract, inserted when the contract is made, which in effect waives a jury trial in action thereon.¹⁰ The court may disregard a waiver of a jury, however,¹¹ as where it was

rehearing, 34 Tex. Crim. Rep. 247; 32 S. W. 690.

³ Thompson v. Ry., 50 Neb. 329; 69 N. W. 1119; rehearing denied, 70 N. W. 385.

⁴ Florida, etc., Ry. v. St. Clair-Abrams, 35 Fla. 514; 17 So. 639; Merchants' National Bank v. McKinney, 6 S. D. 58; 60 N. W. 162.

⁵ Pickett v. Bryan, 34 Fla. 38; 15 So. 681; Commonwealth v. Trust Co., 161 Mass. 550; 37 N. E. 757.

⁶ Lehigh, etc., Co. v. Scallen, 61 Minn. 63; 63 N. W. 245.

⁷ Baker v. Varney, 129 Cal. 564; 79 Am. St. Rep. 140; 62 Pac. 100.

⁸ Gittings v. Baker, 2 O. S. 21. Especially where such contract is made by public officials, such as sinking-fund commissioners, who have no authority to make such contracts. Fidelity, etc., Co. v. Louisville, 174 U. S. 429 (affirming 88 Fed. 407); Stone v. Bank, 174 U. S. 412 (reversing 88 Fed. 398).

⁹ Hawes v. Clark, 84 Cal. 272; 24

Pac. 116; Claussenius v. Clausse-nius, 179 Ill. 545; 53 N. E. 1006; Kreuchi v. Dehler, 50 Ill. 176; Maier v. Wayne Circuit Judge, 112 Mich. 491; 70 N. W. 1032; Levine v. Ins. Co., 66 Minn. 138; 68 N. W. 855; St. Paul Distilling Co. v. Pratt, 45 Minn. 215; 47 N. W. 789; O'Day v. Conn, 131 Mo. 321; 32 S. W. 1109; Pendleton v. Light Co., 121 N. Car. 20; 27 S. E. 1003; Sutton v. McConnell, 46 Wis. 269; 50 N. W. 414.

¹⁰ Columbia Bank v. Okely, 4 Wheat. (U. S.) 235. This is regularly done in cognovit notes.

A statutory provision as to the method whereby a jury may be waived is in some jurisdictions held to exclude other methods. Platt v. Havens, 119 Cal. 244; 51 Pac. 342. *Contra*, Perego v. Dodge, 163 U. S. 160.

¹¹ Wittenberg v. Onsgard, 78 Minn. 342; 47 L. R. A. 141; 81 N. W. 14.

made under the mistaken impression that the issues involved no question of fraud, forgery or perjury.¹²

So the parties may agree that judgment shall be entered,¹³ or reversed.¹⁴ Still such contracts are not always enforced if unfair or unreasonable.¹⁵ In some cases the parties may make a valid stipulation as to the value of the property in litigation.¹⁶

§353. Waiver of defense in advance.

To what extent parties may by provisions in a contract waive defenses to the validity of that contract is a question on which the courts are not in harmony. Thus a covenant that a life insurance policy shall be incontestable from its execution for fraud in the application, is valid in some jurisdictions,¹ and precludes the defense that insured took out the policy under a fraudulent scheme of committing suicide.² A clause that a policy shall become incontestable after a certain specified time is valid,³ and prevents defenses of fraud⁴ and suicide.⁵

¹² *Brown v. Cohen*, 88 Wis. 627; 60 N. W. 826.

¹³ Such contracts are usually provided for by statute. *Blake v. Bank*, 178 Ill. 182; 52 N. E. 957; .. affirming, 78 Ill. App. 166; *Little v. Dyer*, 138 Ill. 272; 32 Am. St. Rep. 140; 27 N. E. 905; *Mains v. Bank*, 113 Ia. 395; 85 N. W. 758; *Dullard v. Phelan*, 83 Ia. 471; 50 N. W. 204.

¹⁴ *Woodhaven Junction Land Co. v. Sally*, 148 N. Y. 42; 42 N. E. 404.

¹⁵ As an improvident stipulation for judgment. *Wells v. Penfield*, 70 Minn. 66; 72 N. W. 816.

¹⁶ As in possessory actions, *Braithwaite v. Jordan*, 5 N. D. 196; 31 L. R. A. 238; 65 N. W. 701.

¹ *Massachusetts, etc., Association v. Robinson*, 104 Ga. 256; 42 L. R. A. 261; 30 S. E. 918; *Ins. Co. v. Fox*, 106 Tenn. 347; 82 Am. St. Rep. 885; 61 S. W. 62; *Patterson v. Ins. Co.*, 100 Wis. 118; 69 Am. St. Rep.

899; 42 L. R. A. 253; 75 N. W. 980. *Contra*, *Welch v. Ins. Co.*, 108 Ia. 224; 50 L. R. A. 774; 78 N. W. 853. A provision that the policy shall be incontestable from date except as to fraud is held valid. *Fitch v. Ins. Co.*, 59 N. Y. 557; 17 Am. Rep. 372.

² *Patterson v. Ins. Co.*, 100 Wis. 118; 69 Am. St. Rep. 899; 42 L. R. A. 253; 75 N. W. 980.

³ *Kline v. Benefit Association*, 111 Ind. 462; 60 Am. Rep. 703; 11 N. E. 620; *Wright v. Life Association*, 118 N. Y. 237; 16 Am. St. Rep. 749; 6 L. R. A. 731; 23 N. E. 186; *Murray v. Life Assurance Co.*, 22 R. L. 524; 53 L. R. A. 742; 48 Atl. 800; *Clement v. Ins. Co.*, 101 Tenn. 22; 70 Am. St. Rep. 650; 42 L. R. A. 247; 46 S. W. 561.

⁴ *Clement v. Ins. Co.*, 101 Tenn. 22; 70 Am. St. Rep. 650; 42 L. R. A. 247; 46 S. W. 561.

⁵ *Goodwin v. Assurance Society*,

Whether such provision precludes the defense that the beneficiary has no insurable interest is a question on which courts differ.⁶

§354. Contract waiving general exemptions in advance.

A covenant in a contract whereby the promisor agrees in advance to waive his rights of exemption in his property generally, is void in most jurisdictions,¹ on the theory that the statute is enacted for the protection of necessitous debtors, and to allow them to contract away their rights in advance would be to defeat the purpose of the statute.² In some cases stress is laid on the fact that the exemption, being for the benefit of the

97 Ia. 226; 59 Am. St. Rep. 411; 32 L. R. A. 473; 66 N. W. 159; Sun Life Ins. Co. v. Taylor, 108 Ky. 408; 94 Am. St. Rep. 383; 56 S. W. 668; Mareck v. Life Association, 62 Minn. 39; 54 Am. St. Rep. 613; 64 N. W. 68; Simpson v. Ins. Co., 115 N. C. 393; 20 S. E. 517.

⁶ Clement v. Ins. Co., 101 Tenn. 22; 70 Am. St. Rep. 650; 42 L. R. A. 247; 46 S. W. 561, holds that such defense can be made under such provision, and claims not to be inconsistent with Wright v. Life Association, 118 N. Y. 237; 16 Am. St. Rep. 749; 6 L. R. A. 731; 23 N. E. 186; though it appears to be inconsistent with the *dicta* at least of that case. The distinction between the two cases is that in the first the beneficiary caused the insured to effect the insurance under a promise to pay the premiums, thus making wager insurance; see § 383 *et seq.*

In the second case, the beneficiary had an insurable interest and then assigned the policy to the widow of the insured. Whether the assignment was valid or not, it was not a wager policy.

¹ Carter v. Carter, 20 Fla. 558; 51

Am. Rep. 618; Recht v. Kelly, 82 Ill. 147; 25 Am. Rep. 301; Maloney v. Newton, 85 Ind. 565; 44 Am. Rep. 46; Curtis v. O'Brien, 20 Ia. 376; 89 Am. Dec. 543; Burke v. Finley, 50 Kan. 424; 34 Am. St. Rep. 132; 31 Pac. 1065; Moxley v. Ragan, 10 Bush. (Ky.) 156; 19 Am. Rep. 61; Levicks v. Walker, 15 La. Ann. 245; 77 Am. Dec. 187; Kneetle v. Newcomb, 22 N. Y. 249; 78 Am. Dec. 186; Branch v. Tomlinson, 77 N. Car. 388; Mills v. Bennett, 94 Tenn. 651; 45 Am. St. Rep. 763; 30 S. W. 748; Moran v. Clark, 30 W. Va. 358; 8 Am. St. Rep. 66; 4 S. E. 303.

² "If such a contract is upheld, the exemption laws of the state would be virtually obsolete and the destitute deprived of all claim they have to its beneficent provisions." Moxley v. Ragan, 10 Bush. (Ky.) 156; 19 Am. Rep. 61, 62; quoted in Mills v. Bennett, 94 Tenn. 651; 45 Am. St. Rep. 763; 30 S. W. 748. Most of the cases above cited are cases in which the debtor has given a promissory note containing such waiver.

whole of the debtor's family, cannot be waived by the debtor alone.³ Conversely it has been held that if the debtor is unmarried he can waive any exemptions, since only his own interest is thus affected.⁴ But the sounder reasoning leads to the conclusion that the debtor cannot agree in advance to waive his right of exemption even though he has no family to be prejudiced thereby.⁵ There is some authority for holding general waivers of exemptions in advance as binding.⁶

The debtor may of course waive exemption as to specific property by giving a mortgage or lien thereon in the manner prescribed by law,⁷ or by agreement to make a payment out of a specific fund otherwise exempt.⁸ Such waiver enures solely

³ "Being created for the benefit of the debtor's family, he cannot waive it." *Burke v. Finley*, 50 Kan. 424; 34 Am. St. Rep. 132; 31 Pac. 1065.

⁴ *Powell v. Daily*, 163 Ill. 646; 45 N. E. 414; reversing, 61 Ill. App. 552.

⁵ *Mills v. Bennett*, 94 Tenn. 651; 45 Am. St. Rep. 763; 30 S. W. 748. "When a man's last cow is taken on an execution on a judgment rendered on one of these notes it is not sufficient to say that it was done pursuant to his consent, freely given when he contracted the debt. The law was designed to protect him against his own improvidence in giving such consent." *Kneettle v. Newcomb*, 22 N. Y. 249; 78 Am. Dec. 186; quoted in *Mills v. Bennett*, 94 Tenn. 651; 45 Am. St. Rep. 763; 30 S. W. 748.

⁶ In Georgia, where exemptions in partnership property are allowed, a waiver of all rights of exemption inserted in a promissory note given in the firm's name by one of its members in the course of partnership business was held valid at least as to partnership property. *Hahn v. Allen*, 93 Ga. 612; 20 S. E. 74.

In Pennsylvania such contract is valid at Common Law. *Case v. Dunmore*, 23 Pa. St. 93; *Bowman v. Smiley*, 31 Pa. St. 225; 72 Am. Dec. 738; *Beatty v. Rankin*, 139 Pa. St. 358; 21 Atl. 74; *Safe Deposit, etc., Co. v. Wright (Pa.)*, 105 Fed. 155; 44 C. C. A. 421; except as to a waiver of exemption of wages for attachment. *Firmstone v. Mack*, 49 Pa. St. 387; 88 Am. Dec. 507. By statute in Alabama before the Code of 1896. *McCormick Harvesting Machine Co. v. Vaughn*, 130 Ala. 314; 30 So. 363; *Brown v. Leitch*, 60 Ala. 313; 31 Am. Rep. 42. A waiver of "exemptions or relief laws" does not waive homestead rights in real property, and such waiver is abandoned if not carried into the judgment. *Agnew v. Walden*, 95 Ala. 108; 10 So. 224.

⁷ *Grover v. Younie*, 110 Ia. 446; 81 N. W. 684; *Evans v. Harvester Works*, 63 Ia. 204; 18 N. W. 881; *Collett v. Jones*, 2 B. Mon. (Ky.) 19; 36 Am. Dec. 586; *Moran v. Clark*, 30 W. Va. 358; 8 Am. St. Rep. 66; 4 S. E. 303.

⁸ As by agreeing to pay his doctor out of an insurance policy. *Murdy*

to the benefit of the mortgagee. Other creditors cannot take advantage of it.⁹ So after judgment he may waive exemptions as to the specific property levied on.¹⁰ Neither of these two last cases fall within the letter or the spirit of the general rule.

§355. Waiver of statutory rights.

Statutes are often passed to protect persons against the effects of certain types of contract. The purpose of such statutes would be defeated if their effect could be avoided by contract; and accordingly it is held that if such is the legislative intent, covenants attempting to avoid the provisions of such statutes are void. Statutes in some states provide that after a certain time an insurance policy cannot be defeated for mere misrepresentation or breach of warranty not amounting to fraud. Such statutes are constitutional.¹ Their provisions cannot be waived by contract and an attempt to do so, directly or indirectly, is void,² as by contracting that the law of another state shall govern the contract.³ So an attempt to evade the statute of fixing the surrender value after a certain number of premiums had been paid is ineffectual.⁴ So the provisions of a statute

v. Shyles, 101 Ia. 549; 63 Am. St. Rep. 411; 70 N. W. 714.

⁹ Buckley v. Wheeler, 52 Mich. 1; 17 N. W. 216; Cheney v. Caldwell, 20 Mont. 77; 49 Pac. 397; Irwin v. Walling, 4 Okla. 128; 44 Pac. 219.

¹⁰ Lackland v. Rogers, 113 Ala. 529; 21 So. 341; Moss v. Jenkins, 146 Ind. 589; 45 N. E. 789; McGee v. Anderson, 1 B. Mon. (Ky.) 187; 36 Am. Dec. 570; Betz v. Brenner, 106 Mich. 87; 63 N. W. 970; Rich v. French, 99 Mich. 27; 57 N. W. 1040; Butt v. Green, 29 O. S. 667; Cleveland National Bank v. Bryant (Tenn. Ch. App.); 54 S. W. 73. If the statute allows his wife to claim exemptions in case he fails to do so, no waiver on his part after execution issues can bar her right. Meyer v. Beaver, 9 S. D. 168; 68 N. W.

310. So by statute in some jurisdictions he cannot waive homestead rights, even after execution issues. Gray v. Putnam, 51 S. Car. 97; 28 S. E. 149.

¹ John Hancock Life Ins. Co. v. Warren, 59 O. S. 45; 51 N. E. 546.

² Equitable Life Assurance Society v. Clements, 140 U. S. 226; Wall v. Ins. Co., 32 Fed. 273; White v. Ins. Co., 4 Dillon (U. S.) 177; Cravens v. Ins. Co., 148 Mo. 583; 71 Am. St. Rep. 628; 53 L. R. A. 305; 50 S. W. 519; John Hancock Life Ins. Co. v. Warren, 59 O. S. 45; 51 N. E. 546.

³ New York Life Ins. Co. v. Block, 12 Ohio C. C. 224.

⁴ Equitable Life Ins. Co. v. Clements, 140 U. S. 226.

requiring notice that a premium is due in order to forfeit the policy for non-payment cannot be waived by contract.⁵ So a provision in a contract for lending money on the security of a paid-up policy giving to the insurance company the right to require a surrender of the policy for its cash value in default of payment has been held void.⁶ So under a statute making the value of the property insured, as fixed in the policy final in case of a total loss, a covenant providing for the payment of the actual value only is void.⁷ Thus a contract giving the insurer a right to rebuild, where the statute requires that in total losses the amount named in the policy must be paid to the insured, is invalid.⁸ But if the statute makes the amount fixed by the policy *prima facie* only, an agreement to fix its value by appraisal is valid.⁹ In states in which statutes limiting the hours for working are valid,¹⁰ the employee cannot waive this provision and a contract entered into in violation thereof is illegal.¹¹ So under statutes providing that wages must be paid in lawful money a contract waiving such right is invalid.¹²

⁵ *Harrigan v. Ins. Co.*, 128 Cal. 531; 58 Pac. 180; 61 Pac. 99; *Griffith v. Ins. Co.*, 101 Cal. 627; 40 Am. St. Rep. 96; 36 Pac. 113.

⁶ *New York Life Ins. Co. v. Curry*, — Ky. —; 61 L. R. A. 268; 72 S. W. 736.

⁷ *Havens v. Ins. Co.*, 123 Mo. 403; 45 Am. St. Rep. 570; 26 L. R. A. 107; 27 S. W. 718; *Ins. Co. v. Bachler*, 44 Neb. 549; 62 N. W. 911; *Home Fire Ins. Co. v. Bean*, 42 Neb. 537; 47 Am. St. Rep. 711; 60 N. W. 907; *German Ins. Co. v. Eddy*, 36 Neb. 461; 19 L. R. A. 707; 54 N. W. 856; *Chamberlain v. Ins. Co.*, 55 N. H. 249; *Queen Ins. Co. v. Leslie*, 47 O. S. 409; 9 L. R. A. 45; 24 N. E. 1072; *Dugger v. Ins. Co.*, 95 Tenn. 245; 28 L. R. A. 796; 32 S. W. 5; *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45; 33 S. W. 992; *Oshkosh Gaslight Co. v. Ins. Co.*, 71 Wis. 454; 5 Am. St. Rep. 233; 37

N. W. 819; *Thompson v. Ins. Co.*, 45 Wis. 388; *Thompson v. Ins. Co.*, 43 Wis. 459; *Reilly v. Ins. Co.*, 43 Wis. 449; 28 Am. Rep. 552. "The statute cannot, we think, be treated as conferring upon the assured a mere personal privilege which may be waived by contract." *Queen Ins. Co. v. Leslie*, 47 O. S. 409; 9 L. R. A. 45; 24 N. E. 1072.

⁸ *Milwaukee Mechanics Ins. Co. v. Russell*, 65 O. S. 230; 56 L. R. A. 159; 62 N. E. 338. So *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45; 33 S. W. 992.

⁹ *Zalesky v. Ins. Co.*, 108 Ia. 341; 79 N. W. 69.

¹⁰ *Commonwealth v. Mfg. Co.*, 120 Mass. 383.

¹¹ *Short v. Mining Co.*, 20 Utah 20; 45 L. R. A. 603; 57 Pac. 720.

¹² *Hancock v. Yaden*, 121 Ind.

Under a statute which provides that in sales on the installment plan by which the title is not to pass to the vendee until the purchase price is all paid, the vendor on retaking the property for default must refund the amount paid in less the amount of any damage done thereto, together with a reasonable charge for its use, such provision cannot be waived by agreement.¹³ Hence giving a chattel mortgage is not a waiver.¹⁴

§356. Contracts affecting the period of limitations.

A contract upon valuable consideration, made before a claim is barred, not to plead the statute of limitations to such claim after it shall have become barred, is generally held valid,¹ though probably an action to enforce such promise must be brought within the time fixed by the statute of limitations after such promise of waiver is made,² or within a reasonable time after such promise.³ It has been held that even if lacking in consideration through failure to agree to delay for any definite time such agreement may operate as an estoppel if acted on.⁴ In some jurisdictions, however, such provisions have been held to be invalid.⁵

366; 16 Am. St. Rep. 396; 6 L. R. A. 576; 23 N. E. 253.

¹³ *Speyer v. Baker*, 59 O. S. 11; 51 N. E. 442.

¹⁴ *Speyer v. Baker*, 59 O. S. 11; 51 N. E. 442.

¹ *State Loan and Trust Co. v. Cochran*, 130 Cal. 245; 62 Pac. 466, 600; *Wells Fargo & Co. v. Enright*, 127 Cal. 669; 49 L. R. A. 647; 60 Pac. 439; *In re King*, 94 Mich. 411; 54 N. W. 178; *Bridges v. Stephens*, 132 Mo. 524; 34 S. W. 555; *Quick v. Corlies*, 39 N. J. L. 11; *Cecil v. Henderson*, 121 N. C. 244; 28 S. E. 481; *Dietrick v. Noel*, 42 O. S. 18; 51 Am. Rep. 788.

² *Kellogg v. Dickinson*, 147 Mass. 432; 1 L. R. A. 346; 18 N. E. 223; *Joyner v. Massey*, 97 N. Car. 148; 1 S. E. 702.

³ *Wells Fargo & Co. v. Enright*,

127 Cal. 669; 49 L. R. A. 647; 60 Pac. 439.

⁴ *Holman v. Bridge Co.*, 117 Ia. 268; 94 Am. St. Rep. 293; 90 N. W. 833.

⁵ *Andreae v. Redfield*, 98 U. S. 225; *Crane v. French*, 38 Miss. 503; *Shapley v. Abbott*, 42 N. Y. 443; 1 Am. Rep. 548. In *Wright v. Gardner*, 98 Ky. 454; 33 S. W. 622; 35 S. W. 1116, the statute provided that all claims for reclamation arising out of resampling tobacco and finding it below the first grading must be made in ninety days if sold in the United States and six months if exported. The warehouse inspector by contract with various growers tried to extend these terms to six months and nine months respectively. The contract was held "void as contrary to public policy."

Provisions are often found in contracts whereby the parties attempt to shorten the period of limitations. A provision that suit must be brought within a given time after the loss, or after notice to the party liable, and the like, are held valid if fair and reasonable. Such provisions in insurance policies,⁶ and bills of lading,⁷ are held valid. Such restrictions are invalid in some jurisdictions.⁸ But such restrictions must be reasonable, even where valid, especially in bills of lading.⁹ A limita-

Suit was brought on the contract, however, after the time limited by statute. In *Nunn v. Edmiston*, 9 Tex. Civ. App. 562; 29 S. W. 1115, in which an indorsement waiving limitations was held void. But in *Yaws v. Jones* (Tex.); 19 S. W. 443, a similar promise after the original claim was barred was upheld. In *Shapley v. Abbott*, 42 N. Y. 443; 1 Am. Rep. 548, a similar verbal promise was held void as not complying with the statute requiring it to be in writing, and as lacking consideration.

⁶ *Riddlesbarger v. Ins. Co.*, 7 Wall (U. S.) 386; *Daly v. Ins. Co.*, — Colo. App. —; 65 Pac. 416; *Chichester v. Ins. Co.*, 74 Conn. 510; 51 Atl. 545; *Woodbury Savings Bank v. Ins. Co.*, 31 Conn. 518; *Brooks v. Ins. Co.*, 99 Ga. 116; 24 S. E. 869; *Ritch v. Accident Association*, 99 Ga. 112; 25 S. E. 191; *Garrettson v. Ins. Co.*, 114 Ia. 17; 86 N. W. 32; *Wilhelmi v. Ins. Co.*, 103 Ia. 532; 72 N. W. 685; *Harrison v. Ins. Co.*, 102 Ia. 112; 47 L. R. A. 709; 71 N. W. 220; *McElroy v. Ins. Co.*, 48 Kan. 200; 29 Pac. 478; *Smith v. Herd*, (Ky.); 22 Ky. L. Rep. 1596; 60 S. W. 841, 1121; *Lee v. Ins. Co.* (Ky.); 22 Ky. L. Rep. 1712; 56 S. W. 724; *Owen v. Ins. Co.*, 87 Ky. 571; 10 S. W. 119; *Shackett v. Benefit Society*, 107 Mich. 65; 64 N. W.

875; *Rottier v. Ins. Co.*, 84 Minn. 116; 86 N. W. 888; *Hamilton v. Ins. Co.*, 156 N. Y. 327; 42 L. R. A. 485; 50 N. E. 863; *Portage, etc., Ins. Co. v. West*, 6 O. S. 599; *Portage, etc., Ins. Co. v. Stukey*, 18 Ohio 455; *Egan v. Ins. Co.*, 29 Or. 403; 54 Am. St. Rep. 798; 42 Pac. 990; *Grier v. Assurance Co.*, 183 Pa. St. 334; 39 Atl. 10; *Guthrie v. Indemnity Association*, 101 Tenn. 643; 49 S. W. 829; *John Morrill & Co. v. Ins. Co.*, 71 Vt. 281; 44 Atl. 358; *Wilson v. Ins. Co.*, 27 Vt. 99; *Griem v. Casualty Co.*, 99 Wis. 530; 75 N. W. 67. If the insured does not bring suit within the time limited because of a mistake as to the date, no relief can be given. *Rottier v. Ins. Co.*, 84 Minn. 116; 86 N. W. 888.

⁷ *Ginn v. Transit Co.*, 85 Fed. 985; 29 C. C. A. 521; *Gulf, etc., Ry. v. McCarty*, 82 Tex. 608; 18 S. W. 716. Even under a statute forbidding a common carrier to limit its liability; *Gulf, etc., Ry. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494; 4 S. W. 567.

⁸ *Eagle Ins. Co. v. Ins. Co.*, 9 Ind. 443; *Miller v. Ins. Co.*, 54 Neb. 121; 69 Am. St. Rep. 709; 74 N. W. 416.

⁹ They are said to be invalid unless clearly reasonable. *Texas, etc., Ry. v. Reeves*, 90 Tex. 499; 59 Am. St. Rep. 830; 39 S. W. 564.

tion to ninety,¹⁰ or to forty¹¹ days, has been held reasonable. On the other hand a limitation of thirty days¹² has been held unreasonable. A limitation of forty days within which suit must be brought and summons served has been held invalid,¹³ since the plaintiff cannot lawfully control the conduct of public officers.

In some jurisdictions statute fixes a time within which it forbids rights of action to be limited by contract.¹⁴ A statute providing in general terms that if a suit commenced within the period of limitations is dismissed other than on its merits, a new suit may be begun within a fixed time thereafter, even if such time is after the period of limitations, is held in some jurisdictions not to apply to a limitation of time found in an insurance policy.¹⁵ A provision of a statute specifically applying to suits against insurance companies, giving the further time of a year after non-suit prevents a limitation of time in an insurance policy.¹⁶

Under the power of the court to apply these provisions so that they shall operate in a reasonable manner, bringing an earlier suit within the time limited which was dismissed for a ground other than on the merits,¹⁷ as for being brought in the name of the wrong party,¹⁸ is a sufficient excuse for not bringing the action in the time limited, so that it can be brought afterward. So where suit is impossible, as where the officers

¹⁰ *Ginn v. Transit Co.*, 85 Fed. 985.

¹¹ *Gulf, etc., Ry. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494; 4 S. W. 567.

¹² *Central Vermont Ry. v. Soper*, 59 Fed. 879.

¹³ *Gulf, etc., Ry. v. Stanley*, 89 Tex. 42; 33 S. W. 109.

¹⁴ *Massachusetts, etc., Association v. Hale*, 96 Ga. 802; 23 S. E. 849. (Governed by Massachusetts law.) *Ins. Co. v. Brim*, 111 Ind. 281; 12 N. E. 315; *Richardson v. Ry.*, 149 Mo. 311; 50 S. W. 782; *Gulf, etc., Ry. v. Hume*, 87 Tex. 211; 27 S. W.

110; *St. Louis, etc., Ry. v. Williams* (Tex. Civ. App.); 32 S. W. 225.

¹⁵ *Melson v. Ins. Co.*, 97 Ga. 722; 25 S. E. 189; *Harrison v. Ins. Co.*, 102 Ia. 112; 47 L. R. A. 709; 71 N. W. 220.

¹⁶ *Lancashire Ins. Co. v. Stanley*, 70 Ark. 1; 62 S. W. 66.

¹⁷ *Phoenix Ins. Co. v. Ry. Co.*, 182 Ill. 33; 54 N. E. 1046. (Dismissed by the court for want of prosecution disregarded a stipulation of the parties that the cause should be continued.)

¹⁸ *Ins. Co. v. Phillips*, 102 Fed. 19; 41 C. C. A. 263; reversing, 101 Fed. 33.

who should have sued were under arrest,¹⁹ bringing suit within the time limited has been excused.

§357. Contracts requiring notice of loss.

Provisions that no action can be brought unless a claim for damages has been presented within a certain period after loss, or damage, are often presented for adjudication. If fair and reasonable they are generally upheld, as in contracts with telegraph companies,¹ though there is authority to the contrary.²

¹⁹ Jackson v. Casualty Co., 75 Fed. 359.

¹ Harris v. Telegraph Co., 121 Ala. 519; 77 Am. St. Rep. 70; 25 So. 910; Western Union Telegraph Co. v. Dougherty, 54 Ark. 221; 26 Am. St. Rep. 33; 11 L. R. A. 102; 15 S. W. 468; Western Union Telegraph Co. v. Wixelbaum, 113 Ga. 1017; 56 L. R. A. 741; 39 S. E. 443; Hill v. Telegraph Co., 85 Ga. 425; 21 Am. St. Rep. 166; 11 S. E. 874; Albers v. Telegraph Co., 98 Ia. 51; 66 N. W. 1040; Russell v. Telegraph Co., 57 Kan. 230; 45 Pac. 598; Clement v. Telegraph Co., 77 Miss. 747; 27 So. 603; Young v. Telegraph Co., 65 N. Y. 163; Lewis v. Telegraph Co., 117 N. C. 436; 23 S. E. 319; Wolf v. Telegraph Co., 62 Pa. St. 83; 1 Am. Rep. 387; Kirby v. Telegraph Co., 7 S. D. 623; 30 L. R. A. 621; 65 N. W. 37; Kirby v. Telegraph Co., 4 S. D. 105, 439; 46 Am. St. Rep. 765; 30 L. R. A. 612; 55 N. W. 759; Lester v. Telegraph Co., 84 Tex. 313; 19 S. W. 256; Western Union Telegraph Co. v. Hays (Tex. Civ. App.); 63 S. W. 171; Western Union Telegraph Co. v. Vanway (Tex. Civ. App.); 54 S. W. 414; Heimann v. Telegraph Co., 57 Wis. 562; 16 N. W. 32.

² Johnson v. Telegraph Co., 33

Fed. 362; Davis v. Telegraph Co., 107 Ky. 527; 92 Am. St. Rep. 371; 54 S. W. 849; Western Union Telegraph Co. v. Eubanks, 100 Ky. 591; 66 Am. St. Rep. 361; 36 L. R. A. 711; 38 S. W. 1068; Smith v. Telegraph Co., 83 Ky. 104; 4 Am. St. Rep. 126; Francis v. Telegraph Co., 58 Minn. 252; 49 Am. St. Rep. 507; 25 L. R. A. 406; 59 N. W. 1078; Western Union Telegraph Co. v. Kemp, 44 Neb. 194; 48 Am. St. Rep. 723; 62 N. W. 451; Pacific Telegraph Co. v. Underwood, 37 Neb. 315; 40 Am. St. Rep. 490; 55 N. W. 1057; Telegraph Co. v. Longwill, 5 N. M. 308; 21 Pac. 339. Some courts hold that the receiver of a telegram is not bound by such provisions unless he expressly assents thereto. Webbe v. Telegraph Co., 169 Ill. 610; 61 Am. St. Rep. 207; 48 N. E. 670; reversing, 64 Ill. App. 331; Western Union Telegraph Co. v. McKibben, 114 Ind. 511; 14 N. E. 894. *Contra*, that he is bound. Russell v. Telegraph Co., 57 Kan. 230; 45 Pac. 598. These cases turn on the questions, (1) whether the receiver's claim against the company is tort or contract, and (2) whether, if his liability is contract, he is bound by provisions in such telegram to which he did not expressly assent.

Such provisions are upheld in contracts of insurance.³ If such provisions are found in a bill of lading given by a common carrier, they are held valid, if reasonable,⁴ unless forbidden by the constitution or statutes of the state.⁵ If the time fixed by the policy is greater than the time fixed by statute, it is held to waive the statute.⁶ Even where the time within which such notice must be given may be fixed by the parties a reasonable provision must be made. If the regulation is unreasonable, the courts refuse to enforce it.⁷ Thus a provision requiring notice of loss to be given within thirty days from the date of

³ California Savings Bank v. Surety Co., 87 Fed. 118; White v. Ins. Co., 128 Cal. 131; 60 Pac. 666; Harrigan v. Ins. Co., 128 Cal. 531; 58 Pac. 180; United Benevolent Society v. Freeman, 111 Ga. 355; 36 S. E. 764; Westchester Fire Ins. Co. v. Coverdale, 9 Kan. App. 651; 58 Pac. 1029; Leftwich v. Ins. Co., 91 Md. 596; 46 Atl. 1010; Gould v. Ins. Co., 90 Mich. 302; 51 N. W. 455; Ermentrout v. Ins. Co., 63 Minn. 305; 56 Am. St. Rep. 481; 30 L. R. A. 346; 65 N. W. 635; National Construction Co. v. Ins. Co., 176 Mass. 121; 57 N. E. 350; Peabody v. Satterlee, 166 N. Y. 174; 52 L. R. A. 956; 59 N. E. 818; Travelers' Ins. Co. v. Myers, 62 O. S. 529; 49 L. R. A. 760; 57 N. E. 458; Foster v. Casualty Co., 99 Wis. 447; 40 L. R. A. 833; 75 N. W. 69. *Contra*, Peele v. Provident Fund Society, 147 Ind. 543; 44 N. E. 661; rehearing denied, 147 Ind. 554; 46 N. E. 990.

⁴ Northern Pacific Express Co. v. Martin, 26 Can. S. C. 135; St. Louis, etc., Ry. Co. v. Hurst, 67 Ark. 407; 55 S. W. 215; Baxter v. Ry., 165 Ill. 78; 45 N. E. 1003; reversing, 64 Ill. App. 130; Chicago, etc., Ry. v. Bozarth, 91 Ill. App. 68; United States Express Co. v. Harris, 51 Ind. 127; Sprague v. Ry., 34 Kan. 347; 8 Pac.

465; Armstrong v. Ry., 53 Minn. 183; 54 N. W. 1059; Ward v. Ry., 158 Mo. 226; 58 S. W. 28; Jennings v. Ry., 127 N. Y. 438; 28 N. E. 394; Selby v. R. R., 113 N. C. 588; 37 Am. St. Rep. 635; 18 S. E. 88.

⁵ So under constitutional, Brown v. R. R., 100 Ky. 525; 38 S. W. 862; Ohio, etc., Ry. v. Tabor, 98 Ky. 503; 34 L. R. A. 685; 32 S. W. 168; affirmed on rehearing, 98 Ky. 508; 34 L. R. A. 688; 36 S. W. 18; or statutory, Grieve v. Ry., 104 Ia. 659; 74 N. W. 192; provisions that the carrier cannot relieve himself from liability. Such provisions of the statute were held not to apply to such provision in Gulf, etc., Ry. v. Trawick, 68 Tex. 314; 2 Am. St. Rep. 494; 4 S. W. 567.

⁶ Ellis v. Ins. Co., 113 Cal. 612; 54 Am. St. Rep. 373; 45 Pac. 988; where the clause in a policy of insurance, controlled by Massachusetts law was held to waive the Massachusetts statute.

⁷ Southern Express Co. v. Bank, 108 Ala. 517; 18 So. 664; Adams Express Co. v. Reagan, 29 Ind. 21; 92 Am. Dec. 332; Gwyn Harper Mfg. Co. v. Ry., 128 N. C. 280; 83 Am. St. Rep. 675; 38 S. E. 894; Memphis, etc. R. R. v. Holloway, 9 Baxt. (Tenn.) 188; Texas, etc., Ry. v. Adams, 78 Tex. 372; 22 Am.

the bill of lading is unreasonable if the carrier requires its agents to hold undelivered packages thirty days before returning them to the consignor.⁸ But a provision requiring notice of loss thirty days from the date of the bill of lading is reasonable where the loss was known to the shippers within a week after the date of the bill of lading.⁹ If the date of delivery or knowledge of the loss is taken as the date from which the period is to run, a shorter period will be held to be reasonable than if the period began at the date of the bill of lading. Thus ten days,¹⁰ five days,¹¹ and thirty hours,¹² have each been held reasonable. So a provision requiring notice of injury to live stock to be given before it is removed from the place of destination is reasonable.¹³ On the other hand, thirty days¹⁴ and thirty-six hours,¹⁵ have been held unreasonable. So in contracts with telegraph companies a provision that a claim must be presented within sixty days from the filing of the message for transmission is reasonable.¹⁶ A contractual provision limiting the time for presenting claims may be waived by the insurer expressly or impliedly.¹⁷

St. Rep. 56; 14 S. W. 666. "The question of the reasonableness of the requirement is one largely dependent upon the object of the notice and the length of the voyage." *Queen of the Pacific*, 180 U. S. 41.

⁸ *United States Watch Case Co. v. Express Co.*, 120 N. C. 351; 27 S. E. 74; *Dixie Cigar Co. v. Express Co.*, 120 N. C. 348; 58 Am. St. Rep. 795; 27 S. E. 73. So, *Southern Express Co. v. Bank*, 108 Ala. 517; 18 So. 664.

⁹ *Queen of the Pacific*, 180 U. S. 41; reversing, 94 Fed. 180, and 78 Fed. 155. So, *United States Express Co. v. Harris*, 51 Ind. 127.

¹⁰ After knowledge of loss. *The Arctic Bird*, 109 Fed. 167.

¹¹ After delivery, *Black v. Ry.*, 111 Ill. 351; 53 Am. Rep. 628.

¹² *St. Louis, etc., Ry. v. Hurst*, 67 Ark. 407; 55 S. W. 215.

¹³ *Southern Ry. v. Adams*, 115 Ga. 705; 42 S. E. 35.

¹⁴ *Capehart v. R. R.*, 81 N. C. 438; 31 Am. Rep. 505.

¹⁵ *Jennings v. Ry.*, 127 N. Y. 438; 28 N. E. 394.

¹⁶ *Western Union Telegraph Co. v. Waxelbaum*, 113 Ga. 1017; 56 L. R. A. 741; 39 S. E. 443; *Russell v. Telegraph Co.*, 57 Kan. 230; 45 Pac. 598; *Kirby v. Telegraph Co.*, 7 S. D. 623; 30 L. R. A. 621; 65 N. W. 37; *Kirby v. Telegraph Co.*, 4 S. D. 105, 439; 46 Am. St. Rep. 765; 30 L. R. A. 612; 55 N. W. 759; 57 N. W. 199.

¹⁷ *Wallace v. Ry.*, — Mich. —; 95 N. W. 750; *Scottish, etc., Ins. Co. v. Enslie*, 78 Miss. 157; 28 So. 822; *Hall v. Ins. Co.*, 23 Wash. 610; 83 Am. St. Rep. 844; 51 L. R. A. 288; 63 Pac. 505.

§358. Contracts forbidding suit for certain time after loss.

Provisions are often found in contracts forbidding an action to be brought within a certain time after the happening of the event which fixes liability. Such provisions, if reasonable, are valid at Common Law.¹ If the local statute fixes the time in which suit can first be brought, such provision controls if less than that fixed by the contract. Such a contractual provision may be waived, as by denying all liability.³

¹ Gillon v. Assurance Co., 127 Cal. 480; 59 Pac. 901; Putze v. Ins. Co. (Mich.); 86 N. W. 814.

² Franklin v. Ins. Co., 70 N. H. 251; 47 Atl. 91.

³ Continental Ins. Co. v. Wick-

ham, 110 Ga. 129; 35 S. E. 287; Northern Assurance Co. v. Hanna, 60 Neb. 29; 82 N. W. 97; Home Ins. Co. v. Hancock, 106 Tenn. 513; 52 L. R. A. 665; 62 S. W. 145.

CHAPTER XVIII.

CONTRACTS WAIVING THE PERFORMANCE OF DUTIES IMPOSED BY LAW.

§359. Contracts relieving common carriers of goods from liability for negligence.

A common carrier of goods is liable, in the absence of special agreement, as an insurer of goods carried by him, except for losses caused by the act of God or the public enemy. To what extent he can by special contract relieve himself in advance from this liability is a question often presented for adjudication. The weight of modern authority is that within limits he can modify his Common Law liability,¹ if not forbidden by statute, provided such limitation is reasonable,² and it is for the carrier to show that such limitation is reasonable.³ The limit fixed by the great majority of the courts is that a com-

¹ Walker v. Ry., 3 Car. & K. 279; Slim v. Ry., 26 Eng. L. & Eq. 297; Wallace v. Matthews, 39 Ga. 617; 99 Am. Dec. 473; Reno v. Hogan, 12 B. Mon. 63; 54 Am. Dec. 513; Roberts v. Riley, 15 La. Ann. 103; 77 Am. Dec. 183; Mobile, etc., Ry. v. Weiner, 49 Miss. 725; Camden & A. R. Co. v. Baldauf, 16 Pa. 67; 55 Am. Dec. 481; Kimball v. Ry., 26 Vt. 247. The New York courts have taken the two extreme positions on this proposition alternately, first holding that the carrier could not modify his liability at all; Gould v. Hill, 2 Hill (N. Y.) 623; then holding that it might make reasonable restrictions, Dorr v. Navigation Co., 11 N. Y. 485; 62

Am. Dec. 125, and finally holding that the carrier may free himself from all liability for any negligence of his servants.

² Little Rock, etc., Ry. v. Cravens, 57 Ark. 112; 38 Am. St. Rep. 230; 20 S. W. 803; O'Malley v. Ry., 86 Minn. 380; 90 N. W. 974; Mitchell v. Ry., 124 N. C. 236; 44 L. R. A. 515; 32 S. E. 671; Willock v. R. R., 166 Pa. St. 184; 45 Am. St. Rep. 674; 27 L. R. A. 228; 30 Atl. 948.

³ Kansas, etc., Ry. v. Ayers, 63 Ark. 331; 38 S. W. 515; Cox v. Ry., 170 Mass. 129; 49 N. E. 97; Gardner v. Ry., 127 N. Car. 293; 37 S. E. 328; Hinkle v. Ry., 126 N. C. 932; 78 Am. St. Rep. 685; 36 S. E. 348.

mon carrier may by express contract relieve himself from liability as insurer but not from liability for his own misconduct, fraud or negligence of that of his employees.⁴ The earlier Wisconsin cases presented only the question of gross negligence and it was held that the carrier could not avoid his

- ⁴ *Inman v. Ry. Co.*, 129 U. S. 128; *Phoenix Ins. Co. v. Transportation Co.*, 117 U. S. 312; *Grand Trunk Ry. v. Stevens*, 95 U. S. 655; *New York Central Ry. v. Lockwood*, 17 Wall. (U. S.) 357; *York Mfg. Co. v. Ry.*, 3 Wall. (U. S.) 107; *The George Dumois*, 88 Fed. 537; *B. & O. Ry. v. McLaughlin*, 73 Fed. 519; *Louisville, etc., Ry. v. Gidley*, 119 Ala. 523; 24 So. 753; *Mouton v. Ry.*, 128 Ala. 537; 29 So. 602; *Louisville, etc., Ry. v. Grant*, 99 Ala. 325; 13 So. 599; *Alabama, etc., Ry. v. Thomas*, 89 Ala. 294; 18 Am. St. Rep. 119; 7 So. 762; *East Tennessee, etc., Ry. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 49; *Pacific Express Co. v. Wallace*, 60 Ark. 100; 29 S. W. 32; *St. Louis, etc., Ry. v. Lesser*, 46 Ark. 236; *Pierce v. Ry.*, 120 Cal. 156; 40 L. R. A. 350; 47 Pac. 874; 52 Pac. 302; *Merchants', etc., Co. v. Cornforth*, 3 Colo. 280; 25 Am. Rep. 757; *Mears v. R. R.*, 75 Conn. 171; 96 Am. St. Rep. 192; 56 L. R. A. 884; 52 Atl. 610; *Welch v. R. R.*, 41 Conn. 333; *Flinn v. Ry. Co.*, 1 Houst. (Del.) 469; *Nicoll v. Ry. Co.*, 89 Ga. 260; 15 S. E. 309; *Western, etc., Ry. v. Cotton Mills*, 81 Ga. 522; 2 L. R. A. 102; 7 S. E. 916; *Berry v. Cooper*, 28 Ga. 543; *Ins. Co. v. Ry.*, 152 Ind. 333; 53 N. E. 382; *Terre Haute, etc., Ry. v. Sherwood*, 132 Ind. 129; 32 Am. St. Rep. 239; 17 L. R. A. 339; 31 N. E. 781; *Adams Express Co. v. Harris*, 120 Ind. 73; 16 Am. St. Rep. 315; 7 L. R. A. 214; 21 N. E. 340; *Bartlett v. Ry. Co.*, 94 Ind. 281; *Ohio, etc., Ry. Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *Adams Express Co. v. Fendrick*, 38 Ind. 150; *Michigan, etc., Ry. v. Heaton*, 37 Ind. 448; 10 Am. Rep. 89; *Hudson v. Ry.*, 92 Ia. 231; 54 Am. St. Rep. 550; 60 N. W. 608; *Atchinson, etc., Ry. v. Temple*, 47 Kan. 7; 13 L. R. A. 362; 27 Pac. 98; *Sprague v. Ry.*, 34 Kan. 347; 8 Pac. 465; *Kansas City, etc., Ry. v. Simpson*, 30 Kan. 645; 46 Am. Rep. 104; 2 Pac. 821; *Louisville, etc., Ry. v. Plummer*, 18 Ky. L. Rep. 228; 35 S. W. 1113; *Baughman v. Ry.*, 94 Ky. 150; 21 S. W. 757; *Louisville, etc., Ry. v. Owen*, 93 Ky. 201; 19 S. W. 590; *Maxwell v. Ry.*, 48 La. Ann. 385; 19 So. 287; *New Orleans Mutual Ins. Co. v. Ry. Co.*, 20 La. Ann. 302; *Willis v. Ry.*, 62 Me. 488; *Fillebrown v. Ry. Co.*, 55 Me. 462; 92 Am. Dec. 606; *Sager v. Ry. Co.*, 31 Me. 228; 50 Am. Dec. 659; *Cox v. Ry.*, 170 Mass. 129; 49 N. E. 97; *Hoadley v. Transportation Co.*, 115 Mass. 304; 15 Am. Rep. 106; *Medfield School Dist. v. Ry.*, 102 Mass. 552; 3 Am. Rep. 502; *Smith v. Express Co.*, 108 Mich. 572; 66 N. W. 479; *Southard v. Ry.*, 60 Minn. 382; 62 N. W. 442, 619; *Boehl v. Ry.*, 44 Minn. 191; 46 N. W. 333; *Hull v. Ry.*, 41 Minn. 510; 16 Am. St. Rep. 722; 5 L. R. A. 587; 43 N. W. 391; *Moulton v. Ry.*, 31 Minn. 85; 47 Am. Rep. 781; 16 N. W. 497; *Illinois Central Ry.*

v. Bogard, 78 Miss. 11; 27 So. 879; Johnson v. Ry., 69 Miss. 191; 30 Am. St. Rep. 534; 11 So. 104; Southern Express Co. v. Moon, 39 Miss. 822; Witting v. Ry., 101 Mo. 631; 20 Am. St. Rep. 636; 10 L. R. A. 602; 14 S. W. 743; Levering v. Transportation Co., 42 Mo. 88; 97 Am. Dec. 320; Ketchum v. Express Co., 52 Mo. 390; Pennsylvania Co. v. Paint Co., 59 Neb. 435; 81 N. W. 372; Ry. v. Gardiner, 51 Neb. 70; 70 N. W. 508; St. Joseph, etc., Ry. v. Palmer, 38 Neb. 463; 22 L. R. A. 335; 56 N. W. 957; Chicago, etc., Ry. v. Witty, 32 Neb. 275; 29 Am. St. Rep. 436; 49 N. W. 183; Missouri Pacific Ry. v. Vandeventer, 26 Neb. 222; 3 L. R. A. 129; 41 N. W. 998; Durgin v. Express Co., 66 N. H. 277; 9 L. R. A. 453; 20 Atl. 328; Merrill v. American Ex. Co., 62 N. H. 514; Rand v. Merchants' Despatch Transportation Co., 59 N. H. 363; Barter v. Wheeler, 49 N. H. 9; 6 Am. Rep. 434; Parker v. R. R., 133 N. C. 335; 63 L. R. A. 827; 45 S. E. 658; denying rehearing of, 43 S. E. 1005 (no opinion); Gardner v. Ry., 127 N. Car. 293; 37 S. E. 328; Morganton Mfg. Co. v. Ry., 121 N. Car. 514; 61 Am. St. Rep. 679; 28 S. E. 474; Wood v. Ry., 118 N. Car. 1056; 24 S. E. 704; United States Express Co. v. Backman, 28 O. S. 144; Erie Ry. Co. v. Lockwood, 28 O. S. 358; Knowlton v. Ry., 19 O. S. 260; 2 Am. Rep. 395; Graham v. Davis, 4 O. S. 362; 62 Am. Dec. 285; Welsh v. Ry., 10 O. S. 65; Willock v. R. R., 166 Pa. St. 184; 45 Am. St. Rep. 674; 27 L. R. A. 228; 30 Atl. 948; Fairchild v. R. R., 148 Pa. St. 527; 24 Atl. 79; Weiller v. Ry., 134 Pa. St. 310; 19 Am. St. Rep. 700; 19 Atl. 702; Pennsylvania Ry. v. Raiordon, 119 Pa. St. 577; 4 Am. St. Rep. 670; 13 Atl. 324; Empire Transportation Co. v. Oil Co., 63 Pa. 14; 3 Am. Rep. 515; Farnham v. Ry., 55 Pa. 53; Pennsylvania Ry. Co. v. Henderson, 51 Pa. 315; Goldey v. Ry. Co. 30 Pa. 242; 72 Am. Dec. 703; Camden, etc., Ry. v. Baldauf, 16 Pa. 67; 55 Am. Dec. 481; Laing v. Colder, 8 Pa. 479; 49 Am. Dec. 533; Ballou v. Earle, 17 R. I. 441; 33 Am. St. Rep. 881; 14 L. R. A. 433; 22 Atl. 1113; Crawford v. Ry., 56 S. C. 136; 34 S. E. 80; Johnstone v. Ry., 39 S. Car. 55; 17 S. E. 512; Swindler v. Hilliard, 2 Rich. L. (S. C.) 286; Illinois, etc., Ry. v. Craig, 102 Tenn. 298; 52 S. W. 164; Bird v. R. R., 99 Tenn. 719; 63 Am. St. Rep. 856; 42 S. W. 451; Louisville, etc., Ry. v. Lowell, 90 Tenn. 17; 15 S. W. 837; Louisville, etc., Ry. v. Gilbert, 88 Tenn. 430; 7 L. R. A. 162; 12 S. W. 1018; Merchants', etc., Co. v. Bloch, 86 Tenn. 392; 6 Am. St. Rep. 847; 6 S. W. 881; Nashville, etc., R. Co. v. Jackson, 6 Heisk. (Tenn.) 271; Texas, etc., Ry. v. Richmond, 94 Tex. 571; 63 S. W. 619; Houston, etc., Ry. v. McFadden, 91 Tex. 194; 42 S. W. 593; affirming in part and reversing in part, 40 S. W. 216; Missouri Pacific Ry. v. Sherwood, 84 Tex. 125; 17 L. R. A. 643; 19 S. W. 455; Missouri Pacific Ry. v. Ivy, 71 Tex. 409; 10 Am. St. Rep. 758; 1 L. R. A. 500; 9 S. W. 349; Missouri Pacific Ry. v. Harris, 67 Tex. 166; 2 S. W. 574; Saunders v. Southern Pacific Co., 13 Utah 275; 44 Pac. 932; Davis v. R. R., 66 Vt. 290; 44 Am. St. Rep. 852; 29 Atl. 313; Norfolk, etc., Ry. v. Reeves, 97 Va. 284; 33 S. E. 606; Norfolk, etc., Ry. v. Harman, 91 Va. 601; 50 Am. St. Rep. 855; 22 S. E. 490; Chesapeake, etc., Ry. v. Bank, 92 Va. 495; 44 L. R. A. 449; 23 S. E. 935; Berry v. R. R., 44 W. Va. 538; 67 Am. St. Rep. 781; 30 S. E. 143; Brown v. Express Co.,

liability for gross negligence.⁵ The later cases presented the question of ordinary negligence and were decided adverse to the right of the carrier to exonerate himself from liability for any degree of negligence.⁶ In Illinois the carrier may exempt himself from all liability except for gross negligence;⁷ and the New York courts recognize his right to exempt himself from all liability for negligence of his servants.⁸ He cannot relieve himself by contract from the consequences of his wilful misconduct.⁹ The reason generally assigned by the courts for the rule held by the majority of the courts is that common carriers have public as well as private functions, are endowed with the power of eminent domain, and do not stand on an equality with shippers. The public has therefore an interest in their contracts as common carriers, and in the enforcement of their liability.¹⁰

15 W. Va. 812; *Ullman v. Ry.*, 112 Wis. 150; 88 Am. St. Rep. 949; 56 L. R. A. 246; 88 N. W. 41; *Densmore, etc., Co. v. Ry.*, 101 Wis. 563; 77 N. W. 904; *Lamb v. Ry.*, 101 Wis. 138; 76 N. W. 1123; *Schaller v. Ry.*, 97 Wis. 31; 71 N. W. 1042; *Loeser v. Ry.*, 94 Wis. 571; 69 N. W. 372; *Abrams v. Ry.*, 87 Wis. 485; 41 Am. St. Rep. 55; 58 N. W. 780; *Black v. Transportation Co.*, 55 Wis. 319; 42 Am. Rep. 713; 13 N. W. 244.

⁵ *Black v. Transportation Co.*, 55 Wis. 319; 42 Am. Rep. 713; 13 N. W. 244.

⁶ See cases cited in note 4, this section.

⁷ *Chicago, etc., Ry. v. Davis*, 159 Ill. 53; 50 Am. St. Rep. 143; 42 N. E. 382; *Wabash Ry. v. Brown*, 152 Ill. 484; 39 N. E. 273; *Jacksonville, etc., Ry. v. Southworth*, 135 Ill. 250; 25 N. E. 1093; *Arnold v. R. R.*, 83 Ill. 273; 25 Am. Rep. 383; *Illinois Central Ry. Co. v. Morrison*, 19 Ill. 136; *Illinois Central R. R. Co. v. Read*, 37 Ill. 484; 87 Am. Dec. 260; *Illinois Central R. R. Co. v. Smyser*, 38 Ill. 354; 87 Am. Dec.

301; *United States Express Co. v. Council*, 84 Ill. App. 491.

⁸ *Zimmer v. R. R.*, 137 N. Y. 460; 33 N. E. 642; *Kenney v. R. R.*, 125 N. Y. 422; 26 N. E. 626; *Brewer v. R. R.*, 124 N. Y. 59; 21 Am. St. Rep. 647; 11 L. R. A. 483; 26 N. E. 324; *Mynard v. R. R.*, 71 N. Y. 180; 27 Am. Rep. 28; *Smith v. R. R.*, 24 N. Y. 222; *Dorr v. Steam Navigation Co.*, 11 N. Y. 485; 62 Am. Dec. 125.

⁹ *Arnold v. R. R.*, 83 Ill. 273; 25 Am. Rep. 383.

¹⁰ "The carrier and shipper do not stand on equal terms. The latter cannot afford to refuse that which the carrier demands as a condition to the transportation of his goods, and in ninety-nine cases out of every hundred, if he does so refuse, he will find himself discriminated against until his business is ruined and he has nothing left to ship. The rule that stipulations insisted on by carriers or other persons who stand in such a position towards their customers as enables them to compel compliance with their demands, or destroy their customer's business, should be judged of by their fair-

Where this rule is applied a contract for exemption from liability for negligence,¹¹ as against all but gross negligence,¹² or even as against all but slight negligence,¹³ is invalid. Thus a contract relieving the carrier from liability for injuries due to fire,¹⁴ water,¹⁵ or decay,¹⁶ do not relieve him from such liability if due to his negligence. So a contract relieving the carrier from liability for damages due to the breakdown of refrigerating machinery does not relieve him from damage caused by failure to have such machinery in good condition when the voyage began.¹⁷ So where the carrier seeks by contract to end his liability with the arrival of the goods at their destination, the law, notwithstanding, ignores this provision and gives the consignee a reasonable time in which to remove the goods.¹⁸ Even a contract to insure goods for the benefit of

ness and held void whenever they are unreasonable or oppressive, is one of very general acceptance. Public policy compels its acceptance in all civilized countries." *Willock v. R. R.*, 166 Pa. St. 184, 191; 45 Am. St. Rep. 674, 678; 27 L. R. A. 228; 30 Atl. 948.

¹¹ *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *New York Central Ry. v. Lockwood*, 17 Wall. 357; *Louisville & N. R. Co. v. Oden*, 80 Ala. 38; *Willis v. Grand Trunk R. Co.*, 62 Me. 488; *Brockway v. Express Co.*, 168 Mass. 257; 47 N. E. 87; *Squire v. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162; *Grogan v. Express Co.*, 114 Pa. 523; 60 Am. Rep. 360; 7 Atl. 134; *Wallingford v. Ry. Co.*, 26 S. C. 258; 2 S. E. 19; *Mann v. Birchard*, 40 Vt. 326; 94 Am. Dec. 398.

¹² *Pierce v. Southern Pacific Co.*, 120 Cal. 156; 40 L. R. A. 350; 47 Pac. 874; affirmed in banc, 40 L. R. A. 354; 52 Pac. 302; *Burgher v. Ry.*, 105 Ia. 335; 75 N. W. 192; *Shriver v. R. R.*, 24 Minn. 506; 31 Am.

Rep. 353; *Newberger Cotton Co. v. Ry.*, 75 Miss. 303; 23 So. 186; *Virginia, etc., R. R. v. Sayers*, 26 Gratt. (Va.) 328.

¹³ *Michigan, etc., Ry. v. Heaton*, 37 Ind. 448; 10 Am. Rep. 89; *New Orelans, etc., Ry. v. Faler*, 58 Miss. 911; *Graham v. Davis*, 4 O. S. 362; 62 Am. Dec. 285; *Davidson v. Graham*, 2 O. S. 131.

¹⁴ *Bank v. Express Co.*, 93 U. S. 174; *Michigan, etc., R. R. v. Heaton*, 37 Ind. 448; 10 Am. Rep. 89; *Maxwell v. Southern Pacific Co.*, 48 La. Ann. 385; 19 So. 287. (Negligence in having inadequate force to guard goods while fireworks were being discharged near by.) *Erie Ry. v. Lockwood*, 28 O. S. 358.

¹⁵ *Mears v. R. R.*, 75 Conn. 171; 96 Am. St. Rep. 192; 56 L. R. A. 884; 52 Atl. 610.

¹⁶ *Chicago, etc., R. R. v. Davis*, 159 Ill. 53; 50 Am. St. Rep. 143; 42 N. E. 382.

¹⁷ *Owners of Cargo v. Hughes* (1895), 2 Q. B. 550.

¹⁸ *Tallassee Falls Mfg. Co. v. Ry.*, 128 Ala. 167; 29 So. 203. However, a contract that where

the shipper and to look solely to the insurance in case of loss, cannot relieve the carrier from liability for negligence.¹⁹ This prohibition applies only to contracts for exemption from liability. In other respects the common carrier may modify his rights by contract. Thus the common carrier may contract, irrespective of his own negligence, for the benefit of insurance held by the shipper.²⁰ In some jurisdictions statutes have been passed providing that no contract limiting the legal liability of a common carrier is binding, and such statutes have been upheld as constitutional.²¹ The carrier may, however, limit his liability to shipment over his own road.²²

§360. Contracts fixing value of goods shipped.

A common carrier often attempts to fix the value of the articles shipped over its line, by contract made with the shipper in advance, for the purpose of determining the amount of liability in case of loss. If the rate paid by the shipper depends on the value of the goods, he is generally, in the absence of statute, held bound by a reasonable valuation agreed upon between himself and the carrier at the time of shipment, even

goods are consigned to a station at which the carrier has neither a building nor an agent are at the owner's risk after they are unloaded on the platform is held valid. *Alam v. Ry.*, 183 Pa. St. 174; 39 L. R. A. 535; 38 Atl. 709.

¹⁹ *Willock v. R. R.*, 166 Pa. St. 184; 45 Am. St. Rep. 674; 27 L. R. A. 228; 30 Atl. 948.

²⁰ *Roos v. Ry.*, 199 Pa. St. 378; 49 Atl. 344.

²¹ *Calderon v. Steamship Co.*, 170 U. S. 272; *Missouri, etc., Ry. v. Mackey*, 127 U. S. 205; *Rose v. Ry.*, 39 Ia. 246; *Bucklew v. Ry.*, 64 Ia. 603; *Chicago, etc., Ry. v. Poston*, 59 Kan. 449; 53 Pac. 465; *Missouri Pacific Ry. v. Mackey*, 33 Kan. 298; 6 Pac. 291; *Ditberner v. Ry.*, 47 Wis. 138; 2 N. W. 69.

²² *Wabash R. R. v. Pearce*, 192 U.

S. 179; *Little Rock, etc., Ry. v. Odom*, 63 Ark. 326; 38 S. W. 339; *Illinois Central Ry. v. Carter*, 165 Ill. 570; 36 L. R. A. 527; 46 N. E. 374; reversing 62 Ill. App. 618; *Hartley v. Ry.*, 115 Ia. 612; 89 N. W. 88; *Berg v. Ry.*, 30 Kan. 561; 2 Pac. 639; *Miller Grain, etc., Co. v. Ry.*, 138 Mo. 658; 40 S. W. 894; *Taffe v. Ry.*, 41 Or. 64; 67 Pac. 1015; rehearing denied, 41 Or. 74; 58 L. R. A. 187; 68 Pac. 732; *Keller v. Ry.*, 196 Pa. St. 57; 46 Atl. 261; *Dunbar v. Ry.*, 62 S. C. 414; 40 S. E. 884; *Bird v. R. Rd's*, 99 Tenn. 719; 63 Am. St. Rep. 856; 42 S. W. 451; *Texas, etc., Ry. v. Adams*, 78 Tex. 372; 22 Am. St. Rep. 56; 14 S. W. 666. *Contra*, *Chicago, etc., Ry. v. Grain Co. (Neb.)*, 90 N. W. 205.

if the loss is due to the negligence of the carrier.¹ This principle is often applied in contracts for the transportation of live stock.² If the shipper deceives the carrier as to the value of the goods shipped for the purpose of getting a lower rate, either by specific statements³ or by the method of packing the goods,⁴ he is bound by such estimate of value. Accordingly as the carrier's risk is limited to the apparent value of the goods shipped, it cannot on learning the true character of the goods

¹Hart v. R. R., 112 U. S. 331; Western R. R. v. Harwell, 91 Ala. 340; 8 So. 649; St. Louis, etc., Ry. v. Weakly, 50 Ark. 397; 7 Am. St. Rep. 104; 8 S. W. 134; Pierce v. Southern Pacific Co., 120 Cal. 160; 40 L. R. A. 350; 47 Pac. 874; affirmed in banc, 120 Cal. 156; 40 L. R. A. 354; 52 Pac. 302; Coupland v. Ry., 61 Conn. 531; 15 L. R. A. 534; 23 Atl. 870; Central of Georgia Ry. v. Murphey, 113 Ga. 514; 53 L. R. A. 720; 38 S. E. 970; Adams Express Co. v. Harris, 120 Ind. 73; 7 L. R. A. 214; 16 Am. St. Rep. 315; 21 N. E. 340; Rosenfeld v. Ry., 103 Ind. 121; 53 Am. Rep. 500; 2 N. E. 344; Chicago, etc., Ry. v. Miller, 79 Ill. App. 473; Adams Express Co. v. Carnahan, 29 Ind. App. 612; 94 Am. St. Rep. 283; 64 N. E. 647; denying rehearing of, 29 Ind. App. 606; 94 Am. St. Rep. 279; 63 N. E. 245; Louisville, etc., Ry. v. Nicolai, 4 Ind. App. 119; 51 Am. St. Rep. 206; 30 N. E. 424; Pacific Express Co. v. Foley, 46 Kan. 457; 26 Am. St. Rep. 107; 12 L. R. A. 799; 26 Pac. 665; Little v. Ry., 66 Me. 239; Graves v. Express Co., 176 Mass. 280; 57 N. E. 462; Hill v. Ry., 144 Mass. 284; 10 N. E. 836; Graves v. Ry., 137 Mass. 33; 50 Am. Rep. 282; Smith v. Express Co., 108 Mich. 572; 66 N. W. 479; J. J. Douglass Co. v. Ry., 62 Minn. 288; 30 L. R. A. 860; 64 N. W. 899; Alair v. R. R., 53 Minn. 160; 39 Am. St. Rep. 588; 19 L. R.

A. 764; 54 N. W. 1072; McFadden v. Ry., 92 Mo. 343; 1 Am. St. Rep. 721; 4 S. W. 689; Bowring v. Ry., 77 Mo. App. 250; Duntley v. R. R., 66 N. H. 263; 49 Am. St. Rep. 610; 9 L. R. A. 449; 20 Atl. 327; Zimmer v. R. R., 137 N. Y. 460; 33 N. E. 642; Magnin v. Dinsmore, 62 N. Y. 35; 20 Am. Rep. 442; Elkins v. Transportation Co., 81½ (32 P. F. Smith) Pa. St. 315; Ballou v. Earle, 17 R. I. 441; 33 Am. St. Rep. 881; 14 L. R. A. 433; 22 Atl. 1113; Railroad v. Gilbert, 88 Tenn. 430; 7 L. R. A. 162; 12 S. W. 1018; Richmond, etc., Ry. v. Payne, 86 Va. 481; 6 L. R. A. 849; 10 S. E. 749; Zouch v. Ry., 36 W. Va. 524; 17 L. R. A. 116; 15 S. E. 185 (by a divided court); Ullman v. Ry., 112 Wis. 150; 88 Am. St. Rep. 949; 56 L. R. A. 246; 88 N. W. 41; Loeser v. Ry., 94 Wis. 571; 69 N. W. 372.

²Hart v. R. R., 112 U. S. 331; St. Louis, etc., Ry. v. Weakly, 50 Ark. 397; 7 Am. St. Rep. 104; 8 S. W. 134; Nelson v. Ry., 28 Mont. 297; 72 Pac. 642; Starnes v. Ry., 91 Tenn. 516; 19 S. W. 675.

³Southern Express Co. v. Wood, 98 Ga. 268; 25 S. E. 436.

⁴Humphreys v. Perry, 148 U. S. 627; Hayes v. Wells Fargo & Co., 23 Cal. 185; 83 Am. Dec. 89; Chicago & Alton Ry. v. Shea, 66 Ill. 471; Shackt v. Ry., 94 Tenn. 658; 28 L. R. A. 176; 30 S. W. 742.

after delivery recover additional compensation.⁵ The carrier must give the shipper the option between shipping under the Common-Law liability and under the limited liability.⁶

If the value put upon the goods is not in consideration of a lower rate for a lower valuation, but is fixed arbitrarily by the shipper without reference to the actual value of the goods to limit his liability, such provision is void.⁷ Such valuation must be reasonable. In some states a valuation greatly below the true value is held unreasonable even if the carrier does not know the true value, provided the shipper is not guilty of fraud.⁸ A stipulation that the carrier will not be liable for any package of a value greater than one hundred dollars is not a limitation of liability to that sum but an attempt to evade all liability for articles worth more than that sum and is void.⁹ So a provision limiting the liability of a carrier of baggage to two hundred fifty francs is void.¹⁰ In Illinois such limitation seems valid except where the loss is caused by gross negligence of the carrier.¹¹

There are, however, some jurisdictions which hold that no limitation of value, though fair and reasonable and in consider-

⁵ *United States Express Co. v. Koerner*, 65 Minn. 540; 36 L. R. A. 600; 68 N. W. 181.

⁶ *Little Rock, etc., Ry. v. Cravens*, 57 Ark. 112; 38 Am. St. Rep. 230; 18 L. R. A. 527; 20 S. W. 803; *Wallace v. Matthews*, 39 Ga. 617; 99 Am. Dec. 473; *Atchison, etc., Ry. v. Dill*, 48 Kan. 210; 29 Pac. 148; *Adams Express Co. v. Nock*, 2 Duv. (Ky.) 562; 87 Am. Dec. 510; *Illinois, etc., Ry. v. Craig*, 102 Tenn. 298; 52 S. W. 164; *Louisville, etc., Ry. v. Turner*, 100 Tenn. 213; 43 L. R. A. 140; 47 S. W. 223.

⁷ *The Kensington*, 183 U. S. 263; *Central of Georgia Ry. v. Murphey*, 113 Ga. 514; 53 L. R. A. 720; 38 S. E. 970; *Georgia, etc., Co. v. Keener*, 93 Ga. 808; 44 Am. St. Rep. 197; 21 S. E. 287; *Chicago, etc.,*

Ry. v. Chapman, 133 Ill. 96; 23 Am. St. Rep. 587; 8 L. R. A. 508; 24 N. E. 417; *Adams Express Company v. Harris*, 120 Ind. 73; 16 Am. St. Rep. 315; 7 L. R. A. 214; 21 N. E. 340; *Alair v. R. R.*, 53 Minn. 160; 39 Am. St. Rep. 588; 19 L. R. A. 764; 54 N. W. 1072; *Abrams v. Ry.*, 87 Wis. 485; 41 Am. St. Rep. 55; 58 N. W. 780.

⁸ *Southern Ry. v. Jones*, 132 Ala. 437; 31 So. 501.

⁹ *Calderon v. Steamship Co.*, 170 U. S. 272.

¹⁰ *The Kensington*, 183 U. S. 263; reversing 94 Fed. 885; 36 C. C. A. 533, which affirmed 58 Fed. 331.

¹¹ *Chicago, etc., Ry. v. Chapman*, 133 Ill. 96; 23 Am. St. Rep. 587; 8 L. R. A. 508; 24 N. E. 417; affirming 30 Ill. App. 504.

ation of reduced rates, can free a common carrier from liability for full value if the damage is due to the negligence of the carrier or his servants.¹² Under statutes forbidding carriers to limit their Common-Law liability by contract, a limitation on the amount of damage is invalid.¹³ So where such provision is found in the constitution such limitation is invalid.¹⁴ Such statutes cannot affect interstate commerce.¹⁵ Under a statute forbidding a carrier to exempt himself by contract from his liability, the shipper is not bound by the value fixed by him even if fixed too low in fraud of the railway company.¹⁶ In some jurisdictions a contract limiting the amount of recovery to the value of the goods at the time and place of shipment is held valid.¹⁷ This seems to exclude the value added by the transportation contracted and often paid for. In Minnesota for this reason such contracts were held invalid,¹⁸ but subsequently such language was held not to exclude the freight paid or agreed to be paid; and such contracts were held valid.¹⁹

¹² *Chicago, etc., R. R. v. Stock Farm*, 194 Ill. 9; 88 Am. St. Rep. 68; 61 N. E. 1095; *Baughman v. Ry.*, 94 Ky. 150; 21 S. W. 757; *Louisville, etc., Ry. v. Owen*, 93 Ky. 201; 19 S. W. 590; *Illinois Central R. R. v. Bogard*, 78 Miss. 11; 27 So. 879; *Southern Express Co. v. Seede*, 67 Miss. 609; 7 So. 547; *Wyrick v. Ry.*, 74 Mo. App. 406; *Chicago, etc., Ry. v. Witty*, 32 Neb. 275; 29 Am. St. Rep. 436; 49 N. W. 183; *Pittsburgh, etc., Ry. v. Sheppard*, 56 O. S. 68; 60 Am. St. Rep. 732; 46 N. E. 61; *United States Express Co. v. Backman*, 28 O. S. 144; *Normile v. Navigation Co.*, 41 Or. 177; 69 Pac. 928; *Hughes v. Ry.*, 202 Pa. St. 222; 51 Atl. 990; *Grogan v. Express Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; 7 Atl. 134; *Fort Worth, etc., Ry. v. Greathouse*, 82 Tex. 104; 17 S. W. 834; *Southern Pacific Co. v. Anderson* (Tex. Civ. App.), 63 S. W. 1023.

¹³ *St. Louis etc., Ry. v. Sherlock* 59 Kan. 23; 51 Pac. 899; *Pacific Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100; 42 S. W. 795.

¹⁴ *Illinois Central Ry. v. Radford* (Ky.), 64 S. W. 511.

¹⁵ *Southern Pacific Co. v. Phillips* (Tex. Civ. App.), 39 S. W. 958.

¹⁶ *Lucas v. Ry.*, 112 Ia. 594; 84 N. W. 673.

¹⁷ *Pierce v. Southern Pacific Co.*, 120 Cal. 156; 40 L. R. A. 350; 47 Pac. 874; affirmed on rehearing, 40 L. R. A. 354; 52 Pac. 302. (In this case the bill of lading provided that the invoice price should be the measure of damages; but as no invoice was made out, the actual value was assumed to be intended.)

¹⁸ *Shea v. Ry.*, 63 Minn. 228; 65 N. W. 458.

¹⁹ *Davis v. Ry.*, 70 Minn. 37; 72 N. W. 823.

Under statutes forbidding carriers to contract for less than Common-Law liability a custom requiring the shipper of stock to agree that his damage shall not exceed the cash value of his stock at the place of shipment is invalid.²⁰ But such stipulation is valid as to interstate shipments.²¹ A contract limiting the amount for which the carrier is liable in case of loss is strictly construed if held valid. Such a contract does not in any way affect the amount of the liability of a carrier for non-compliance with a demand by the shipper to stop the goods *in transitu*.²²

§361. Contracts relieving carriers of live stock from liability.

The rule that a common carrier cannot relieve himself from liability for injuries due to his own negligence applies to carriers of live stock.¹ This qualification, however, must be made. The peculiarity of handling live-stock makes shippers often willing to agree to load, care for, feed, water and unload their own stock at their risk. Such contracts are valid.² So it has been held that a carrier of live-stock may contract for the liability of a private carrier.³ Under the Kansas statute which forbids a carrier to contract for less than a Common-Law liability unless otherwise ordered by a board of railroad commissioners and an order from such board permitted contracts restricting liability except in case of negligence, such contracts are valid.⁴ So

²⁰ *Missouri Pacific Ry. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776; 2 L. R. A. 75; 9 S. W. 749.

²¹ *Southern Pacific Co. v. Phillips* (Tex. Civ. App.), 39 S. W. 958.

²² *Rosenthal v. Weir*, 170 N. Y. 148; 57 L. R. A. 527; 63 N. E. 65.

¹ *Chicago, etc., Ry. v. Stock Farm*, 194 Ill. 9; 88 Am. St. Rep. 68; 61 N. E. 1095; *Omaha, etc., R. R. v. Crow*, 54 Neb. 747; 69 Am. St. Rep. 741; 74 N. W. 1006; *Pittsburgh, etc., Ry. v. Sheppard*, 56 O. S. 68; 60 Am. St. Rep. 732; 46 N. E. 61; See under the Iowa statute: *Grieve*

v. Ry., 104 Ia. 659; 74 N. W. 192.

² *Seaboard, etc., R. R. v. Cauthen*, 115 Ga. 422; 41 S. E. 653; *Georgia R. R. v. Spears*, 66 Ga. 485; 42 Am. Rep. 81; *Terre Haute, etc., R. R. v. Sherwood*, 132 Ind. 129; 32 Am. St. Rep. 239; 17 L. R. A. 339; 31 N. E. 781; *Myers v. Ry.*, 90 Mo. 98; 2 S. W. 263. *Contra*, under the Iowa statute: *Grieve v. Ry.*, 104 Ia. 659; 74 N. W. 192.

³ *Central of Georgia Ry. v. Glasgow*, 117 Ga. 938; 43 S. E. 981.

⁴ *Burgher v. Ry.*, 105 Ia. 335; 75 N. W. 192.

under such contract the carrier is not liable for damage caused by the shipper's over-loading the car,⁵ nor for lost animals.⁶ Under such a statute a common carrier of live-stock cannot insist on a written notice to himself before delivery of the stock.⁷ Even under such contract, however, the carrier is liable if he does not give the shipper proper facilities for feeding, watering and otherwise caring for his stock;⁸ or if the carrier unloads the stock himself without giving the shipper reasonable opportunity so to do.⁹

§362. Contracts relieving carriers of passengers from liability.

A carrier of passengers while not an insurer of their safety, owes them a very high degree of care in providing therefor.¹ Considerations similar to those obtaining in the case of a carrier of goods, make a contract of a common carrier of passengers invalid insofar as it seeks to free him from liability for his own negligence.² Thus a covenant in a mileage book whereby the railroad is released from liability for injuries received by the passenger when riding "upon any freight train desig-

⁵ Texas, etc., Ry. v. Stribling (Tex. Civ. App.), 34 S. W. 1002.

⁶ Susong v. R. R., 115 Ga. 361; 41 S. E. 566.

⁷ Ohio, etc., Ry. v. Tabor, 98 Ky. 503; 34 L. R. A. 685; 36 S. W. 18; affirming on rehearing 34 L. R. A. 685; 32 S. W. 168.

⁸ Norfolk, etc., R. R. v. Harman, 91 Va. 601; 50 Am. St. Rep. 855; 22 S. E. 490; Abrams v. Ry., 87 Wis. 485; 41 Am. St. Rep. 55; 58 N. W. 780.

⁹ Normile v. Navigation Co., 41 Or. 177; 69 Pac. 928.

¹ Southern Ry. v. Crowder, 130 Ala. 256; 30 So. 592; Bosqui v. R. R., 131 Cal. 390; 63 Pac. 682; Norfolk, etc., Ry. v. Tanner, 100 Va. 379; 41 S. E. 721; Wanzer v. R. R., 108 Wis. 319; 84 N. W. 423.

² Railroad Co. v. Lockwood, 17

Wall. (U. S.) 357; Denver, etc., Co. v. Dwyer, 20 Colo. 132; 36 Pac. 1106; Doyle v. R. R., 166 Mass. 492; 55 Am. St. Rep. 417; 33 L. R. A. 844; 44 N. E. 611; Doyle v. R. R., 162 Mass. 66; 44 Am. St. Rep. 335; 37 N. E. 770; Flint, etc., Ry. v. Weir, 37 Mich. 111; 26 Am. Rep. 499; Jones v. Ry., 125 Mo. 666; 46 Am. St. Rep. 514; 26 L. R. A. 718; 28 S. W. 883; Richmond v. R. R., 41 Or. 54; 93 Am. St. Rep. 694; 57 L. R. A. 616; 67 Pac. 947; Cleveland, etc., R. R. v. Curran, 19 O. S. 1; 2 Am. Rep. 362; Crary v. R. R., 203 Pa. St. 525; 93 Am. St. Rep. 778; 59 L. R. A. 815; 53 Atl. 363; Missouri Pacific Ry. v. Ivy, 71 Tex. 409; 10 Am. St. Rep. 758; 1 L. R. A. 500; 9 S. W. 346; Williams v. R. R., 18 Utah 210; 72 Am. St. Rep. 777; 54 Pac. 991.

nated to carry passengers" is invalid.³ This rule applies where the party injured is traveling on a drover's pass, giving him free transportation to enable him to care for live stock shipped by him or his employer.⁴ Such a covenant does not restrict the right of the next of kin to recover for the death of such passenger.⁵ So a covenant exonerating the railroad from liability for injury to one attending to live stock except in case of gross negligence of the railroad is invalid;⁶ and so is a covenant exonerating the railroad from liability except such as would make it liable to an employee.⁷ This rule also applies where the party injured is an employee of a railroad traveling as a passenger;⁸ as on an employee's excursion.⁹ If a passenger is carried gratuitously some courts hold that a provision relieving the carrier from liability is valid, on the theory that the carrier is not obliged to transport such person at all, and may therefore prescribe such terms as he sees fit.¹⁰ Other

³ *Richmond v. R. R.*, 41 Or. 54; 93 Am. St. Rep. 694; 57 L. R. A. 616; 67 Pac. 947.

⁴ *Ohio, etc., Ry. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *Louisville, etc., R. R. v. Bell*, 100 Ky. 203; 38 S. W. 3; *Missouri Pacific Ry. v. Tietken*, 49 Neb. 130; 59 Am. St. Rep. 526; 68 N. W. 336; *Cleveland, etc., Ry. v. Curran*, 19 O. S. 1; 2 Am. Rep. 362; *Missouri Pacific Ry. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758; 1 L. R. A. 500; 9 S. W. 346; *Saunders v. Southern Pacific Co.*, 13 Utah 275; 44 Pac. 932; *Davis v. Ry.*, 93 Wis. 470; 57 Am. St. Rep. 935; 33 L. R. A. 654; 67 N. W. 16; rehearing denied, 93 Wis. 486; 67 N. W. 1132.

⁵ *Chicago, etc., Ry. v. Martin*, 59 Kan. 437; 53 Pac. 461.

⁶ *Illinois Central Ry. v. Beebe*, 174 Ill. 13; 66 Am. St. Rep. 253; 43 L. R. A. 210; 50 N. E. 1019; affirming 69 Ill. App. 363.

⁷ *Missouri Pacific Ry. v. Tietken*,

49 Neb. 130; 59 Am. St. Rep. 526; 68 N. W. 336.

⁸ *Doyle v. R. R.*, 166 Mass. 492; 55 Am. St. Rep. 417; 33 L. R. A. 844; 44 N. E. 611; *Doyle v. R. R.*, 162 Mass. 66; 44 Am. St. Rep. 335; 37 N. E. 770.

⁹ *Crary v. R. R.*, 203 Pa. St. 525; 93 Am. St. Rep. 778; 59 L. R. A. 815; 53 Atl. 363. (The burden is said to be on the injured party to show negligence.)

¹⁰ *Boering v. Ry.*, 193 U. S. 442; *Northern Pacific Ry. v. Adams*, 192 U. S. 440; reversing 116 Fed. 324; 54 C. C. A. 196; which affirmed 95 Fed. 938; *Duncan v. Ry.*, 113 Fed. 508; *Payne v. Ry.*, 157 Ind. 616; 56 L. R. A. 472; 62 N. E. 472; *Rogers v. Steamboat Co.*, 86 Me. 261; 25 L. R. A. 491; 29 Atl. 1069; *Quimby v. R. R.*, 150 Mass. 365; 5 L. R. A. 846; 23 N. E. 205; *Kinney v. R. R.*, 34 N. J. L. 513; 3 Am. Rep. 265; *Muldoon v. Ry.*, 7 Wash. 528; 38 Am. St. Rep. 901; 22 L. R. A.

courts hold that such provisions are void.¹¹ A covenant fixing the maximum amount of recovery in case of injury to a passenger does not affect the amount recoverable in an action by his personal representative for causing his death.¹² Such a covenant is void as to the passenger if unreasonable.¹³

§363. Restrictions as to form and use of tickets.

Covenants in a ticket as to the method of authenticating and of using it are generally enforced if reasonable.¹ Thus limitations as to the time within which it must be used,² provisions that the ticket must be stamped by the agent at the destination of the passenger before he return part of the ticket is valid,³ or that the passenger must identify himself by signing his name,⁴ are all valid provisions. So a clause restricting the use of the ticket to a continuous passage is valid.⁵ The

794; 35 Pac. 422; S. C. Muldoon v. Ry., 10 Wash. 311; 45 Am. St. Rep. 787; 38 Pac. 995.

¹¹ Mobile, etc., R. R. v. Hopkins, 41 Ala. 486; 94 Am. Dec. 607; Rose v. R. R., 39 Ia. 246; Pennsylvania R. R. v. Butler, 57 Pa. St. 335; Gulf, etc., Ry. v. McGown, 65 Tex. 640. So under a statute forbidding a carrier to limit his Common Law liability. Chicago, etc., Ry. v. Hambel, (Neb.) 89 N. W. 643; Norfolk, etc., Ry. v. Tanner, 100 Va. 379; 41 S. E. 721.

¹² Clark v. Geer, 86 Fed. 447. So under a statute forbidding a carrier to change his Common Law liability. Drovers' passes: Chicago, etc., Ry. v. Posten, 59 Kan. 449; 53 Pac. 465; Chicago, etc., Ry. v. Martin, 59 Kan. 437; 53 Pac. 461.

¹³ Moses v. Packet Co., 88 Fed. 329.

¹ Mosher v. Ry., 127 U. S. 390; Frederick v. R. R., 37 Mich. 342; 26 Am. Rep. 531; Alabama, etc., Ry. v. Drummond, 73 Miss. 813; 20 So. 7.

² McGhee v. Drisdale, 111 Ala. 597; 20 So. 391; Landers v. Ry. (Tex. Civ. App.); 50 S. W. 528; Grogan v. Ry., 39 W. Va. 415; 19 S. E. 563.

³ Reed v. Ry. (Tex. Civ. App.), 50 S. W. 432; Russell v. Ry., 12 Tex. Civ. App. 627; 35 S. W. 724. However, the railroad may be liable where the ticket is not stamped but the agent has caused the passenger to believe that it is properly stamped. Northern Pacific Ry. v. Pauson, 70 Fed. 585; 30 L. R. A. 730; 17 C. C. A. 287. Or where the railroad has no agent at the destination to stamp the ticket. Southern Ry. v. Wood, 114 Ga. 140; 55 L. R. A. 536; 39 S. E. 894.

⁴ Central of Georgia Ry. v. Cannon, 106 Ga. 828; 32 S. E. 874; Ketcheson v. Southern Pacific Co., 19 Tex. Civ. App. 288; 46 S. W. 907.

⁵ Petrie v. Ry., 42 N. J. L. 449; Dietrich v. R. R., 71 Pa. St. 432; 10 Am. Rep. 711.

Harter act⁶ was intended to relieve a ship-owner from liability if he used due diligence in making his vessel seaworthy; and to exempt him from loss due to fault or error in navigation.⁷ Neither prior to⁸ nor subsequent to⁹ such act, could a ship-owner free himself from liability for unseaworthiness existing at the beginning of the voyage which could be discovered by due diligence. So a clause providing that dressed beef should be carried at the owner's risk was ineffectual to relieve him from liability for loss due to a failure to have the refrigerating machines in condition when the voyage began.¹⁰ Such act gives no power to put an arbitrary limit to the amount for which the carrier will be liable.¹¹

§364. Common carrier contracting as private carrier.

A distinction is made between such duties as a common carrier is bound to perform irrespective of special contract and such as he is not so bound to perform, but may perform on his own terms and conditions¹ He may make a valid contract for exemption from liability for negligence as to the latter. So a common carrier may make such contract as he pleases for the transportation of goods which he is not bound to carry, such as explosives.² Since a railroad is not bound to have cars belonging to, and in charge of another, it may do so on such terms as it chooses,³ and may exonerate itself from liability for

⁶ 27 Stat. 445.

⁷ *The Irrawaddy*, 171 U. S. 187.

⁸ *The Caledonia*, 157 U. S. 124 (a latent defect).

⁹ *The Carib Prince*, 170 U. S. 655.

¹⁰ *The Southwark*, 191 U. S. 1.

¹¹ *The Kensington*, 183 U. S. 263; *Calderon v. Steamship Co.*, 170 U. S. 272.

¹ "A common carrier may, however, become a private carrier or bailee for hire where as a matter of accommodation or special engagement he undertakes to carry something which it is not in his business

to carry." *Louisville, etc., Ry. v. Keefer*, 146 Ind. 21, 26; 58 Am. St. Rep. 348, 351; 38 L. R. A. 93; 44 N. E. 796; quoted in *Russell v. Ry.*, 157 Ind. 305; 87 Am. St. Rep. 214; 61 N. E. 678.

² *Fitzgerald v. Ry.*, 39 U. C. Q. B. 525; *California Powder Works v. Ry.*, 113 Cal. 329; 36 L. R. A. 648; 45 Pac. 691.

³ Such as cars belonging to a circus and in charge of its employees. *Chicago, etc., Ry. v. Wallace*, 66 Fed. 506; 30 L. R. A. 161; 14 C. C. A. 257; *Robertson v. R. R.*, 156

negligence therefor. Thus a carrier transporting a circus train may contract with the circus for indemnity in case the carrier is held liable for injury to the employees of such circus.⁴ Thus a railroad company may contract with an express company for exemption from liability even for negligence,⁵ or for indemnity from the company for injury to the employees of such company.⁶ An express company may make a valid contract with an employee that the company shall be released from all damages for any injury to such employee.⁷ If the railroad company contracts for exemption from liability to the express company and the express company contracts for exemption from liability to its employees, the effect of the two contracts is to prevent the employee from recovering from the railroad for injuries due to its negligence.⁸ A contract between a railroad company and a news company whereby the news company agrees to indemnify the railroad company against any loss arising out of injury to the employees of the news company is valid.⁹ So a contract between a railroad and a restaurant keeper, allowing an employee of the

Mass. 525; 32 Am. St. Rep. 482; 31 N. E. 650; *Coup v. Ry.*, 56 Mich. 111; 56 Am. Rep. 374; 22 N. W. 215; *Forepaugh v. R. R.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; 5 L. R. A. 508; 18 Atl. 503.

⁴ *Seaboard Air Line Ry. v. Main*, 132 N. C. 445; 43 S. E. 930.

⁵ *Baltimore, etc., Ry. v. Voigt*, 176 U. S. 498; reversing 79 Fed. 561; *Express Cases*, 117 U. S. 1; *Blank v. R. R.*, 182 Ill. 332; 55 N. E. 332; affirming 80 Ill. App. 475; *Louisville, etc., Ry. v. Keefer*, 146 Ind. 21; 38 L. R. A. 93; 44 N. E. 796; *Hosmer v. R. R.*, 156 Mass. 506; 31 N. E. 652; *Quimby v. R. R.*, 150 Mass. 365; 5 L. R. A. 846; 23 N. E. 205; *Bates v. R. R.*, 157 Mass. 255; 17 N. E. 633.

⁶ *Louisville, etc., Ry. v. Keefer*, 146 Ind. 21; 58 Am. St. Rep. 348; 38 L. R. A. 93; 44 N. E. 796; *Hos-*

mer v. Ry., 156 Mass. 506; 31 N. E. 652; *Bates v. Ry.*, 147 Mass. 255; 17 N. E. 663; *Quimby v. R. R.*, 150 Mass. 365; 5 L. R. A. 846; 23 N. E. 205.

⁷ *Pittsburgh, etc., Ry. Co. v. Mahoney*, 148 Ind. 196; 40 L. R. A. 101; 46 N. E. 917; motion to modify overruled, 148 Ind. 207; 47 N. E. 464.

⁸ *Baltimore, etc., Ry. v. Voigt*, 176 U. S. 498; reversing 79 Fed. 561; *Blank v. R. R.*, 182 Ill. 332; 55 N. E. 332; affirming 80 Ill. App. 475; *Pittsburgh, etc., Ry. v. Mahoney*, 148 Ind. 196; 62 Am. St. Rep. 503, 512; 40 L. R. A. 101; 46 N. E. 917; motion to modify overruled, 148 Ind. 207; 47 N. E. 464; *Peterson v. Ry.*, 119 Wis. 197; 96 N. W. 532.

⁹ *Kansas City, etc., Co. v. News Co.*, 151 Mo. 373; 74 Am. St. Rep. 545; 45 L. R. A. 380; 52 S. W. 205.

restaurant keeper to travel on the train to sell refreshments, the railroad to be free from all liability for injury to him is valid.¹⁰ A similar contract between a porter and a sleeping-car company, and a sleeping-car company and a railroad was held valid.¹¹ In order to protect the railroad company from liability the injured employee must have agreed to waive his right of action for injury. An employee of one company who is injured by the negligence of another company, such as a railroad, is not bound by the terms of a contract between the two companies freeing each other from liability for negligence if he does not acquiesce therein.¹² Thus a contract between a railroad company and an express company whereby the express company releases the railroad company from liability for injuries received by the employees of the express company does not affect the right of an employee to recover if he did not know of such contract.¹³ Thus if a mail clerk does not waive his claim for damages he may hold the railroad for damages caused by its negligence.¹⁴ So a contract between a shipper of live stock and a carrier providing that the person in charge of the live stock shall assume all risk of injury is not binding on such person if he does not acquiesce therein.¹⁵

The liability from which the carrier may thus relieve himself is his Common-Law liability for Common-Law duties. If a statute prescribes the doing of certain acts by the carrier as a safeguard to the public, and imposes a penalty for omitting

¹⁰ *Griswold v. R. R.*, 53 Conn. 371; 55 Am. Rep. 115; 4 Atl. 261.

¹¹ *McDermion v. Southern Pacific Co.*, 122 Fed. 669; *Russell v. R. R.*, 157 Ind. 305; 87 Am. St. Rep. 214; 55 L. R. A. 253; 61 N. E. 678. *Contra*, *Jones v. Ry.*, 125 Mo. 666; 46 Am. St. Rep. 514; 26 L. R. A. 718; 28 S. W. 883.

¹² *Ziegler v. R. R.*, 52 Conn. 543; *Philadelphia, etc., R. R. v. State*, 58 Md. 372; *Brewer v. R. R.*, 124 N. Y. 59; 21 Am. St. Rep. 647; 11 L. R.

A. 483; 26 N. E. 324; *Kenny v. R. R.*, 125 N. Y. 422; 26 N. E. 626; affirming 54 Hun 143; *Ominger v. R. R.*, 4 Hun 159; *Sawyer v. R. R.*, 27 Vt. 370.

¹³ *Brewer v. R. R.*, 124 N. Y. 59; 21 Am. St. Rep. 647; 11 L. R. A. 483; 26 N. E. 324.

¹⁴ *Seybolt v. R. R.*, 95 N. Y. 562; 47 Am. Rep. 75.

¹⁵ *Chicago, etc., Ry. v. Lee*, 92 Fed. 318; 34 C. C. A. 365.

such acts, the carrier cannot by contract relieve himself from liability for omitting such acts.¹⁶ Thus where the statute required that trains should be stopped a certain distance before crossing another railroad track, a railroad cannot by contract with a news company, relieve itself from liability for omitting to make such stop.¹⁷

§365. Insurance by common carrier.

The rule that a common carrier cannot by contract relieve himself from liability for the negligence of himself or his employees does not prevent him from contracting with an insurer for indemnity against losses arising out of his liability as a common carrier,¹ nor from contracting with a news company for indemnity from liability for injuries to the employees of such news company,² nor does it prevent a receiver from leas-

¹⁶ *Starr v. Ry.*, 67 Minn. 18; 69 N. W. 632.

¹⁷ *Starr v. Ry.*, 67 Minn. 18; 69 N. W. 632. (In this case the railroad had a contract with the news company for indemnity against liability to the news company or its employees from all risks whatever; and the news company had a contract with its employees for indemnity against any liability over to the railroad company on such contract between the railroad company and the news company. Notwithstanding such contracts the court allowed an employee of the news company to recover from the railroad for damages caused by the train's failing to stop before crossing another road. The court said: "When by express prohibitory enactments, the state has thus declared its public policy and provided a remedy for enforcing it, we do not think that it is competent for a railroad company to stipulate against this statutory

liability. If it were otherwise the state might, in its attempt to enforce a wise public policy, be completely thwarted, and the law thus nullified. This right of the state to interfere in behalf of the welfare of its citizens ought not to be bartered away by the contract of the parties, and especially by railroad companies, who derive their rights to operate their roads from the sovereign power." *Starr v. Ry.*, 67 Minn. 18; 69 N. W. 632.)

¹ *California Ins. Co. v. Compress Co.*, 133 U. S. 387; approving *Phoenix Ins. Co. v. Transportation Co.*, 117 U. S. 312; *The American Casualty Ins. Co.'s Case*, 82 Md. 535; s. c., *sub nom.*, Boston, etc., Co. v. Mercantile, etc., Co., 38 L. R. A. 97; 34 Atl. 778; *Trenton, etc., Co. v. Indemnity Co.*, 60 N. J. L. 246; 44 L. R. A. 213; 37 Atl. 609.

² *Kansas City, etc., Co. v. News Co.*, 151 Mo. 373; 74 Am. St. Rep. 545; 45 L. R. A. 380; 52 S. W. 205.

ing a road under contract to hold the lessee free from damages for accidents to persons or property.³

§366. Contracts relieving telegraph companies from liability for negligence.

A contract relieving a telegraph company from liability for negligence in transmitting a message is invalid in some jurisdictions;¹ as is a provision limiting liability to the cost of an unrepeatd message,² or otherwise limiting the liability of the telegraph company unless the message is repeated at an additional charge to the sender:³ while in other jurisdictions such

³ South Carolina, etc., Ry. v. Ry. Co., 93 Fed. 543; 35 C. C. A. 423. (By construction such provisions not including loss by wilful misconduct, gross negligence and the like.)

¹ Western Union Telegraph Co. v. Cook, 61 Fed. 624; Fleischner v. Cable Co., 55 Fed. 738; Western Union Telegraph Co. v. Chamblee, 122 Ala. 428; 25 So. 232; Western Union Telegraph Co. v. Crawford, 110 Ala. 460; 20 So. 111; Harkness v. Telegraph Co., 73 Ia. 190; 5 Am. St. Rep. 672; 34 N. W. 811; Postal Telegraph Cable Co. v. Schaefer (Ky.); 62 S. W. 1119; Western Union Telegraph Co. v. Eubanks, 160 Ky. 591; 66 Am. St. Rep. 361; 36 L. R. A. 711; 38 S. W. 1068; Smith v. Telegraph Co., 83 Ky. 104; 4 Am. St. Rep. 126; Fowler v. Telegraph Co., 80 Me. 381; 6 Am. St. Rep. 211; 15 Atl. 29; Birkett v. Telegraph Co., 103 Mich. 361; 50 Am. St. Rep. 374; 33 L. R. A. 404; 61 N. W. 645; Francis v. Telegraph Co., 58 Minn. 252; 49 Am. St. Rep. 507; 25 L. R. A. 406; 59 N. W. 1078; Reed v. Telegraph Co., 135 Mo. 661; 58 Am. St. Rep. 609; 34 L. R. A. 492; 37 S. W. 904; Western Union Telegraph Co. v. Beals, 56 Neb. 415; 71 Am. St. Rep. 682; 76 N. W. 903; Western

Union Telegraph Co. v. Lowney, 32 Neb. 732; 49 N. W. 707; Brown v. Telegraph Co., 111 N. C. 187; 32 Am. St. Rep. 793; 17 L. R. A. 648; 16 S. E. 179; Pepper v. Telegraph Co., 87 Tenn. 554; 10 Am. St. Rep. 699; 4 L. R. A. 660; 11 S. W. 783; Marr v. Telegraph Co., 85 Tenn. 529; 3 S. W. 496; Western Union Telegraph Co. v. Norris, 25 Tex. Civ. App. 43; 60 S. W. 982. At least if reasonable care is lacking; Western Union Telegraph Co. v. Ragland, (Tex. Civ. App.); 61 S. W. 421; Gillis v. Telegraph Co., 61 Vt. 461; 15 Am. St. Rep. 917; 4 L. R. A. 611; 17 Atl. 736. Even where it is a case of ordinary negligence; Western Union Telegraph Co. v. Eubanks, 100 Ky. 591; 66 Am. St. Rep. 361; 36 L. R. A. 711; 38 S. W. 1068; Reed v. Telegraph Co., 135 Mo. 661; 58 Am. St. Rep. 609; 34 L. R. A. 492; 37 S. W. 904.

² Postal Telegraph Cable Co. v. Schaefer (Ky.); 62 S. W. 1119; Western Union Telegraph Co. v. Eubanks, 100 Ky. 591; 66 Am. St. Rep. 361; 36 L. R. A. 711; 38 S. W. 1068; Francis v. Telegraph Co., 58 Minn. 252; 49 Am. St. Rep. 507; 25 L. R. A. 406; 59 N. W. 1078.

³ Birkett v. Telegraph Co., 103

contracts seem to be held valid.⁴ Some authorities treat such contract as valid unless the negligence is gross.⁵ Some courts hold that such provisions are invalid as to such negligence as could not have been affected by the repetition of the message;⁶ as where the message was transmitted properly, but delivery was delayed at the receiving station.⁷

§367. Contracts relieving employer from liability to employee for negligence.

It is generally held that an employer cannot by contract in advance release himself from liability for injury to his employee caused by his own negligence, or caused by the negligence of superior employees if by the law of the jurisdiction he is responsible for their negligence.¹ Invalid contracts of this class are most commonly entered into between railroads and their employees.² So a contract whereby the next of kin of an employee of a railroad released the railroad from all

Mich. 361; 50 Am. St. Rep. 374; 33 L. R. A. 404; 61 N. W. 645; Francis v. Telegraph Co., 58 Minn. 252; 49 Am. St. Rep. 507; 25 L. R. A. 406; 59 N. W. 1078; Brown v. Telegraph Co., 111 N. C. 187; 32 Am. St. Rep. 793; 17 L. R. A. 648; 16 S. E. 179.

⁴ Primrose v. Telegraph Co., 154 U. S. 1. So in case of cipher telegram. Shaw v. Telegraph Co., 79 Miss. 670; 89 Am. St. Rep. 666; 56 L. R. A. 486; 31 So. 222 (under Massachusetts statute).

⁵ Coit v. Telegraph Co., 130 Cal. 657; 80 Am. St. Rep. 153; 53 L. R. A. 678; 63 Pac. 83; Birkett v. Telegraph Co., 103 Mich. 361; 50 Am. St. Rep. 404; 33 L. R. A. 404; 61 N. W. 645.

⁶ Western Union Telegraph Co. v. Henderson, 89 Ala. 510; 18 Am. St. Rep. 148; 7 So. 419; Western Union Telegraph Co. v. Graham, 1 Colo. 230; 9 Am. Rep. 136; Western

Union Telegraph Co. v. Henley, 157 Ind. 90; 60 N. E. 682; Hibbard v. Telegraph Co., 33 Wis. 558; 14 Am. Rep. 775.

⁷ Barnes v. Telegraph Co., 24 Nev. 125; 77 Am. St. Rep. 791; 50 Pac. 438.

¹ Roesner v. Hermann, 10 Biss. (U. S.) 486; Chicago, etc., Coal Co. v. Peterson, 39 Ill. App. 114; Blanton v. Dold, 109 Mo. 64; 18 S. W. 1149; Bonner v. Bean, 80 Tex. 152; 15 S. W. 798.

² Otis v. Pennsylvania Co., 71 Fed. 136; Louisville, etc., R. R. v. Orr, 91 Ala. 548; 8 So. 360; Hissong v. R. R., 91 Ala. 514; 8 So. 776; Kansas, etc., Ry. v. Peavey, 29 Kan. 169; 44 Am. Rep. 630; Purdy v. R. R., 125 N. Y. 209; 21 Am. St. Rep. 736; 26 N. E. 255; Ry. v. Spangler, 44 O. S. 471; 58 Am. Rep. 833; 8 N. E. 467; Memphis, etc., Ry. v. Jones, 2 Head. (Tenn.) 517.

liability to himself for any injury to such employee was held void.³ Even where power is given to a railroad to "farm out" its right of transportation, it cannot insert a valid provision in a lease exonerating itself from liability to lessee's employees from lessee's negligence.⁴

There is, however, some authority for upholding a contract which waives in advance liability for negligence.⁵ Thus a contract between a street car company and its employees that it should not be liable for any injuries to them while they were on its cars, even if due to its own negligence was held valid.⁶ In Texas a contract by a father consenting to the employment of his minor son by a railroad not to hold them for damages if the son is injured is a bar to an action by the parent for damages,⁷ except such as are outside of the ordinary risks of the employment.⁸ A contract whereby the employee is required to make careful inspection of the railway on which he is to work, is held, to charge him with knowledge of visible dangers, such as adjoining buildings, overhanging bridges and the like.⁹ In some jurisdictions the employee may waive all liability for negligence except for such gross negligence as is criminal in its nature.¹⁰ A contract whereby a father released the railroad company from liability to him for any injury to his minor son, an employee of the road, has been held valid as to injuries caused by negligence as long as such negligence is **not** criminal.¹¹ On principle the same rules should apply to common

³ Tarbell v. R. R., 73 Vt. 347; 87 Am. St. Rep. 734; 56 L. R. A. 656; 51 Atl. 6.

⁴ Harden v. R. R., 129 N. Car. 354; 55 L. R. A. 784; 40 S. E. 184.

⁵ Pittsburgh, etc., Ry. Co. v. Mahoney, 148 Ind. 196; 62 Am. St. Rep. 503; 40 L. R. A. 101; 46 N. E. 917; 47 N. E. 464.

⁶ Peterson v. Traction Co., 23 Wash. 615; 53 L. R. A. 586; 63 Pac. 539; affirmed on rehearing, 23 Wash. 645; 65 Pac. 543.

⁷ International, etc., Ry. v. Hinzie, 82 Tex. 623; 18 S. W. 681.

⁸ Texas, etc., Ry. v. Putnam (Tex. Civ. App.); 63 S. W. 910.

⁹ Quinn v. Ry., 175 Mass. 150; 55 N. E. 891. (Even under a statute forbidding an employer to contract against liability for negligence.)

¹⁰ Galloway v. Ry., 57 Ga. 512; Western, etc., Ry. v. Strong, 52 Ga. 461; Hendricks v. Ry., 52 Ga. 467; Western, etc., Ry. v. Bishop, 50 Ga. 465; Cooke v. Atlantic & Western R. Co., 72 Ga. 48.

¹¹ New v. R. R., 116 Ga. 147; 59 L. R. A. 115; 42 S. E. 391.

carriers in their capacity of employers as to any other employers, and the reasons given by the courts in deciding the cases in which common carriers are parties do not suggest any distinction.¹²

A contract which gives an employee injured by his employer's negligence an alternative right to exact damages by action or to accept other compensation specified in such contract is valid, such as a contract which provides for forming a relief fund, in part from assessments upon the employees, and provides that in case of injury a resort to such relief fund for benefits will preclude a right of action for damages,¹³ even under a statute which forbids a railroad to exempt itself from liability by contract.¹⁴ Bringing suit for damages prevents recovery on a beneficial certificate containing such condition.¹⁵ However the act of a widow in accepting such relief does not pre-

¹² *Ry. v. Spangler*, 44 O. S. 471; 58 Am. Rep. 833; 8 N. E. 467.

¹³ *Hamilton v. Ry.*, 118 Fed. 92; *Chicago, etc., Ry. v. Miller*, 76 Fed. 439; 22 C. C. A. 264; s. c., reversing 65 Fed. 305; *Shaver v. Pennsylvania Co.*, 71 Fed. 931; *Otis v. Pennsylvania Co.*, 71 Fed. 136; *Martin v. Ry.*, 41 Fed. 125; *Owens v. Ry.*, 35 Fed. 715; 1 L. R. A. 75; *Eckman v. Ry.*, 169 Ill. 312; 38 L. R. A. 750; 48 N. E. 496; affirming 64 Ill. App. 444; *Pittsburg, etc., Ry. v. Moore*, 152 Ind. 345; 44 L. R. A. 638; 53 N. E. 290; disapproving *Pittsburg, etc., Ry. v. Montgomery*, 152 Ind. 1; 71 Am. St. Rep. 300; 49 N. E. 582; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47; 37 N. E. 423; *Maine v. R. R.*, 109 Ia. 260; 70 N. W. 630; 80 N. W. 315; *Donald v. Ry.*, 93 Ia. 284; 33 L. R. A. 492; 61 N. W. 971; *Spitze v. R. R.*, 75 Md. 162; 32 Am. St. Rep. 378; 23 Atl. 307; *Chicago, etc., R. R. v. Curtis*,

51 Neb. 422; 66 Am. St. Rep. 456; 71 N. W. 42; *Chicago, etc., R. R. v. Bell*, 44 Neb. 44; 62 N. W. 314; *Beck v. R. R.*, 63 N. J. L. 232; 76 Am. St. Rep. 211; 43 Atl. 908; *Pittsburgh, etc., Ry. v. Cox*, 55 O. S. 497; 35 L. R. A. 507; 45 N. E. 641. Same case in lower court, 2 Ohio Dec. 594; 1 Ohio N. P. 213; *Ringle v. R. R.*, 164 Pa. St. 529; 44 Am. St. Rep. 628; 30 Atl. 492; *Johnson v. Ry.*, 163 Pa. St. 127; 29 Atl. 854; *Johnson v. Ry. Co.*, 55 S. Car. 152; 44 L. R. A. 645; 32 S. E. 2; 33 S. E. 174.

¹⁴ *Pittsburg, etc., Ry. v. Moore*, 152 Ind. 345; 44 L. R. A. 638; 53 N. E. 290; disapproving, *Pittsburg, etc., Ry. v. Montgomery*, 152 Ind. 1; 71 Am. St. Rep. 300; 49 N. E. 582; *Donald v. Ry.*, 93 Ia. 284; 33 L. R. A. 492; 61 N. W. 971.

¹⁵ *Oyster v. Burlington Relief Department*, — Neb. —; 59 L. R. A. 291; 91 N. W. 699.

vent her from suing for damages as administratrix, on behalf of her minor children.¹⁶

§368. Abutting property-owners.

The rule that a common carrier cannot by contract relieve himself from liability for the negligence of himself or his employees has no application to provisions in leases given by such carrier for buildings owned by him on or near the right of way, exempting him from liability for loss by fire.¹ Accordingly an insurance company which has paid a loss upon a building erected under such a contract has no right of action against the railroad company, though such loss was caused by the latter, there being no wilful lack of due care.² A contract between a landlord and a corporation which becomes his tenant that he shall not be responsible for injuries from the elevator, is not binding individually on an officer of the corporation though he attested the contract and knew its contents.³

§369. Bailor and bailee.

A bailee may by contract relieve himself from liability for negligence. Thus the contract between the World's Columbian Exposition Company and all exhibitors, whereby it was re-

¹⁶ Chicago, etc., R. R. v. Wymore, 40 Neb. 645; 58 N. W. 1120.

¹ Hartford Fire Ins. Co. v. Ry., 175 U. S. 91; affirming, 70 Fed. 201; 17 C. C. A. 62; 30 L. R. A. 193; King v. Southern Pacific Co., 109 Cal. 96; 29 L. R. A. 755; 41 Pac. 786; Stephens v. Southern Pacific Co., 109 Cal. 86; 50 Am. St. Rep. 17; 29 L. R. A. 751; 41 Pac. 783; Griswold v. Ry., 90 Ia. 265; 24 L. R. A. 647; 57 N. W. 843; reversing on rehearing, 53 N. W. 295; Greenwich Ins. Co. v. Ry., — Ky. —; 56 L. R. A. 477; 66 S. W. 411; Wabash, etc., Ry. v. Ordelheide, 172 Mo. 436; 72 S. W. 684; affirming,

88 Mo. App. 589; Rutherford v. R. Co., 147 Mo. 441; 48 S. W. 921; Ordelheide v. Ry., 80 Mo. App. 357; American, etc., Co. v. Ry., 74 Mo. App. 89; Northern Pacific Ry. Co. v. McClure, 9 N. D. 73; 47 L. R. A. 149; 81 N. W. 52.

² Greenwich Ins. Co. v. R. R., 112 Ky. 598; 56 L. R. A. 477; 66 S. W. 411.

³ Griffen v. Manice, 166 N. Y. 188; 82 Am. St. Rep. 630; 52 L. R. A. 922; 59 N. E. 925. For a similar case see Springer v. Ford, 189 Ill. 430; 82 Am. St. Rep. 464; 52 L. R. A. 930; 59 N. E. 953; affirming, 88 Ill. App. 529.

lieved from liability for losses "resulting from any cause" was held valid, at least as to negligence, not gross or wilful, and not chargeable to the directors or managing officers.¹ So a warehouseman may by contract relieve himself from liability for loss by fire, even if due to his own negligence.²

§370. Other illustrations.

Independent contractor.—A contracted with a railroad to remove an embankment, A to exempt the railroad from liability for any injury whatever. A was killed by reason of the company's negligence. The contract was held void as far as it released the railroad from liability for negligence.¹

Commercial Agency.—A contract between a commercial agency and a subscriber providing that the company shall not be liable for any loss caused by negligence does not relieve it from liability for gross negligence of an employee in making a typographical error whereby a subscriber is damaged.²

Insurance.—A contract between an insurance company and the insured in which it is provided that one who is in fact the agent of the insurance company shall be held for the purposes of that contract to be the agent of the insured so that he shall be liable for any error in transmitting his answers to the insurance company, is held in many jurisdictions to be void as to such provision.³

¹ World's Columbian Exposition v. Republic of France, 96 Fed. 687; 38 C. C. A. 483. (On this point taking the same view as on former hearing in 91 Fed. 64; 33 C. C. A. 333, and reversing 83 Fed. 109. The court criticises the proposition in Cooley on Torts, p. 687, that negligence cannot be contracted against.)

² Wells v. Porter, 169 Mo. 252; 92 Am. St. Rep. 637; 69 S. W. 282 (distinguishing O'Neal v. Stone, 79 Mo. App. 279, as a case in which such clause was not considered.)

³ Johnson v. R. R., 86 Va. 975; 11 S. E. 829.

² Crew v. Bradstreet Co., 134 Pa. St. 161; 19 Am. St. Rep. 681; 7 L. R. A. 661; 19 Atl. 500.

³ Sellers v. Ins. Co., 105 Ala. 282; 16 So. 798; Royal Neighbors v. Boman, 177 Ill. 27; 69 Am. St. Rep. 201; 52 N. E. 264; Lumbermen's Mutual Ins. Co. v. Bell, 166 Ill. 400; 57 Am. St. Rep. 140; 45 N. E. 130; Indiana Ins. Co. v. Hartwell, 100 Ind. 566; s. c., 123 Ind. 177; 24 N. E. 100; Sternaman v. Ins. Co., 170 N. Y. 13; 88 Am. St. Rep. 625; 57 L. R. A. 318; 62 N. E. 763. (Distinguishing, Allen v. Ins. Co., 123 N. Y. 6; 25 N. E. 309; Alex-

Municipal Corporation.—A contract between a city and a property owner who wishes to make a sewer connection whereby he agrees to hold the city harmless from any damage resulting from such connection is void as to a subsequent purchaser from such party.⁴

§371. General doctrine of contracts relieving from liability for negligence.

The validity of contracts relieving from liability for negligence cannot, therefore, be stated in broad and general terms. Common carriers, telegraph companies, and employers, cannot by the weight of authority relieve themselves from this liability; while private carriers, landlords, and bailees, can. The rule as to common carriers and telegraph companies is based on the theory that they owe duties to the public of which they cannot divest themselves; and the reasoning employed would imply that private persons, not charged with special duties to the public could free themselves by contract from liability for negligence. The reasoning adopted in holding that employers cannot by contract relieve themselves in advance from liability to their employees for their negligence, would seem to imply that all contracts for freedom from liability for negligence are invalid; unless it can be explained by holding that in entering into a contract of employment, employer and employee are not on equal terms. The reasoning in the cases

ander v. Ins. Co., 66 N. Y. 464; 23 Am. Rep. 76; and Rohrbach v. Ins. Co., 62 N. Y. 47; 20 Am. Rep. 451, as cases of a broker rather than an insurance agent). Eilenberger v. Ins. Co., 89 Pa. St. 464; South Bend, etc., Co. v. Ins. Co., 2 S. D. 17; 48 N. W. 310; Knights of Pythias v. Cogbill, 99 Tenn. 28; 41 S. W. 340; Coles v. Ins. Co., 41 W. Va. 261; 23 S. E. 732. "Sound public policy prohibits the company from stipulating for immunity from the consequences of its own negli-

gence or what is the same thing, the negligence of its agent." Sternaman v. Ins. Co., 170 N. Y. 13, 23; 88 Am. St. Rep. 625, 630; 57 L. R. A. 318; 62 N. E. 763. *Contra*, New York Life Ins. Co. v. Fletcher, 117 U. S. 519. So under Massachusetts law, Davis v. Ins. Co., 67 N. H. 335; 39 Atl. 902.

⁴ Murphy v. Indianapolis, 158 Ind. 238; 63 N. E. 469. To the same effect see King v. Granger, 21 R. I. 93; 79 Am. St. Rep. 779; 31 Atl. 1012.

of private carriers, landlords and bailees, seems to imply that contracts relieving from liability for ordinary negligence are valid in the absence of special circumstances.

§372. Contracts relieving from liability after loss.

After damage, by negligence or otherwise, the parties may agree upon a compromise or settlement of the claim for damages.¹ The doctrines concerning the validity of contracts relieving against liability in advance, have no application to contracts made after the loss is sustained.

¹ See § 321; and see *Houston, etc.*, Am. St. Rep. 854; 53 L. R. A. 507; *Ry. v. McCarty*, 94 Tex. 298; 86 60 S. W. 429.

CHAPTER XIX.

CONTRACTS IN RESTRAINT OF TRADE AND OF ALIENATION.

§373. Contracts in restraint of trade distinguished from monopoly contracts.

Contracts whereby one or both of the parties thereto are restrained from engaging in a business, trade, or profession are of two kinds: (a) those which are a part of a transaction involving the good-will of a business, which are designed to protect such good-will, and to that end to restrain some person or persons from engaging in business, and (b) those which have for their primary object not the protection of good-will, but the formation of a monopoly in a given business. The first class, if objectionable at all, is so because the restraint is unreasonable; the second class is always illegal. When contracts in restraint of trade first came before the English courts they were treated as necessarily illegal and invalid.¹ This view undoubtedly was taken because contracts in restraint of trade were confused with contracts tending to create a monopoly. The next step in the development of this doctrine was to recognize that some contracts in restraint of trade might be valid, if the restraint was reasonable and designed merely to protect good-will.² Unfortunately the confusion between contracts whose sole objectionable feature was that they were in restraint of trade, and contracts objectionable as tending to a monopoly, persisted for some time, and some of the earlier

¹ Year Book, 2 Hen. V., fol. 5, pl. 26 (in which the court with profanity declared the bond void and threatened the plaintiff with fine or

imprisonment). *Colgate v. Bachelor*, Cro. Eliz. 872.

² *Mitchell v. Reynolds*, 1 P. Wms. 181.

See § 374.

American cases treat monopoly contracts as if their sole objectionable feature were that they were in restraint of trade and as if monopoly contracts not transcending the limits fixed for contracts in restraint of trade must necessarily be valid;³ and the failure to make this distinction is the cause of some confusion in the later cases.⁴ The present attitude of the law is that contracts which do not aim to stifle competition but merely to transfer a business and good-will from one person to another,⁵ are very different in their effect from those which aim to stifle competition and to build up a monopoly.⁶

§374. Nature of contracts in restraint of trade.

Good-will is "the probability that the old customers will resort to the old place for the purpose of trade."¹ It is recognized by the law as a right of value which may be sold. The mere sale of a good-will does not imply a covenant by the vendor not to compete.² It is evident, however, that a sale of good-will, without any provision restraining the vendor from promptly destroying such good-will by opening a new place of business and drawing his old customers to himself, would be a mockery. Accordingly, if not unreasonable,³ a contract restraining the vendor of good-will from re-entering business to the ruin of the

³ *Whitney v. Slayton*, 40 Me. 224; *Palmer v. Stebbins*, 3 Pick. (Mass.) 188; 15 Am. Dec. 204; *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102; *Chappel v. Brockway*, 21 Wend. (N. Y.) 157; *Kellogg v. Larkin*, 3 Chand. (Wis.) 133; 3 Pinn. (Wis.) 123; 56 Am. Dec. 164.

⁴ *Anchor, etc., Co. v. Hawkes*, 171 Mass. 101; 68 Am. St. Rep. 403; 50 N. E. 509; *Gloucester, etc., Glue Co. v. Cement Co.*, 154 Mass. 92; 26 Am. St. Rep. 214; 12 L. R. A. 563; 27 N. E. 1005; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; 9 N. E. 629.

⁵ These contracts are discussed in §§ 374-381.

⁶ These contracts are discussed in §§ 432-447.

¹ *Lufkin Rule Co. v. Fringeli*, 57 O. S. 596; 605; 63 Am. St. Rep. 736, 739; 41 L. R. A. 185; 49 N. E. 1030. This definition is too narrow in limiting good-will to a place. In retail business this definition is approximately though not always correct; but in wholesale business it is the trade name or trademark to which old customers are more likely to resort than the location of the business.

² *Beard v. Dennis*, 6 Ind. 200; 63 Am. Dec. 380.

³ See § 375, *et seq.*

good-will,⁴ even though no property of the business passes in connection with the sale of good-will of a business which is carried on without any property or plant, as in the sale of the good-will of an agency for the sale of sand;⁵ or of the good-will of a steamship business without selling the vessels, putting them on another route;⁶ a contract whereby A abandons his business to enter B's employment, A agreeing not to re-engage in such business,⁷ a contract restraining a retiring partner from

⁴ *Mitchell v. Reynolds*, 1 P. Wms. 181; *Rousillon v. Rousillon*, L. R., 14 Ch. Div. 351; *Leather Cloth Co. v. Lorisont*, L. R., 9 Eq. 345; *Maxim*, etc., *Co. v. Nordenfelt* (1893), 1 Ch. 630; *Fowle v. Park*, 131 U. S. 88; *Hitchcock v. Anthony*, 83 Fed. 779; 28 C. C. A. 80; *Moore, etc., Hardware Co. v. Hardware Co.*, 87 Ala. 206; 13 Am. St. Rep. 23; 6 So. 41; *Hoyt v. Holly*, 39 Conn. 326; 12 Am. Rep. 390; *Bullock v. Johnson*, 110 Ga. 486; 35 S. E. 703; *Ryan v. Hamilton*, 205 Ill. 191; 68 N. E. 781; reversing, 103 Ill. App. 212; *Johnson v. Gwinn*, 100 Ind. 466; *Pohlman v. Dawson*, 63 Kan. 471; 88 Am. St. Rep. 249; 54 L. R. A. 913; 65 Pac. 689; *Grow v. Seligman*, 47 Mich. 607; 41 Am. Rep. 737; 11 N. W. 404; *Beal v. Chase*, 31 Mich. 490; *Hubbard v. Miller*, 27 Mich. 15; 15 Am. Rep. 153; *National Benefit Co. v. Hospital Co.*, 45 Minn. 272; 11 L. R. A. 437; 47 N. W. 806; *Presbury v. Fisher*, 18 Mo. 50; *Downing v. Lewis*, 59 Neb. 38; 80 N. W. 261; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; partly affirming and partly reversing, 56 N. J. Eq. 680; 39 Atl. 923; *King v. Fountain*, 126 N. Car. 196; 35 S. E. 427; *Paragon Oil Co. v. Hall*, 7 Ohio C. C. 240; *Jackson v. Byrnes*, 103 Tenn. 698; 54 S. W. 984; *Tobler v. Austin*, 22 Tex.

Civ. App. 99; 53 S. W. 706; *Washburn v. Dosch*, 68 Wis. 436; 60 Am. Rep. 873; 32 N. W. 551. Under the California Statute (Civil Code, § 1673) a contract by a stockholder on selling his stock not to engage in the business of billposting as long as vendee should engage therein is invalid, as the vendor cannot sell the good-will of the corporation, and without a valid sale of good-will a contract in restraint of trade is invalid, *Merchants Ad. Sign Co. v. Sterling*, 124 Cal. 429; 71 Am. St. Rep. 94; 46 L. R. A. 142; 57 Pac. 468. But such a contract made in connection with the sale of stock in a corporation was held valid in *Up River Ice v. Denler*, 114 Mich. 296; 68 Am. St. Rep. 480; 72 N. W. 157.

⁵ *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545; 59 N. E. 357.

⁶ *Leslie v. Lorillard*, 110 N. Y. 519; 1 L. R. A. 456; 18 N. E. 363. This principle has been extended to make valid a contract whereby the owner of a newspaper hires a competitor to discontinue his paper in that county for five years, paying him therefor a certain per cent. of the amount received for publishing legal notices. *Mapes v. Metcalf*, 10 N. D. 601; 88 N. W. 713. But see § 434.

⁷ *Anchor Electric Co. v. Hawkes*, 171 Mass. 101; 68 Am. St. Rep. 403; 41 L. R. A. 189; 50 N. E. 509:

engaging in the same business as that retired from;⁸ and a contract restraining an agent or employee from competing with his employer after his employment ends,⁹ are each held valid.

§375. What is a reasonable restraint of trade.

The courts are unanimous in holding that a contract in restraint of trade must be reasonable in order to be enforceable,¹

Carnig v. Carr, 167 Mass. 544; 57 Am. St. Rep. 488; 35 L. R. A. 512; 46 N. E. 117; *Kevil v. Oil Co.*, 8 Ohio N. P. 311.

⁸ *Hursen v. Gavin*, 162 Ill. 377; 44 N. E. 735; *Curtis v. Gokey*, 68 N. Y. 300; *Thomas v. Miles*, 3 O. S. 274; *Lange v. Werk*, 2 O. S. 520. So a contract giving the control of the business to one partner is valid. *Kinsman v. Parkhurst*, 18 How. (U. S.) 289. But under the South Dakota statute, while a provision in the contract of dissolution restraining the retiring partner from competing is valid, a subsequent contract by him, though on a new consideration is void. *Prescott v. Bidwell*, — S. D. —; 99 N. W. 93.

⁹ *Haynes v. Doman* (1899), 68 L. J. Ch. 419; 80 L. T. N. S. 569; *Underwood v. Barker* (1899), 1 Ch. 300; 68 L. J. Ch. 201; 80 L. T. N. S. 306; *Dubowski v. Goldstein* (1896), 1 Q. B. 478; *S. Jarvis Adams Co. v. Knapp*, 121 Fed. 34; 58 C. C. A. 1; *Harrison v. Refining Co.*, 116 Fed. 304; 58 L. R. A. 915; *Carnig v. Carr*, 167 Mass. 544; 57 Am. St. Rep. 488; 35 L. R. A. 512; 46 N. E. 117. (A contract for permanent employment, with an agreement not to engage in business as long as such employment was furnished.) This rule has been applied to the following employments: *Salesmen*, *Mills v. Dunham* (1891), 1 Ch. 576; *Carter v. Alling*, 43 Fed.

208; *Sternberg v. O'Brien*, 48 N. J. Eq. 370; 22 Atl. 348. A teacher: *Herreshoff v. Boutineau*, 17 R. I. 3; 33 Am. St. Rep. 850; 8 L. R. A. 469; 19 Atl. 712; (Though in this case the covenant was void because the area was so great as to be unreasonable. See § 379.) *Patterson v. Crabb* (Tex. Civ. App.); 51 S. W. 870. A dentist: *Tillinghast v. Boothby*, 20 R. I. 59; 37 Atl. 344. A contract binding the employee to give the employer the exclusive right to a machine invented by the employee, with all improvements thereon. *Bonsack Machine Co. v. Hulse*, 57 Fed. 519; *Morse, etc., Co. v. Morse*, 103 Mass. 72; 4 Am. Rep. 513.

¹ *McCurry v. Gibson*, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806; *Wright v. Ryder*, 36 Cal. 342; 95 Am. Dec. 186; *California Steam Navigation Co. v. Wright*, 6 Cal. 259; 65 Am. Dec. 511; *Rakestraw v. Lanier*, 104 Ga. 188; 69 Am. St. Rep. 154; 30 S. E. 735; *Lanzit v. Mfg. Co.*, 184 Ill. 326; 75 Am. St. Rep. 171; 56 N. E. 393; *Hoops Tea Co. v. Dorsey*, 99 Ill. App. 181; *O'Neal v. Hines*, 145 Ind. 32; 43 N. E. 946; *Beatty v. Cable*, 142 Ind. 329; 41 N. E. 590; *Eisel v. Hayes*, 141 Ind. 41; 40 N. E. 119; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560; 51 Am. St. Rep. 193; 41 N. E. 1048; *Duffy v. Shockey*, 11

and that it is reasonable when its extent is "such only as to afford a fair protection to the interests of the party in favor of whom it is given and not so large as to interfere with the interests of the public."²

Ind. 70; 71 Am. Dec. 348; *Beard v. Dennis*, 6 Ind. 200; 63 Am. Dec. 380; *Smalley v. Greene*, 52 Ia. 241; 3 N. W. 78; *Hedge v. Lowe*, 47 Ia. 137; *Pike v. Thomas*, 4 Bibb. 486; 7 Am. Dec. 741; *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102; *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Perkins v. Lyman*, 9 Mass. 522; *Beal v. Chase*, 31 Mich. 490; *Hubbard v. Miller*, 27 Mich. 15; 15 Am. Rep. 153; *National Benefit Co. v. Hospital Co.*, 45 Minn. 272; 11 L. R. A. 437; 47 N. W. 806; *Long v. Towl*, 42 Mo. 545; 97 Am. Dec. 355; *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545; 59 N. E. 357; *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816; 17 N. E. 335; *Hauser v. Harding*, 126 N. Car. 295; 35 S. E. 586; *Kramer v. Old*, 119 N. Car. 1; 56 Am. St. Rep. 650; 34 L. R. A. 389; 25 S. E. 813; *Lufkin Rule Co. v. Fringeli*, 57 O. S. 596; 63 Am. St. Rep. 736; 41 L. R. A. 185; 49 N. E. 1030.

² *Nordenfelt v. Ammunition Co.* (1894), A. C. 535; *Underwood v. Barker* (1899), 1 Ch. 300; *Badische, etc., Fabrik v. Schott* (1892), 3 Ch. 447; *Goddard v. Crefield Mills*, 75 Fed. 818; 21 C. C. A. 530; *Moore, etc., Hardware Co. v. Hardware Co.*, 87 Ala. 206; 13 Am. St. Rep. 23; 6 So. 41; *Webster v. Williams*, 62 Ark. 101; 34 S. W. 537; *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64; *Godfrey v. Roessle*, 5 App. D. C. 299; *Lanzit v. Mfg. Co.*, 184 Ill. 326; 75 Am. St. Rep. 171; 56 N. E. 393; reversing, 83 Ill. App. 168; *Consumers' Oil Co. v. Nunnemaker*,

142 Ind. 560; 51 Am. St. Rep. 193; 41 N. E. 1048; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101; 68 Am. St. Rep. 403; 41 L. R. A. 189; 50 N. E. 509; *Palmer v. Stebbins*, 3 Pick. 188; 15 Am. Dec. 204; *National Benefit Co. v. Hospital Co.*, 45 Minn. 272; 11 L. R. A. 437; 47 N. W. 806; *Gordon v. Mansfield*, 84 Mo. App. 367; *Ellerman v. Ry.*, 49 N. J. Eq. 217; 23 Atl. 287; *Sternberg v. O'Brien*, 48 N. J. Eq. 370; 22 Atl. 348; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; 13 N. E. 419; *Dunlop v. Gregory*, 10 N. Y. 241; 61 Am. Dec. 746; *Hauser v. Harding*, 126 N. Car. 295; 35 S. E. 586; *Kramer v. Old*, 119 N. Car. 1; 56 Am. St. Rep. 650; 34 L. R. A. 389; 25 S. E. 813; *Cowan v. Fairbrother*, 118 N. Car. 406; 54 Am. St. Rep. 733; 32 L. R. A. 829; 24 S. E. 212; *Tillinghast v. Boothby*, 20 R. I. 59; 37 Atl. 344; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784; 23 L. R. A. 639; 28 Atl. 973; *Herreshoff v. Boutineau*, 17 R. I. 3; 33 Am. St. Rep. 850; 8 L. R. A. 469; 19 Atl. 712. Such a contract must be "no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased." *More v. Bennett*, 140 Ill. 69, 80; 33 Am. St. Rep. 216, 220; 15 L. R. A. 361; 29 N. E. 888; quoted, *Nester v. Brewing Co.*, 161 Pa. St. 473, 481; 41 Am. St. Rep. 894, 896; 24 L. R. A. 247; 29 Atl. 102; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110; 50 L. R.

§376. Area of restraint.—Area less than entire country.

A sharp divergence of authority arises on the question of when the area involved is so great that the contract is injurious to the public interest. The rule as originally laid down in England, and as still in force in perhaps the majority of the jurisdictions in the United States, is that the area of restriction must not be so large that the public interest suffers, even though the business whose good-will is to be sold extends over the entire area, and that a contract covering such an area is unreasonable and void. Where this doctrine is in force, contracts in restraint of trade, extending over no larger area than necessary to protect the good-will involved, are valid if limited to the area of a village or a city,¹ or a part thereof,² or the

A. 175; 28 So. 669. To the same effect, *Chapin v. Brown Bros.*, 83 Ia. 156; 32 Am. St. Rep. 297; 12 L. R. A. 428; 48 N. W. 1074; *Oliver v. Gilmore*, 52 Fed. 562. It must operate "not more extensively than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased," and must not be "not otherwise injurious to the public interest." *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; partly affirming and partly reversing, 56 N. J. Eq. 680; 39 Atl. 923; *Finger v. Hahn*, 42 N. J. Eq. 606; 8 Atl. 654; 44 N. J. Eq. 604; 17 Atl. 1104.

¹ *McNichol v. Ryan*, 34 N. B. 391; *Jenkins v. Temples*, 39 Ga. 655; 99 Am. Dec. 482; *Hursen v. Gavin*, 162 Ill. 377; 44 N. E. 735; affirming, 59 Ill. App. 66; *Sell v. Branen*, 70 Ill. App. 471; *Boyce v. Watson*, 52 Ill. App. 361; *Marshalltown Stone Co. v. Mfg. Co.*, 114 Ia. 574; 87 N. W. 496; *Chapin v. Brown*, 83 Ia. 156; 32 Am. St. Rep. 297; 12 L. R. A.

428; 48 N. W. 1074; *Arnold v. Kreutzer*, 67 Ia. 214; 25 N. W. 138; *Grundy v. Edwards*, 7 J. J. Mar. (Ky.) 368; 23 Am. Dec. 409; *Kronschabel-Smith Co. v. Kronschabel*, 87 Minn. 230; 91 N. W. 892; *Downing v. Lewis*, 59 Neb. 38; 80 N. W. 261; *Sternberg v. O'Brien*, 48 N. J. Eq. 370; 22 Atl. 348; *Carll v. Snyder* (N. J. Eq.); 26 Atl. 977; *King v. Fountain*, 126 N. Car. 196; 35 S. E. 427; *Baumgarten v. Broadway*, 77 N. Car. 8; *Thomas v. Miles*, 3 O. S. 274; *Kevil v. Oil Co.*, 8 Ohio N. P. 311; *Gates v. Hooper*, 90 Tex. 563; 39 S. W. 1079; reversing, 39 S. W. 186; *Palmer v. Toms*, 96 Wis. 367; 71 N. W. 654; *Washburn v. Dosch*, 68 Wis. 436; 60 Am. Rep. 873; 32 N. W. 551. So with the practice of a profession. *McCurry v. Gibson*, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806; *Smalley v. Greene*, 52 Ia. 241; 35 Am. Rep. 267; 3 N. W. 78; *Doty v. Martin*, 32 Mich. 462; *Patterson v. Crabb* (Tex. Civ. App.); 51 S. W. 870.

² *Peterson v. Schmidt*, 13 Ohio C.

vicinity thereof,³ or a reasonable distance therefrom,⁴ or to the area of a county.⁵

§377. Area including entire country.—Original rule.

The divergent views are most sharply contrasted when the contract provides for an area of restraint which while no larger than necessary to protect the good-will of the business in question, is yet so large as to include the entire area of the country in whose courts the suit is brought. It is evident that on the one hand such a contract prevents the promisor from carrying

C. 205; 7 Ohio C. D. 202; Patterson v. Glassmire, 166 Pa. St. 230; 31 Atl. 40.

³ Stride v. Martin, 77 Law T. Rep. 600; Up River Ice Co. v. Denler, 114 Mich. 296; 68 Am. St. Rep. 480; 72 N. W. 157; Kramer v. Old, 119 N. Car. 1; 56 Am. St. Rep. 650; 34 L. R. A. 389; 25 S. E. 813; Jackson v. Byrnes, 103 Tenn. 698; 54 S. W. 984. This view is taken where there is no express limitation as to space, but the context shows that the restraint was limited to the vicinity of the business. Hitchcock v. Anthony, 83 Fed. 779; 28 C. C. A. 80; Western Distilling Warehouse Co. v. Hobson, 96 Ky. 550; 29 S. W. 308; Heichew v. Hamilton, 3 G. Greene (Ia.) 596; Buck v. Coward, 122 Mich. 530; 81 N. W. 328; Hubbard v. Miller, 27 Mich. 15; 15 Am. Rep. 153; Peltz v. Eichele, 62 Mo. 171; Dethlefs v. Tamsen, 7 Daly (N. Y.) 354. So with contracts not to practise a profession. Webster v. Williams, 62 Ark. 101; 34 S. W. 537; Cole v. Edwards, 93 Ia. 477; 61 N. W. 940; Timmerman v. Dever, 52 Mich. 34; 50 Am. Rep. 240; 17 N. W. 230.

⁴ Two miles; Smith v. Brown, 164 Mass. 584; 42 N. E. 101. Ten

miles; dentist, Cook v. Johnson, 47 Conn. 175; 36 Am. Rep. 64; physician; Wolff v. Hirschfeld, 23 Tex. Civ. App. 670; 57 S. W. 572. Eleven miles; Eisel v. Hayes, 141 Ind. 41; 40 N. E. 119. Twenty-five miles, Haynes v. Doman (1899), 68 L. J. Ch. 419; 80 L. T. N. S. 569. Fifty miles, Robinson v. Brick Co., 127 Fed. 804.

⁵ Bullock v. Johnson, 110 Ga. 486; 35 S. E. 703; Trentman v. Wahrenburg, 30 Ind. App. 304; 65 N. E. 1057; Davis v. Brown, 98 Ky. 475; 32 S. W. 614; affirmed on rehearing, 36 S. W. 534; Mapes v. Metcalf, 10 N. D. 601; 88 N. W. 713; Tobler v. Austin, 22 Tex. Civ. App. 99; 53 S. W. 706. So with a contract not to practise a profession; dentist; Tillinghast v. Boothby, 20 R. I. 59; 37 Atl. 344; physician; Gordon v. Mansfield, 84 Mo. App. 367. Many of the cases here cited necessarily decide only the reasonableness of the particular contract. Further discussion is obiter. Hence it is possible that space limits held unreasonable as to the good-will of certain kinds of business may be held reasonable as to other kinds.

on business in that state, and to that extent it tends to diminish the state's population, resources and wealth. On the other hand such a contract is not intended to do more than protect the good-will of a business in a legitimate way; and it is only the wide extent of the business in question that makes so wide an area of restraint necessary. The earlier English cases held restraints unreasonable which extended over the entire country,¹ while later cases have explained the earlier ones as being cases in which the area of restraint was wider than necessary to protect the business and hence unreasonable.² The early decisions have been followed in many states before the later explanations were made; and many American courts hold that a contract in restraint of trade which involves the whole area of a state,³ or substantially the whole of a state,⁴ or several states,⁵ or the whole of the United States,⁶ or which has no restrictions as to space⁷ are invalid. A contract not to engage in manufac-

¹ Price v. Green, 16 M. & W. 346 (conceded in argument); Homer v. Ashford, 3 Bing. 322 (obiter).

² See § 378.

Thus in Price v. Green, 16 M. & W. 346, a covenant not to engage in business in London or within six hundred miles thereof was attacked by defendant as void because that included England, Wales, and nineteen-twentieths of Scotland. Its invalidity outside of London was conceded, the only question argued being as to whether it was valid as to London. It was held valid as to such city, and this was really all that plaintiff had claimed.

³ Wright v. Ryder, 36 Cal. 342; 95 Am. Dec. 186; Union Strawboard Co. v. Bonfield, 193 Ill. 420; 86 Am. St. Rep. 346; 61 N. E. 1038; Hurssen v. Gavin, 162 Ill. 377; 44 N. E. 735; Bishop v. Palmer, 146 Mass. 469; 16 N. E. 299; Taylor v. Blanchard, 13 All. (Mass.) 370; 90 Am. Dec. 203; Lufkin Rule Co. v. Frin-

geli, 57 O. S. 596; 63 Am. St. Rep. 736; 41 L. R. A. 185; 49 N. E. 1030; Lange v. Werk, 2 O. S. 519; Oregon Steam Navigation Co. v. Hale, 1 Wash. Ter. 283; 34 Am. Rep. 803.

⁴ As all the state except one city. Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560; 51 Am. St. Rep. 193; 41 N. E. 1048.

⁵ Two states. Lanzit v. Mfg. Co., 184 Ill. 326; 75 Am. St. Rep. 171; 56 N. E. 393; reversing, 83 Ill. App. 168. Eight states. Western Woodware Association v. Starkey, 84 Mich. 76; 22 Am. St. Rep. 686; 11 L. R. A. 503; 47 N. W. 604. Thirty states and part of two others. Richards v. American, etc., Co., 87 Wis. 503; 58 N. W. 787.

⁶ Pike v. Thomas, 4 Bibb. (Ky.) 486; 7 Am. Dec. 741; Mallinckrodt Chemical Works v. Nemnich, 169 Mo. 388; 69 S. W. 355; Mallinckrodt Chemical Works v. Nemnich, 83 Mo. App. 6.

⁷ Santa Clara Mill & Lumber Co.

turing within an area so large that it includes the whole available field of such manufacturing is void.⁸

§378. **Area including entire country.—Modern English rule.**

The later English rule followed by some American courts is that as long as the area within which trade is restrained is no greater than was covered by the business whose good-will is in question, the contract is not injurious to the public interest and is valid.¹ "The test is to be applied according to the circumstances of the contract and is not to be arbitrarily limited by boundaries of time and space."² Where this view is entertained and the extent of the business in question justifies it, a contract which restrains business over the entire area of a country, as Great Britain,³ or the United States,⁴ or the District of Columbia,⁵ or over several states of the Union,⁶ or

v. Hayes, 76 Cal. 387; 9 Am. St. Rep. 211; 18 Pac. 391; Callahan v. Donnolly, 45 Cal. 152; 13 Am. Rep. 172; Wiley v. Baumgardner, 97 Ind. 66; 49 Am. Rep. 427; Gamewell, etc., Co. v. Crane, 160 Mass. 50; 39 Am. St. Rep. 458; 22 L. R. A. 673; 35 N. E. 98; Alger v. Thacher, 19 Pick. (Mass.) 51; 31 Am. Dec. 119. (See § 379 as showing the modification of the Massachusetts doctrine by Electric Co. v. Hawks.) Clark v. Needham, 125 Mich. 84; 84 Am. St. Rep. 559; 51 L. R. A. 785; 83 N. W. 1027; Albright v. Teas, 37 N. J. Eq. 171; Taylor v. Saurman, 110 Pa. St. 3; 1 Atl. 40; Keeler v. Taylor, 53 Pa. St. 467; 91 Am. Dec. 221; Tecktonius v. Scott, 110 Wis. 441; 86 N. W. 672; Berlin Machine Works v. Perry, 71 Wis. 495; 5 Am. St. Rep. 236; 38 N. W. 82.

⁸ As a contract not to manufacture glucose within one thousand miles of Chicago, thus including the whole of the cornbelt, within which alone such manufacture was practicable. Harding v. Glucose Co.,

182 Ill. 551, 639; 74 Am. St. Rep. 189, 231; 55 N. E. Rep. 577. *Contra*, a contract not to compete in the manufacture of glucose within fifteen hundred miles of Chicago was held valid. Harrison v. Refining Co., 116 Fed. 304; 58 L. R. A. 915.

¹ Underwood v. Barker (1899), 1 Ch. 300; Badische, etc., Fabrik v. Schott (1892), 3 Ch. 447; Whitaker v. Howe, 3 Beav. 383; Fowle v. Park, 131 U. S. 88; Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64; Warren v. Jones, 51 Me. 146; Whitney v. Slayton, 40 Me. 224.

² Oakdale Mfg. Co. v. Garst, 18 R. I. 484; 49 Am. St. Rep. 784; 23 L. R. A. 639; 28 Atl. 973.

³ Underwood v. Barker (1899), 1 Ch. 300; Nordenfelt v. Ammunition Co. (1894), A. C. 535.

⁴ National, etc., Co. v. Haberman, 120 Fed. 415.

⁵ Godfrey v. Roessle, 5 App. D. C. 299.

⁶ Swigert v. Tilden, 121 Ia. 650:

within fifteen hundred miles of Chicago,⁷ or within two hundred miles of Chicago,⁸ or over the whole of one state,⁹ or over substantially the whole of a state,¹⁰ or without any restriction as to space¹¹ is held valid. So a contract not to compete in catching certain kinds of fish or manufacturing products therefrom along the Atlantic sea-board is held valid.¹²

§379. Restraint void if unreasonable.

Whether the early English theory or the modern one is adopted the courts are agreed upon the rule that the area of restraint must not be larger than is necessary to protect the goodwill of the business in question. A restraint covering a greater area is void.¹ Thus a contract by a teacher of foreign lan-

63 L. R. A. 608; 97 N. W. 82; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723. As a contract not to make or sell matches in the United States except in Nevada and Montana for ninety-nine years, the vendors business extending substantially over the United States. *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; 13 N. E. 419.

⁷ *Harrison v. Refining Co.*, 116 Fed. 304; 58 L. R. A. 915.

⁸ *Ellerman v. Ry.*, 49 N. J. Eq. 217; 23 Atl. 287.

⁹ *Oregon Navigation Co. v. Winsor*, 20 Wall. (U. S.) 64.

¹⁰ As over the state of Ohio except the city of Cleveland. *Paragon Oil Co. v. Hall*, 7 Ohio C. C. 240.

¹¹ *Goddard v. Crefield Mills*, 75 Fed. 818; 21 C. C. A. 530; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101; 68 Am. St. Rep. 403; 41 L. R. A. 189; 50 N. E. 509; *Bancroft v. Embossing Co.*, — N. H. —; 64 L. R. A. 298; 57 Atl. 97; *Tode v. Gross*, 127 N. Y. 480; 24 Am. St.

Rep. 475; 13 L. R. A. 652; 28 N. E. 469; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784; 23 L. R. A. 639; 28 Atl. 973.

¹² *Fisheries Co. v. Lennen*, 116 Fed. 217.

¹ *Horner v. Graves*, 7 Bing. 735; *Price v. Green*, 16 M. & W. 346; *Lanzit v. Mfg. Co.*, 184 Ill. 326; 75 Am. St. Rep. 171; 56 N. E. 393; reversing, 83 Ill. App. 168; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560; 51 Am. St. Rep. 193; 41 N. E. 1048; *Beard v. Dennis*, 6 Ind. 200; 63 Am. Dec. 380; *Gamewell, etc., Co. v. Crane*, 160 Mass. 50; 39 Am. St. Rep. 458; 22 L. R. A. 673; 35 N. E. 98; *Caswell v. Gibbs*, 33 Mich. 331; *Mallinckrodt Chemical Works v. Memnich*, 83 Mo. App. 6; *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816; 17 N. E. 335; *Taylor v. Saurman*, 110 Pa. St. 3; 1 Atl. 40; *Hall's Appeal*, 60 Pa. St. 458; 100 Am. Dec. 584; *Keeler v. Taylor*, 53 Pa. St. 467; 91 Am. Dec. 221; *Hershoff v. Boutineau*, 17 R. I. 3; 33 Am. St. Rep. 850; 8 L. R. A. 469; 19 Atl. 712; *Tecktonius v. Scott*, 110 Wis. 441; 86 N. W. 672;

guages with his employer not to teach in Rhode Island for one year after his employment ends, is invalid as to the whole state where it appears that the pupils of his employer come from a limited section of the state;² and a contract not to engage in the business of making or selling sanitary pottery in any part of the United States except Nevada and Arizona for fifty years was held valid as to the state of New Jersey in which vendor's business was located and over which it extended, but invalid as to the remaining area, it not appearing that the business extended over such area.³ A contract not to engage in business within a thousand miles of the city where the vendor's business is located is invalid where such business extends only a hundred miles from such city.⁴ The area cannot be greater than the extent of the business when sold, and cannot extend over the area to which the business will afterwards be extended.⁵ A contract for restraint may be valid as to a part of the area contracted for, but not as to the rest of such area, if the parties have by their own agreement severed such area. Thus an agreement not to engage in business in a given county or elsewhere,⁶

Richards v. American, etc., Co., 87 Wis. 503; 58 N. W. 787; *Berlin Machine Works v. Perry*, 71 Wis. 495; 5 Am. St. Rep. 236; 38 N. W. 82.

² *Herreshoff v. Boutineau*, 17 R. I. 3; 33 Am. St. Rep. 850; 8 L. R. A. 469; 19 Atl. 712.

³ *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; partly affirming and partly reversing, 56 N. J. Eq. 680; 39 Atl. 923.

⁴ *Althen v. Vreeland* (N. J. Eq.); 36 Atl. 479. A covenant not to engage in business, though general in terms, may from the context be construed to apply to the area covered by the previous business. *Hardware Co. v. Hardware Co.*, 87 Ala. 206; 13 Am. St. Rep. 23; 6 So. 41.

⁵ *Robinson v. Brick Co.*, 127 Fed. 804; *Trenton Potteries Co. v. Oli-*

phant, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; partly affirming and partly reversing, 56 N. J. Eq. 680; 39 Atl. 923. (Citing in 56 N. J. Eq. 680; *Horner v. Graves*, 7 Bing. 735; *Ward v. Byrne*, 5 Mees. & W. 548; *Allsopp v. Wheateroft*, L. R., 15 Eq. 59; *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64; *Rannie v. Irvine*, 7 Mann. & G. 976.) *Contra*, *Anchor Electric Co. v. Hawkes*, 171 Mass. 101; 41 L. R. A. 189; 50 N. E. 509; where the courts seems to have upheld a contract applying to the whole country because the prospective business of the vendee was more general than that of the vendors, and was of a nature to extend over the whole country.

⁶ *Smith's Appeal*, 113 Pa. St. 579; 6 Atl. 251.

or in a given county or state or the United States,⁷ may be in each case valid as to such county and void as to the rest of the area contracted for. The doctrine that restraint is void if unreasonable is not limited to area. If for any reason the restraint is greater than is necessary to protect the good-will, the contract is invalid. Thus while an employee may within reasonable limits be prevented by his contract from competing with his employer after his employment ends,⁸ a contract restraining him from engaging in a business not competing with his employer's is unreasonable. Thus a contract was held invalid by which the employee was not to engage in any kind of business for three years after his employment ended, within fifteen miles of the place where his employer's business was located.⁹

§380. Duration of restraint.

If the space covered by the contract is reasonable, contracts in partial restraint of trade for one,¹ two,² three,³ five,⁴ ten,⁵ twenty,⁶ twenty-five⁷ and ninety-nine⁸ years have each been held valid, when necessary to protect the good-will of the busi-

⁷ Thomas v. Miles, 3 O. S. 274.
See note 5, *ante* this §.

⁸ See § 374.

⁹ Perls v. Saalfeld (1892), 2 Ch. 149.

¹ Sternberg v. O'Brien, 48 N. J. Eq. 370; 22 Atl. 348; Gates v. Hooper, 90 Tex. 563; 39 S. W. 1079; reversing, 39 S. W. 186.

² Rogers v. Maddocks (1892), 3 Ch. 346; McCurry v. Gibson, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806.

³ Brown v. Kling, 101 Cal. 295; 35 Pac. 995; National Benefit Co. v. Hospital Co., 45 Minn. 272; 11 L. R. A. 437; 47 N. W. 806; King v. Fountain, 126 N. Car. 196; 35 S. E. 427.

⁴ Snider v. McKelvey, 31 Ont. 91; Bullock v. Johnson, 110 Ga. 486; 35 S. E. 703; Hursen v. Gavin, 162 Ill. 377; 44 N. E. 735; affirming,

59 Ill. App. 66; Boyce v. Watson, 52 Ill. App. 361; Downing v. Lewis, 56 Neb. 386; 76 N. W. 900; Mapes v. Metcalf, 10 N. D. 601; 88 N. W. 713; Thomas v. Miles, 3 O. S. 274; Palmer v. Toms, 96 Wis. 367; 71 N. W. 654; Washburn v. Dosch, 68 Wis. 436; 60 Am. Rep. 873; 32 N. W. 551.

⁵ Western District Warehouse Co. v. Hobson, 96 Ky. 550; 29 S. W. 308; Wolff v. Hirschfeld, 23 Tex. Civ. App. 670; 57 S. W. 572.

⁶ Fisheries Co. v. Lennem, 116 Fed. 217.

⁷ Nordenfelt v. Ammunition Co. (1894), A. C. 535; Tobler v. Austin, 22 Tex. Civ. App. 99; 53 S. W. 706.

⁸ Diamond Match Co. v. Roeber, 106 N. Y. 473; 60 Am. Rep. 464; 13 N. E. 419.

ness in question. Indeed, if limited as to space so as to be reasonable a contract in restraint of trade, is valid though it is to last for the life of the promisee,⁹ or though no time limit is imposed;¹⁰ if necessary for the protection of the good-will, an express agreement not to compete as long as the adversary party continues in the business is valid.¹¹ Conversely, if a contract in restraint of trade covers an unreasonable space, a limitation in point of time will not make it valid.¹² By statute in California a contract in restraint of trade can extend only to a specified county, city, or a part thereof, and can last only so long as the buyer or any person deriving title to the good-will from him, carries on a like business therein. This rule does not introduce a new principle of law, but "it simply eliminates from the controversy arising on such restriction the question as to what is a reasonable territorial limit."¹³ Other jurisdictions

⁹ *Kramer v. Old*, 119 N. Car. 1; 56 Am. St. Rep. 650; 34 L. R. A. 389; 25 S. E. 813. So with covenants not to practise a profession. *Webster v. Williams*, 62 Ark. 101; 34 S. W. 537; *Hauser v. Harding*, 126 N. Car. 295; 35 S. E. 586.

¹⁰ *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64; *Swanson v. Kirby*, 98 Ga. 586; 26 S. E. 71; *O'Neal v. Hines*, 145 Ind. 32; 43 N. E. 946; *Martin v. Murphy*, 129 Ind. 464; 28 N. E. 1118; *Bowser v. Bliss*, 7 Blackf. (Ind.) 344; 43 Am. Dec. 93; *Smith v. Brown*, 164 Mass. 584; 42 N. E. 101; *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102; *Up River Ice Co. v. Denler*, 114 Mich. 296; 68 Am. St. Rep. 480; 72 N. W. 157; *Gordon v. Mansfield*, 84 Mo. App. 367; *Webster v. Buss*, 61 N. H. 40; 60 Am. Rep. 317; *Carll v. Snyder* (N. J. Eq.); 26 Atl. 977; *Tillinghast v. Boothby*, 20 R. I. 59; 37 Alt. 344; *French v. Parker*, 16 R. I. 219; 27 Am. St. Rep. 733; 14 Atl. 870; *Patterson v. Crabb* (Tex. Civ. App.); 51 S. W. 870. In *Mande-*

ville v. Harman, 42 N. J. Eq. 185, the question of whether a contract unlimited as to time could be reasonable was held so doubtful at law that equity would refuse an injunction. A contract not to work as a barber in a given town "now or hereafter" was held unreasonable. *Carroll v. Giles*, 30 S. C. 412; 4 L. R. A. 154; 9 S. E. 422.

¹¹ *Jackson v. Byrnes*, 103 Tenn. 698; 54 S. W. 984.

¹² *Callahan v. Donnolly*, 45 Cal. 152; 13 Am. Rep. 172; *Wiley v. Baumgardner*, 97 Ind. 66; 49 Am. Rep. 427; *Gamewell, etc., Co. v. Crane*, 160 Mass. 50; 39 Am. St. Rep. 458; 22 L. R. A. 673; 35 N. E. 98; *Bishop v. Palmer*, 146 Mass. 469; 4 Am. St. Rep. 339; 16 N. E. 299; *Dean v. Emerson*, 102 Mass. 480; *Saratoga County Bank v. King*, 44 N. Y. 87; *Lufkin Rule Co. v. Fringelli*, 57 O. S. 596; 63 Am. St. Rep. 736; 41 L. R. A. 185; 49 N. E. 1030.

¹³ *City Carpet, etc., Works v. Jones*, 102 Cal. 506; 36 Pa. 841. A

have similar statutes limiting the duration of the restraint to the time that the adversary party continues in such business.¹⁴

§381. Restraint of use of realty.

Covenants in a lease or deed restricting the use of the property leased, as forbidding the sale of intoxicating liquor,¹ or its sale in amounts less than five gallons,² or restricting the sale to the beer of particular brewing company only,³ or forbidding vendee to erect a warehouse thereon,⁴ or forbidding lessee to use the property leased, as a hotel,⁵ or to sublet,⁶ or to lease for competition,⁷ or to build tenement houses thereon,⁸ or to refuse to sell the rest of the land retained by vendor for less than that

limitation within five miles from a given city is valid; *Brown v. Kling*, 101 Cal. 295; 35 Pac. 995. A sale of property and good-will of the business of searching records may be accompanied by a contract restraining the vendor from competing in the county as long as vendee carries on such business. *Ragsdale v. Nagle*, 106 Cal. 332; 39 Pac. 628. A vendor may bind himself not to engage in business as an agent. *Meyers v. Merillion*, 118 Cal. 352; 50 Pac. 662.

¹⁴ *Hulen v. Earel*, 13 Okl. 246; 73 Pac. 927.

¹ *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *Collins Mfg. Co. v. Marcy*, 25 Conn. 241; *Star Brewery Co. v. Primas*, 163 Ill. 652; 45 N. E. 145; *Sullivan v. Kohlenberg*, 31 Ind. App. 215; 67 N. E. 541; *O'Brien v. Wetherell*, 14 Kan. 616; *Indian Orchard Canal Co. v. Sikes*, 8 Gray (Mass.) 562; *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363; 24 N. W. 104; *Smith v. Barrie*, 56 Mich. 314; 56 Am. Rep. 391; 22 N. W. 816; *Anderson v. Rowland*, 18 Tex. Civ. App. 460; 44 S. W. 911.

² *Sutton v. Head*, 86 Ky. 156; 9 Am. St. Rep. 274; 5 S. W. 410.

³ *Ferris v. Brewing Co.*, 155 Ind. 539; 52 L. R. A. 305; 58 N. E. 701. (Citing *O'Neal v. Hines*, 145 Ind. 32; 43 N. E. 946; *Beatty v. Coble*, 142 Ind. 329; 41 N. E. 590; *Eisel v. Hayes*, 141 Ind. 41; 40 N. E. 119; *Cowell v. Springs Co.*, 100 U. S. 55; *Manufacturing Co. v. Marcy*, 25 Conn. 242; *O'Brien v. Wetherell*, 14 Kan. 616; *Canal Co. v. Sikes*, 8 Gray, 562; *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363; 24 N. W. 104; *Smith v. Barrie*, 56 Mich. 314; 56 Am. Rep. 391; 22 N. W. 816; *Sutton v. Head*, 86 Ky. 156; 9 Am. St. Rep. 274; 5 S. W. 410; *Chicago, etc., R. R. Co. v. Car Co.*, 139 U. S. 79.

⁴ *Robbins v. Webb*, 68 Ala. 393.

⁵ *Wittenberg v. Mollyneaux*, 60 Neb. 583; 83 N. W. 842; *Mollyneaux v. Wittenberg*, 39 Neb. 547; 58 N. W. 205.

⁶ *Darnell v. Geis*, 78 Ill. App. 493.

⁷ *Anthony v. Hitchcock*, 71 Fed. 659.

⁸ *Lewis v. Gollner*, 129 N. Y. 227; 26 Am. St. Rep. 516; 29 N. E. 81.

paid by vendee,⁹ or a covenant whereby the grantor (a railroad) agrees, on consideration that grantee would erect a hotel on the property conveyed, to maintain a permanent station at that point and to dissuade others from erecting hotels there,¹⁰ are all valid. The question in such cases is whether such restraint is reasonable. So an agreement, in consideration of dismissing an action to prevent the use of the property for the business in question on the ground that it is a nuisance, whereby the owner of such property agrees that such business shall not be carried on therein for five years is valid.¹¹ So a covenant on the part of a lessor, who leases part of his department store to a firm to sell glassware, not to engage in the sale of such article during the term of the lease is valid.¹² A covenant against the sale of intoxicating liquors is held to be waived if the grantor permits the sale of such liquor on other realty conveyed by the same grantor under the same conditions, since such provision would under these circumstances tend to create a monopoly.¹³

§382. Contract in restraint of alienation.

A contract in restraint of alienation is not void if not unreasonable. An agreement restricting the purchase of shares in an association may be valid.¹ Thus an agreement between stockholders that in case of the death of one, the survivors should have an option to purchase the stock of the decedent at its value, is not invalid.² An agreement between stockholders that individual stock shall not be sold for a certain time so as to create a market for treasury stock, is valid.³ A contract

⁹ Rackemann v. Improvement Co., 167 Mass. 1; 57 Am. St. Rep. 427; 44 N. E. 990 (as the law will hold that this restraint is for a reasonable time only).

¹⁰ Texas, etc., R. R. v. Robards, 60 Tex. 545; 48 Am. Rep. 268.

¹¹ Grasselli v. Lowden, 11 O. S. 349.

¹² Herpolsheimer v. Funke, 1 Neb.

Rep. (Unoff.) 304; 95 N. W. 687.

¹³ Chippewa Lumber Co. v. Tremper, 75 Mich. 36; 13 Am. St. Rep. 420; 4 L. R. A. 373; 42 N. W. 532.

¹ Carter v. Oil Co., 182 Pa. St. 551; 39 L. R. A. 100; 38 Atl. 571.

² Fitzsimmons v. Lindsay, 205 Pa. St. 79; 54 Atl. 488.

³ Williams v. Montgomery, 148 N. Y. 519; 43 N. E. 57.

which tends to restrain the alienation of a fee-simple is invalid.* An option in a lease to be exercised within fifteen years is not void as against perpetuities.⁵ In other jurisdictions an option to be exercised after twenty-one years is void as against perpetuities.⁶ The rules of the two jurisdictions forbidding perpetuities were, however different.

⁴ *Prey v. Stanley*, 110 Cal. 423; 42 Pac. 908; *Munroe v. Hall*, 97 N. Car. 206; 1 S. E. 651.

⁵ *Blakeman v. Miller*, 136 Cal. 138; 89 Am. St. Rep. 120; 68 Pac. 587.

⁶ *London, etc., Ry. v. Gomm*, 20 Ch. Div. 562; overruling, *Birmingham Canal Co. v. Cartwright*, 11 Ch. Div. 421; *Tulk v. Moxhay*, 2 Phill. Ch. 774.

CHAPTER XX.

WAGER INSURANCE.

§383. Nature of wager insurance.

Wager insurance is insurance on life or property effected by one who has no insurable interest therein. The history of wager insurance at Common Law is a matter of dispute; some authorities holding that it was valid as were wagers in general,¹ and that its invalidity in England was solely due to statute,² while other authorities take the view that wager insurance was invalid as being a class of wagers not enforced because contrary to public policy;³ and that the English statutes on the subject were merely declaratory of the Common Law.⁴ Another theory is that such insurance is invalid not because it is a wager but because it gives to a party who has no special interest of any sort in preserving the life or property insured, a financial interest in its destruction.⁵

§384. Insurable interest in one's own life.

As a person has an insurable interest in his own life,¹ he may insure his life for the benefit of another who has no insurable

¹ Craufurd v. Hunter, 8 T. R. 13; Loomis v. Ins. Co., 6 Gray (Mass.) 396; Abbott v. Sebor, 3 Johns. Cas. (N. Y.) 39; Hurd v. Doty, 86 Wis. 1; 21 L. R. A. 746; 56 N. W. 371.

² As to life insurance, "or in any other event or events whatsoever," 14 Geo. III., C. 48. As to marine insurance, 19 Geo. II., C. 37. 14 Geo. III., C. 48, is said never to have been in force in Wisconsin. Hurd v. Doty, 86 Wis. 1; 21 L. R. A. 746; 56 N. W. 371.

³ Goddard v. Garrett, 2 Vern. 269.

⁴ Connecticut, etc., Ins. Co. v. Schaefer, 94 U. S. 457.

⁵ Cheeves v. Anders, 87 Tex. 287; 47 Am. St. Rep. 107; 28 S. W. 274.

¹ If A induces B to take out insurance on B's life, payable to B's executors, such a contract is not a wager, though B is to pay the premiums and the policy to be indorsed as collateral for B's debt. Union Central Life Ins. Co. v. Hilliard, 63 O. S. 478; 81 Am. St. Rep. 644; 53 L. R. A. 462; 59 N. E. 230.

risk therein;² or he may assign over insurance payable to himself to such person as he pleases, even to one not having an insurable interest.³ At any rate the assignor and all claiming under him, cannot object that the assignee has no insurable interest.⁴ This view has been expressed in cases where the con-

² *Aetna Life Ins. Co. v. France*, 94 U. S. 561; *Fidelity, etc., Association v. Jeffords*, 107 Fed. 402; 53 L. R. A. 193; *American, etc., Ins. Co. v. Barr*, 68 Fed. 873; 16 C. C. A. 51; *Robinson v. Association*, 68 Fed. 825; *Union Fraternal League v. Walton*, 109 Ga. 1; 77 Am. St. Rep. 350; 46 L. R. A. 424; 34 S. E. 317; s. c., 112 Ga. 315; 37 S. E. 389; *Equitable Life Assurance Society v. Paterson*, 41 Ga. 338; 5 Am. Rep. 535; *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620; 18 N. E. 657; *Bloomington, etc., Association v. Blue*, 120 Ill. 121; 60 Am. Rep. 558; 58 Am. Rep. 852; 11 N. E. 331; *Milner v. Bowman*, 119 Ind. 448; 5 L. R. A. 95; 21 N. E. 1094; *Elkhart, etc., Association v. Houghton*, 103 Ind. 286; 53 Am. Rep. 514; 2 N. E. 763; *Provident Life Ins. etc., Co. v. Baum*, 29 Ind. 236; *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297; 57 Am. St. Rep. 228; 43 N. E. 1056; *Campbell v. Ins. Co.*, 98 Mass. 381; *Heinlein v. Ins. Co.*, 101 Mich. 250; 45 Am. St. Rep. 409; 25 L. R. A. 627; 59 N. W. 615; *Ashford v. Ins. Co.*, 80 Mo. App. 638; *Vivar v. Supreme Lodge, etc.*, 52 N. J. L. 455; 20 Atl. 36; *Sabin v. Phinney*, 134 N. Y. 423; 30 Am. St. Rep. 681; 31 N. E. 1087; *Olmstead v. Keyes*, 85 N. Y. 593; *Albert v. Ins. Co.*, 122 N. Car. 92; 65 Am. St. Rep. 693; 30 S. E. 327; *Overbeck v. Overbeck*, 155 Pa. St. 5; 25 Atl. 646; *Hill v. Ins. Association*, 154 Pa. St. 29; 35 Am. St. Rep. 807; 25 Atl. 771; *Northwest-*

ern, etc., Assoc. v. Jones, 154 Pa. St. 99; 35 Am. St. Rep. 810; 26 Atl. 253; *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192; *Clark v. Allen*, 11 R. I. 439; 23 Am. Rep. 496; *Bursinger v. Bank*, 67 Wis. 75; 58 Am. Rep. 848; 30 N. W. 290. Still more clearly may he take out insurance on his own life payable to one who has an insurable interest therein. *Schonfield v. Turner*, 75 Tex. 324; 7 L. R. A. 189; 12 S. W. 626.

³ *Allen v. Ins. Co.*, 72 Conn. 693; 45 Atl. 955; *Fitzpatrick v. Ins. Co.*, 56 Conn. 116; 7 Am. St. Rep. 288; 13 Atl. 673; 17 Atl. 411; *Milner v. Bowman*, 119 Ind. 448; 5 L. R. A. 95; 21 N. E. 1094; *Chamberlain v. Butler*, 61 Neb. 730; 87 Am. St. Rep. 478; 54 L. R. A. 338; 86 N. W. 481; *Mechanics' National Bank v. Comins*, — N. H. —; 55 Atl. 191; *Steinback v. Diepenbrock*, 158 N. Y. 24; 70 Am. St. Rep. 424; 44 L. R. A. 417; 52 N. E. 662; *St. John v. Ins. Co.*, 13 N. Y. 31; 64 Am. Dec. 529; *Wright v. Life Association*, 118 N. Y. 237; 16 Am. St. Rep. 749; 6 L. R. A. 731; 23 N. E. 186; *Wheeland v. Atwood*, 192 Pa. St. 237; 73 Am. St. Rep. 803; 43 Atl. 946.

⁴ *Stoelker v. Thornton*, 88 Ala. 241; 6 L. R. A. 140; 6 So. 680; *Rittler v. Smith*, 70 Md. 261; 2 L. R. A. 844; 16 Atl. 890; *Dixon v. Ins. Co.*, 168 Mass. 48; 46 N. E. 430; *Hoffman v. Hoke*, 122 Pa. St. 377; 1 L. R. A. 229; 15 Atl. 437.

tract was a mere wager as far as the assignee was concerned.⁵ Such defense can be interposed only by the insurer. If the insured reserves the right to change the beneficiary the original beneficiary cannot complain of such assignment.⁶ So if A has an insurable interest in B's life and effects insurance thereon and assigns such policy to X, X may recover thereon.⁷ The right of the assignee to recover is still clearer where he has an insurable interest in the life of the assignor.⁸ As between a creditor who is the assignee of his debtor's life insurance policy, and the representatives of the debtor, the tendency is to treat the assignment as one for security only; and to hold the assignee liable to the representatives of the insured for any excess above his claim;⁹ and it has been held, in apparent contradiction to the views heretofore expressed that a creditor cannot take by assignment any greater interest than enough to protect his claim, and that on collecting the policy, he is liable for the excess to the representatives of the insured.¹⁰

Such insurance is valid except (a) where the transaction is merely a subterfuge to enable such third person to effect wager insurance indirectly which he could not effect directly.¹¹ A contract by which one who has no insurable interest is to have a policy made out for his benefit in consideration of his paying the premiums,¹² or paying a sum of money to the widow

Contra, Roller v. Moore, 86 Va. 512; 10 S. E. 241. *Sub nomine*, Roller v. Beam, 6 L. R. A. 136.

⁵ Hoffman v. Hoke, 122 Pa. St. 377; 1 L. R. A. 229; 15 Atl. 437.

⁶ Carpenter v. Knapp, 101 Ia. 712; 38 L. R. A. 128; 70 N. W. 764.

⁷ Louder v. Friendly Society, 72 Md. 511; 20 Atl. 137.

⁸ Robinson v. Hurst, 78 Md. 59; 44 Am. St. Rep. 266; 26 Atl. 956. Creditor, Stoelker v. Thornton, 88 Ala. 241; 6 L. R. A. 140; 6 So. 680; Martin v. Stubbings, 126 Ill. 387; 9 Am. St. Rep. 620; 18 N. E. 657.

⁹ Morris v. Banking Co., 109 Ga. 12; 46 L. R. A. 506; 34 S. E. 378;

Hays v. Lapeyre, 48 La. Ann. 749; 35 L. R. A. 647; 19 So. 821.

¹⁰ Equitable Ins. Co. v. Hazlewood, 75 Tex. 338; 16 Am. St. Rep. 893; 7 L. R. A. 217; 12 S. W. 621; Rooler v. Moore, 86 Va. 512; 10 S. E. 241. *Sub nomine*, Roller v. Beam, 6 L. R. A. 136.

¹¹ Croswell v. Indemnity Association, 51 S. Car. 103; 28 S. E. 200.

¹² West v. Sanders, 104 Ga. 727; 31 S. E. 619; Cisna v. Sheibley, 88 Ill. App. 385. But if the beneficiary has an insurable interest in the life of the insured it makes no difference what arrangement they have for paying premiums. Fidelity Mutual Life Association v. Jef-

of the insured,¹³ or by which one is to take out a policy on his own life for the benefit of one having no insurable interest therein,¹⁴ or is to assign it to his creditor in clear excess of such creditor's claim, the creditor to pay the premiums,¹⁵ or by which A is to take out insurance on his own life, payable to his estate, and to assign it at once to B, B to pay the premiums,¹⁶ are all held wagers. But a subsequent promise of the beneficiary to pay premiums not connected with any understanding to that effect between insured and beneficiary when the insurance was effected does not invalidate the policy.¹⁷

The second exception to the validity of such insurance is (b) where the policy is taken out in a beneficial association whose charter prescribes who may be beneficiaries.¹⁸ In the latter case the beneficiary must be within the prescribed classes, or the insurance is invalid as to such beneficiary even if he has an insurable interest.

fords, 107 Fed. 402; 53 L. R. A. 193; 46 C. C. A. 377.

¹³ Burbage v. Windley, 108 N. Car. 357; 12 L. R. A. 409; 12 S. E. 839.

¹⁴ Keystone Mutual Benefit Association v. Norris, 115 Pa. St. 446; 2 Am. St. Rep. 572; 8 Atl. 638; Tate v. Building Association, 97 Va. 74; 75 Am. St. Rep. 770; 45 L. R. A. 243; 33 S. E. 382.

¹⁵ Warnock v. Davis, 104 U. S. 775 (held a wager as to the part in excess of the debt).

¹⁶ Fitzpatrick v. Ins. Co., 56 Conn. 116; 7 Am. St. Rep. 288; 13 Atl. 673; 17 Atl. 411; Rittler v. Smith, 70 Md. 261; 2 L. R. A. 844; 16 Atl. 890; Olmsted v. Keyes, 85 N. Y. 593; Clark v. Allen, 11 R. I. 439; 23 Am. Rep. 496; Clement v. Ins. Co., 101 Tenn. 22; 70 Am. St. Rep. 650; 42 L. R. A. 247; 46 S. W. 561; Fairchild v. Life Association, 51 Vt. 613; Bursinger v. Bank, 67

Wis. 75; 58 Am. Rep. 848; 30 N. W. 290.

¹⁷ United Order, etc., v. Merrick, 165 Mass. 421; 43 N. E. 127. To the same effect see Fidelity, etc., Association v. Jeffords, 107 Fed. 402; 53 L. R. A. 193. That one having no insurable interest is surety on the premium notes given by the insured does not make the policy a wager. Union, etc., Ins. Co. v. Hilliard, 63 O. S. 478; 81 Am. St. Rep. 644; 53 L. R. A. 462; 59 N. E. 230.

¹⁸ Alexander v. Parker, 144 Ill. 355; 19 L. R. A. 187; 33 N. E. 183; reversing, 42 Ill. App. 455; Beard v. Sharp, 100 Ky. 606; 38 S. W. 1057; National Exchange Bank v. Bright (Ky.); 36 S. W. 10; rehearing denied, 38 S. W. 135; Supreme Council v. McGinness, 59 O. S. 531; 53 N. E. 54; Ownby v. Supreme Lodge, 101 Tenn. 16; 46 S. W. 758.

§385. Insurable interest in life of another.—Relation by consanguinity.

An insurable interest in life consists in "a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity to expect some benefit or advantage from the continuance of the life of the assured."¹ Among the relations by blood, a parent is held to have an insurable interest in the life of his child, at least if a minor;² and a child in the life of his parent.³ A sister has an insurable interest in the life of her brother.⁴ An aunt has no insurable interest in the life of her nephew.⁵ An insurable interest always exists in one who stands *in loco parentis* to the beneficiary.⁶ An aunt who has supported her niece, so that she may reasonably expect that the niece will assist her, has an insurable interest in her life.⁷

§386. Relation by affinity.

Of the relations by affinity a wife has an insurable interest in her husband's life,¹ even if she is divorced after the policy

¹ Warnock v. Davis, 104 U. S. 775. 779.

² Wakeman v. Ins. Co., 30 Ont. 705; Loomis v. Ins. Co., 6 Gray (Mass.) 396. *Contra*, Prudential Ins. Co. v. Hunn, 21 Ind. App. 525; 69 Am. St. Rep. 380; 52 N. E. 772.

³ Crosswell v. Indemnity Association, 51 S. Car. 103; 28 S. E. 200. So where A had B's life insured for B's daughter it was held valid if *bona fide*; McCann v. Ins. Co., 177 Mass. 280; 58 N. E. 1026. *Contra*, if the son is an adult and not dependent on his parent; Life Ins. Clearing Co. v. O'Neill, 106 Fed. 800; 54 L. R. A. 225; 45 C. C. A. 641; Guardian, etc., Ins. Co. v. Hogan, 80 Ill. 35; 22 Am. Rep. 180. So a daughter's policy on her father's life is void if taken without his consent or knowledge; Metro-

politan Life Ins. Co. v. Blesch, (Ky.) 58 S. W. 436.

⁴ Aetna, etc., Ins. Co. v. France, 94 U. S. 561; Hosmer v. Welch, 107 Mich. 474; 67 N. W. 504; denying rehearing, 107 Mich. 470; 65 N. W. 280. So by statute if she is unmarried, which is here held to include a widow; Sternberg v. Levy, 159 Mo. 617; 53 L. R. A. 438; 60 S. W. 1114.

⁵ Riner v. Riner, 166 Pa. St. 617; 45 Am. St. Rep. 693; 31 Atl. 347.

⁶ Carpenter v. Ins. Co., 161 Pa. St. 9; 41 Am. St. Rep. 880; 23 L. R. A. 571; 28 Atl. 943.

⁷ Cronin v. Ins. Co., 20 R. I. 570; 40 Atl. 497.

¹ Pullis v. Robison, 73 Mo. 201; 39 Am. Rep. 497; Fowler v. Butterfly, 78 N. Y. 68; 34 Am. Rep. 507.

issues.² A woman has an insurable interest in the life of a man to whom she is engaged to be married.³

§387. Pecuniary relations.

Of the parties sustaining pecuniary relations to each other, a creditor has an insurable interest in the life of his debtor to the extent of his debt,¹ including the cost of taking out the policy and keeping it up.² What excess in the amount of the policy over the amount of the debt makes the contract a wager is a question on which the courts are not harmonious. A policy of four,³ six,⁴ or ten times⁵ the amount of the debt, has been upheld;⁶ on the other hand a policy of thirty⁷ or forty⁸ times the debt, is held invalid. A contract to keep up insurance, paying all premiums, for nine-tenths of the policy, was held invalid on this principle.⁹ But here there seems to have been no debt other than payment of premiums under the

² Connecticut, etc., Ins. Co. v. Schaefer, 94 U. S. 457; Supreme Commandery v. Everding, 20 Ohio C. C. 689; 11 Ohio C. D. 419.

³ Chisholm v. Ins. Co., 52 Mo. 213; 14 Am. Rep. 414; Taylor v. Ins. Co., 15 Tex. Civ. App. 254; 39 S. W. 185; Opitz v. Karel, 118 Wis. 527; 62 L. R. A. 982; 95 N. W. 948.

¹ Godsall v. Boldero, 9 East 72; Crotty v. Ins. Co., 144 U. S. 621; Page v. Burnstine, 102 U. S. 664; Connecticut Ins. Co. v. Schaefer, 94 U. S. 457; Belknap v. Johnston, 114 Ia. 265; 86 N. W. 267; Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584; 52 N. W. 1012; Olmsted v. Keyes, 85 N. Y. 593; Seigrist v. Schmoltz, 113 Pa. St. 326; 6 Atl. 47; Ruth v. Katterman, 112 Pa. St. 251; 3 Atl. 833; Insurance Co. v. Dunsecomb, 108 Tenn. 724; 91 Am. St. Rep. 769; 58 L. R. A. 694; 69 S. W. 345; Equitable Ins. Co. v. Hazlewood, 75 Tex. 338; 16 Am. St. Rep. 893; 7 L. R. A. 217; 12 S. W.

621; Schonfield v. Turner, 75 Tex. 324; 7 L. R. A. 189; 12 S. W. 626; Roller v. Moore, 86 Va. 512; 6 L. R. A. 136; 10 S. E. 241; *Sub nomine*, Roller v. Beam, 6 L. R. A. 136.

² Exchange Bank v. Loh, 104 Ga. 446; 44 L. R. A. 372; 31 S. E. 459.

³ Amick v. Butler, 111 Ind. 578; 60 Am. Rep. 722; 12 N. E. 518; Grant v. Kline, 115 Pa. St. 618; 9 Atl. 150; McHale v. McDonnell, 175 Pa. St. 632; 34 Atl. 966.

⁴ Rittler v. Smith, 70 Md. 261; 2 L. R. A. 844; 16 Atl. 890.

⁵ Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338; 16 Am. St. Rep. 893; 7 L. R. A. 217; 12 S. W. 621.

⁶ Ulrich v. Reinoehl, 143 Pa. St. 238; 24 Am. St. Rep. 534; 13 L. R. A. 433; 22 Atl. 862.

⁷ Cooper v. Shaeffer, 20 W. N. C. 123; 11 Atl. 548.

⁸ Cammack v. Lewis, 15 Wall. (U. S.) 643.

⁹ Warnock v. Davis, 104 U. S. 775.

contract under which the policy was taken out. If the rule that the cost of keeping up the policy may be included in the amount of the policy is correct, it is hard to see what limit can be placed in advance to the amount of the policy, since according to the tables of mortality the average policy costs more than insured receives. This interest is not lost by the creditor's taking a partial dividend as payment in full under an assignment,¹⁰ or by the debt's becoming barred by limitations,¹¹ or by discharge in bankruptcy.¹² A surety has an insurable interest in the life of his principal.¹³ A partner has as such no insurable interest in the life of a co-partner.¹⁴ If one of the partners is to perform personal services under the partnership contract,¹⁵ or is indebted to the firm,¹⁶ the other partners have an insurable interest in his life. A mother-in-law who has an arrangement with her son-in-law, of no definite duration, to conduct the business of keeping a boarding house and dividing the profits, has an insurable interest in his life.¹⁷

§388. Insurable interest in property.—Owner.

An insurable interest in property is such interest that in case of its destruction the insured will suffer loss.¹ In insur-

¹⁰ *Manhattan Life Ins. Co. v. Hennessy*, 99 Fed. 64; 39 C. C. A. 625.

¹¹ (The policy being assigned as collateral to the debt.) *Townsend v. Tyndale*, 165 Mass. 293; 52 Am. St. Rep. 513; 43 N. E. 107.

¹² Especially where there is a new promise made by the debtor to pay such debt. *Mutual Reserve Fund Life Association v. Beatty*, 93 Fed. 747; 35 C. C. A. 573.

¹³ *Embry v. Harris*, 107 Ky. 61; 52 S. W. 958; *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192.

¹⁴ *Powell v. Dewey*, 123 N. Car. 103; 68 Am. St. Rep. 818; 31 S. E. 381.

¹⁵ *Connecticut, etc., Ins. Co. v. Luchs*, 108 U. S. 498.

¹⁶ *Connecticut, etc., Ins. Co. v. Luchs*, 108 U. S. 498. Even after dissolution it may be enforced to the extent of premiums advanced, but the interest ceases. *Cheeves v. Anders*, 87 Tex. 287; 47 Am. St. Rep. 107; 28 S. W. 274.

¹⁷ *Adams v. Reed* (Ky.); 35 L. R. A. 692; 38 S. W. 420; reversing, 36 S. W. 568.

¹ *Helvetia, etc., Ins. Co., v. Allis Co.*, 11 Colo. App. 264; 53 Pac. 242. To the same effect see *Hooper v. Robinson*, 98 U. S. 528; *Howard Fire Ins. Co. v. Chase*, 5 Wall. (U. S.) 509; *Warren v. Ins. Co.*, 31 Ia. 464; 7 Am. Rep. 160; *Hayes v. Ins. Co.*, 170 Mass. 492; 49 N. E. 754; *Gilman v. Ins. Co.*, 81 Me. 488; 17 Atl. 544; *Horsch v. Ins. Co.*, 77 Wis. 4; 45 N. W. 945.

ance of property, the insurable interest need not exist when the policy is taken out. It is sufficient if it exists when the loss occurs.² Illustrations of a few of the many classes of insurable interests, with some of the enormous number of cases on this topic, will be given. The owner³ has an insurable interest in his own property, even if the loss must ultimately fall on another, as where A owns an uncompleted building, the loss of which, if destroyed without insurance, is by contract to fall on the contractors,⁴ or if he has mortgaged the property insured,⁵ or if he holds the legal title merely, the equitable interest being in another,⁶ or where he has contracted for its sale but part of the purchase price is unpaid.⁷ A mortgagor who has mortgaged land for his personal debt and then sold his equity, has an insurable interest therein until his debt is paid.⁸ One put in possession of land by his father, with the assurance that it is devised to him, has an insurable interest therein, though his father bought the land at a partition sale, which has not yet been confirmed.⁹ One who is in possession under a quitclaim deed and who has erected valuable improvements has an insurable interest.¹⁰ The fact that the owner has by contract with a railroad company released all claim for subsequent damage from fire, does not prevent

² Sun Ins. Office v. Merz, 64 N. J. L. 301; 52 L. R. A. 330; 45 Atl. 785.

³ As the owner of revenue stamps, United States v. Tobacco Co., 166 U. S. 468.

⁴ Foley v. Ins. Co., 152 N. Y. 131; 43 L. R. A. 664; 46 N. E. 318. Under such a contract the contractor has an insurable interest even if his claim is nearly all paid. Ulmer v. Ins. Co., 61 S. C. 459; 39 S. E. 712; Cushing v. Ins. Co., 4 Wash. 538; 30 Pac. 736.

⁵ Royal Ins. Co., v. Stinson, 103 U. S. 25; Nordyke, etc., Ins. Co. v. Gery, 112 Ind. 535; 2 Am. St. Rep. 219; 13 N. E. 683; Gordon v. Ins.

Co., 2 Pick. (Mass.) 249; Guest v. Ins. Co., 66 Mich. 98; 33 N. W. 31.

⁶ Hooper v. Robinson, 98 U. S. 528; Sibley v. Ins. Co., 57 Mich. 14; 23 N. W. 473.

⁷ Continental Ins. Co. v. Brooks, 131 Ala. 614; 30 So. 876. (The unpaid purchase money exceeded the insurance.)

⁸ Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743; 58 Am. St. Rep. 719; 67 N. W. 774.

⁹ Home Ins. Co. v. Mendenhall, 164 Ill. 458; 36 L. R. A. 374; 45 N. E. 1078; affirming, 64 Ill. App. 30.

¹⁰ American Central Ins. Co. v. Donlon, — Colo. App. —; 66 Pac. 249.

him from having an insurable interest.¹¹ It has been held that the owner may effect insurance on his property, payable to one having no insurable interest therein.¹² On the other hand it has even held that an assignment of a fire insurance policy by the owner to one who has no beneficial interest in the property insured gives the assignee no interest and avoids the policy.¹³ If, however, the assignment is made as collateral only, the owner retaining the ultimate interest under the policy, the assignment is void, but the policy is not made invalid.¹⁴

§389. Special estates.

The owner of any estate or interest in property has an insurable interest therein. Thus a tenant by the entirety,¹ a tenant by curtesy,² the occupant of a legal homestead,³ a lessee,⁴ and even a tenant at will, if entitled to notice to quit,⁵ have all insurable interests. Under modern statutes securing her property to a married woman a husband has no insurable interest in his wife's property.⁶

¹¹ Greenwich Ins. Co. v. R. R., 112 Ky. 598; 56 L. R. A. 477; 66 S. W. 411; 67 S. W. 16.

¹² Donaldson v. Ins. Co., 95 Tenn. 280; 32 S. W. 251.

¹³ Merrill v. Ins. Co., 169 Mass. 10; 61 Am. St. Rep. 268; 47 N. E. 439.

¹⁴ Merrill v. Ins. Co., 169 Mass. 10; 61 Am. St. Rep. 268; 47 N. E. 439.

¹ Clawson v. Ins. Co., 121 Mich. 591; 80 N. W. 573.

² Franklin, etc., Ins. Co. v. Drake, 2 B. Mon. (Ky.) 47; Doyle v. Ins. Co., 181 Mass. 139; 63 N. E. 394; Trade Ins. Co. v. Barracliff, 45 N. J. L. 543; 46 Am. Rep. 792.

³ Culbertson v. Cox, 29 Minn. 309; 43 Am. Rep. 204; 13 N. W.

177; Webster v. Ins. Co., 53 O. S. 558; 53 Am. St. Rep. 658; 30 L. R. A. 719; 42 N. E. 546.

⁴ Schaeffer v. Ins. Co., 113 Ia. 652; 85 N. W. 985; Fowle v. Ins. Co., 122 Mass. 191; 23 Am. Rep. 308; Berry v. Ins. Co., 132 N. Y. 49; 28 Am. St. Rep. 548; 30 N. E. 254; Philadelphia Tool Co. v. Assurance Co., 132 Pa. St. 236; 19 Am. St. Rep. 596; 19 Atl. 77.

⁵ (Here 30 days' notice was necessary.) Schaeffer v. Ins. Co., 113 Ia. 652; 85 N. W. 985.

⁶ Ins. Co. v. Newman, 120 Ind. 554; 22 N. E. 428; German American Ins. Co. v. Paul, 2 Ind. Ter. 625; 53 S. W. 442; Agricultural Ins. Co. v. Montague, 38 Mich. 548; 31 Am. Rep. 326.

§390. Equitable owner.

The holder of an equitable interest,¹ as a vendee under an executory contract, the legal title still remaining in the vendor,² or the grantee under a deed defectively acknowledged,³ or under a deed in which the grantee was improperly designated,⁴ has an insurable interest.

§391. Lienors and creditors.

A mortgagee,¹ an attaching creditor,² or a judgment creditor, who has acquired a lien as by execution,³ or one whose claim is

¹ *Columbia Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *North Alabama, etc., Co. v. Caldwell*, 85 Ala. 607; 5 So. 338; *Sanford v. Ins. Co.*, 174 Mass. 416; 75 Am. St. Rep. 358; 54 N. E. 883; *Bohn Mfg. Co. v. Sawyer*, 169 Mass. 477; 48 N. E. 620; *Miotke v. Ins. Co.*, 113 Mich. 166; 71 N. W. 463; *Holbrook v. Ins. Co.*, 25 Minn. 229; *De Witt v. Ins. Co.*, 157 N. Y. 353; 51 N. E. 977; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460; 2 Am. St. Rep. 686; 12 Atl. 668; *Lebanon, etc., Co. v. Erb*, 112 Pa. St. 149; 4 Atl. 8; *Hume v. Ins. Co.*, 23 S. Car. 190.

² *Davis v. Ins. Co.*, 111 Cal. 409; 43 Pac. 1115; *Grange Mill Co. v. Assurance Co.*, 118 Ill. 396; 9 N. E. 274; *Ayers v. Ins. Co.*, 17 Ia. 176; 85 Am. Dec. 553; *Bohn Mfg. Co. v. Sawyer*, 169 Mass. 477; 48 N. E. 620; *Miotke v. Ins. Co.*, 113 Mich. 166; 71 N. W. 463; *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568; 29 Am. Rep. 271; *De Witt v. Ins. Co.*, 157 N. Y. 353; 51 N. E. 977; *Carpenter v. Ins. Co.*, 135 N. Y. 298; 31 N. E. 1015; *Clapp v. Ins. Association*, 126 N. Car. 388; 35 S. E. 617; *Lorillard Fire Ins. Co. v. McCulloch*, 21 O. S. 176; 8 Am. Rep. 52; *Dunn v. Yakish*, 10 Okl. 388; 61 Pac. 926; *Elliott v. Ins.*

Co., 117 Pa. St. 548; 2 Am. St. Rep. 703; 12 Atl. 676; *Gettelman v. Assurance Co.*, 97 Wis. 237; 72 N. W. 627.

³ *Sanford v. Ins. Co.*, 174 Mass. 416; 75 Am. St. Rep. 358; 54 N. E. 883.

* As under a deed to a voluntary unincorporated association. *Grabbs v. Ins. Association*, 125 N. Car. 389; 34 S. E. 503.

¹ *Carpenter v. Ins. Co.*, 16 Pet. (U. S.) 495; *National Bank v. Ins. Co.*, 88 Cal. 497; 22 Am. St. Rep. 324; 26 Pac. 509; *Addison v. Ins. Co.*, 7 B. Mon. (Ky.) 470; *Cannon v. Ins. Co.*, 49 La. Ann. 1367; 22 So. 387; *Carpenter v. Ins. Co.*, 61 Mich. 635; 28 N. W. 749; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743; 58 Am. St. Rep. 719; 67 N. W. 774; *Grevemeyer v. Ins. Co.*, 62 Pa. St. 340; 1 Am. Rep. 420; *Appleton Iron Co. v. Assurance Co.*, 46 Wis. 23; 1 N. W. 9; 50 N. W. 1100. Even between sale and confirmation. *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130; 63 Am. St. Rep. 499; 38 Atl. 29.

² *International Trust Co. v. Boardman*, 149 Mass. 158; 21 N. E. 239; *McLaughlin v. Bank*, 22 Utah 473; 54 L. R. A. 343; 63 Pac. 589.

³ *Spare v. Ins. Co.*, 15 Fed. 707; *Slobodisky v. Ins. Co.*, 53 Neb. 816;

a lien on a married woman's separate estate,⁴ or a landlord who has the right to hold the personal property on the leased premises for his rent,⁵ or a general creditor whose debt has become a lien by reason of the death of the debtor,⁶ or other lien holders,⁷ have each an insurable interest. So a receiver in bankruptcy has an insurable interest.⁸ A general creditor has no insurable interest in the property of his debtor during the life of the latter.⁹

§392. Bailor.

A bailee who is responsible over to the bailor,¹ as a commission merchant,² or a common carrier,³ has an insurable interest.

§393. Other insurable interests.

One who has a contract with another for remuneration fixed by profits to be made out of certain property has an insurable interest in such property.¹ If A buys property from B on credit, B has such interest that A may insure such property for B.² Where A agreed to buy lumber from B and made a payment in advance, A has an interest in the general mass

74 N. W. 270. Even between sale and confirmation. *Slobodisky v. Ins. Co.*, 53 Neb. 816; 74 N. W. 270.

⁴ *Rohrbach v. Ins. Co.*, 62 N. Y. 47; 20 Am. Rep. 451.

⁵ *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231; 28 S. E. 209.

⁶ *Creed v. Sun Fire Office*, 101 Ala. 522; 46 Am. St. Rep. 134; 23 L. R. A. 177; 14 So. 323.

⁷ *Royal Ins. Co. v. Stinson*, 103 U. S. 25; *Hartford Ins. Co. v. Haas*, 87 Ky. 531; 2 L. R. A. 64; 9 S. W. 720.

⁸ *In re Hamilton*, 102 Fed. 683.

⁹ *China Mutual Ins. Co. v. Ward*, 59 Fed. 712; 8 C. C. A. 229; *Bishop v. Ins. Co.*, 49 Conn. 167.

¹ *California Ins. Co. v. Compress*

Co., 133 U. S. 387; *Home Ins. Co. v. Warehouse Co.*, 93 U. S. 527; *Fire Ins. Association v. Transportation Co.*, 66 Md. 339; 59 Am. Rep. 162; 7 Atl. 905.

² *Hough v. Ins. Co.*, 36 Md. 398; *Ferguson v. Plow Co.*, 141 Mo. 161; 42 S. W. 711; *Waring v. Ins. Co.*, 45 N. Y. 606; 6 Am. Rep. 146.

³ *Home Ins. Co. v. Ry. Co.*, 178 Ill. 64; 52 N. E. 862; affirming 78 Ill. App. 137; *Lancaster Mills v. Press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586; 14 S. W. 317.

⁴ *Hayes v. Ins. Co.*, 170 Mass. 492; 49 N. E. 754; *Graham v. Ins. Co.*, 48 S. Car. 195; 59 Am. St. Rep. 707; 26 S. E. 323.

⁵ *Guiterman v. Ins. Co.*, 111 Mich. 626; 70 N. W. 135.

of hunter to the extent of his advance payment only.³ A stockholder has an insurable interest in the corporate property.⁴ An insurer of property has such an insurable interest therein that he may reinsure.⁵

§394. Effect of wager insurance.

In substantially all jurisdictions wager insurance is now held invalid.¹ Such insurance differs from ordinary wager contracts in that it is void merely, and not illegal. Thus if A agrees that B may take wager insurance on A's life and the insurance company pays the policy to B on A's death, A's representatives may recover.² If the insurance company has not paid B, A's representatives may recover the amount of the policy from the company.³

³ Wunderlich v. Ins. Co., 104 Wis. 395; 80 N. W. 471.

⁴ Aachen, etc., Ins. Co. v. Crawford, 199 Ill. 367; 65 N. E. 134; affirming 100 Ill. App. 454.

⁵ Boston Ins. Co. v. Ins. Co., 174 Mass. 229; 75 Am. St. Rep. 303; 54 N. E. 543; Manufacturers', etc., Co. v. Assurance Co., 145 Mass. 419; 14 N. E. 632; Hunt v. Underwriters' Assoc., 68 N. H. 305; 73 Am. St. Rep. 602; 38 Atl. 145; Berry v. Ins. Co., 132 N. Y. 49; 28 Am. St. Rep. 548; 30 N. E. 254; Shoaf v. Ins. Co., 127 N. C. 308; 80 Am. St. Rep. 804; 37 S. E. 451.

¹ Anetil v. Ins. Co. (1899), App. Cas. 604; Connecticut, etc., Co. v. Luchs, 108 U. S. 498; Warnock v. Davis, 104 U. S. 775; Life Ins. Clearing Co. v. O'Neill, 106 Fed. 800; 54 L. R. A. 225; 45 C. C. A. 641; Curtiss v. Ins. Co., 90 Cal. 245; 25 Am. St. Rep. 114; 27 Pac. 211; Fuller v. Ins. Co., 70 Conn. 647; 41 Atl. 4; Exchange Bank v. Loh, 104 Ga. 446; 44 L. R. A. 372; 31 S. E. 459; Bloomington, etc., Association v. Blue, 120 Ill. 121; 60 Am. Rep. 558; (no opinion; reference

to discussion of case in note in 58 Am. Rep. 852); 11 N. E. 331; affirming 24 Ill. App. 518; Traders' Ins. Co. v. Newman, 120 Ind. 554; 22 N. E. 428; Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584; 52 N. W. 1012; Stevens v. Warren, 101 Mass. 564; Loomis v. Ins. Co., 6 Gray (Mass.) 396; Whitmore v. Supreme Lodge, 100 Mo. 36; 13 S. W. 495; Powell v. Dewey, 123 N. Car. 103; 68 Am. St. Rep. 818; 31 S. E. 381; Trinity College v. Ins. Co., 113 N. Car. 244; 22 L. R. A. 291; 18 S. E. 175; National, etc., Association v. Gonser, 43 O. S. 1; 1 N. E. 11; Riner v. Riner, 166 Pa. St. 617; 45 Am. St. Rep. 693; 31 Atl. 347; Currier v. Ins. Co., 57 Vt. 496; 52 Am. Rep. 134; Tate v. Building Association, 97 Va. 74; 75 Am. St. Rep. 770; 45 L. R. A. 243; 33 S. E. 382; Valley, etc., Association v. Teewalt, 79 Va. 421.

² Warnock v. Davis, 104 U. S. 775.

³ Weigelman v. Bronger, 96 Ky. 132; 28 S. W. 334; Rindge v. Aid Society, 146 Mass. 286; 15 N. E. 628.

CHAPTER XXI.

ILLEGAL CONTRACTS—CONTRACTS TENDING TO DISTURB PUBLIC PEACE, ORDER AND MORALITY.

§395. Contracts to commit treason.

Contracts in aid of a public enemy or a domestic insurgent are invalid. The chief class of such contracts involved in litigation in this country are contracts to aid the Confederate forces during the Civil War,¹ such as contracts to furnish guns,² horses,³ mules,⁴ cloth for uniforms,⁵ or services as a substitute,⁶ all of which are held invalid.⁷ So a purchase of cotton from the Confederate government has been held illegal.⁸

An executory contract on consideration of Confederate money has been held valid in some states, if made within the Confederate lines,⁹ and illegal and invalid in others.¹⁰ If

¹ Patton v. Gilmer, 42 Ala. 548; 94 Am. Dec. 665; Bowman v. Gonsal, 19 La. Ann. 328; 92 Am. Dec. 537.

² Hanauer v. Doane, 12 Wall. (U. S.) 342; Tatum v. Kelley, 25 Ark. 209; 94 Am. Dec. 717; Wood v. Stone, 2 Cold. (Tenn.) 369; 88 Am. Dec. 601.

³ Shepherd v. Reese, 42 Ala. 329; Lewis v. Latham, 74 N. Car. 283; Roquemore v. Alloway, 33 Tex. 461.

⁴ Oxford Iron Co. v. Quinchett, 44 Ala. 487.

⁵ Milner v. Patton, 49 Ala. 423.

⁶ Chancely v. Bailey, 37 Ga. 532; 95 Am. Dec. 350; Lance v. Hunter, 72 N. Car. 178; 21 Am. Rep. 454.

⁷ See § 329.

⁸ Sprott v. United States, 20 Wall. (U. S.) 459.

⁹ Delmas v. Ins. Co., 14 Wall. (U. S.) 661; Thorington v. Smith, 8 Wall. (U. S.) 1; Weaver v. Lapsley, 42 Ala. 601; 94 Am. Dec. 671; Sherfy v. Argenbright, 1 Heisk. (Tenn.) 128; 2 Am. Rep. 690. A promise to pay a note in Tennessee money or Confederate bonds was held valid, and enforced as a promise to pay Tennessee money. Hanauer v. Gray, 25 Ark. 350; 99 Am. Dec. 226. So where payable in state warrants issued in aid of the Confederate cause. Houston, etc., Ry. v. Texas, 177 U. S. 66.

¹⁰ Norton v. Dawson, 19 La. Ann. 464; 92 Am. Dec. 548; Ivey v. Lal-

a contract on consideration of Confederate money is executed, it will not be set aside by the courts.¹¹ An investment of a ward's estate in Confederate bonds has been held proper if made by a guardian who resided in the Confederate lines when the war broke out,¹² but improper where the guardian lived without the Confederate lines when the war broke out, and thereafter took the property within the Confederate lines and there invested it in Confederate bonds.¹³

A contract to aid in making war on a friendly state is invalid. Thus a contract to lend money to aid Texas in her war of independence with Mexico, before the United States had recognized the independence of Texas, was held invalid.¹⁴

§396. Contracts to commit other crime.

So if an act is made criminal, either by statute¹ or at Common Law,² whether felony³ or misdemeanor,⁴ a contract to perform such act is illegal. Thus no recovery can be had for storing game during such time of the year as it is a misdemeanor to have game in possession,⁵ or for threshing wheat with a thresher the machinery of which is not boxed in, which omission to box in is a misdemeanor.⁶ A provision in a lease

land, 42 Miss. 444; 2 Am. Rep. 606; 97 Am. Dec. 475 (a case governed by Louisiana law); *Rand v. North Carolina*, 65 N. Car. 194; 6 Am. Rep. 741; *Brown v. Wylie*, 2 W. Va. 502; 98 Am. Dec. 781.

¹¹ *Montgomery v. Kerr*, 6 Cold. (Tenn.) 199; 98 Am. Dec. 450; *Henly v. Franklin*, 3 Cold. (Tenn.) 472; 91 Am. Dec. 296; *Brown v. Wylie*, 2 W. Va. 502; 98 Am. Dec. 781.

¹² *Baldy v. Hunter*, 171 U. S. 388.

¹³ *Lamar v. Micou*, 112 U. S. 452.

¹⁴ *Kennett v. Chambers*, 14 How. (U. S.) 38.

¹ See §§ 327-329.

² See § 326.

³ *Robinson v. Robards*, 15 Mo. 459 (obiter).

⁴ *Youngblood v. Trust & Savings*

Co., 95 Ala. 521; 36 Am. St. Rep. 245; 20 L. R. A. 58; 12 S. O. 579; *Gardner v. Tatum*, 81 Cal. 370; 22 Pac. 880; *Nichols v. Ruggles*, 3 Day (Conn.) 145; 3 Am. Dec. 262; *Dillon v. Allen*, 46 Ia. 299; 26 Am. Rep. 145; *Smith v. Robertson*, 106 Ky. 472; 20 Ky. Law Rep. 1959; 45 L. R. A. 510; 50 S. W. 852; *Haggerty v. Storage Co.*, 143 Mo. 238; 65 Am. St. Rep. 647; 40 L. R. A. 151; 44 S. W. 1114; *Snoddy v. Bank*, 88 Tenn. 573; 17 Am. St. Rep. 918; 7 L. R. A. 705; 13 S. W. 127.

⁵ *Haggerty v. Storage Co.*, 143 Mo. 238; 65 Am. St. Rep. 647; 40 L. R. A. 151; 44 S. W. 1114.

⁶ *Dillon v. Allen*, 46 Ia. 299; 26 Am. Rep. 145.

whereby the lessor agrees to protect the lessee from the consequences of maintaining a public nuisance is illegal.⁷ A contract for the support or hire of a person for life is valid. The fact that it may give a remote interest in causing the death of such employee is no objection thereto.⁸ So a certificate of permanent scholarship in a college is valid.⁹ It has been intimated that a contract to pay insurance, even if the insured commits suicide, is void, as tending to encourage suicide.¹⁰

§397. Contracts to be performed at the death of given person.

Contracts to be performed at the death of a given person are not invalid on that account. The interest given to one person in causing the death of another by means of such a contract is not regarded as such an inducement to commit murder that the courts should on that account declare such contracts void or illegal. Thus a note payable at the maker's death is valid.¹ So a contract that A's executors shall pay B after A's death is valid.² So a contract between A, who has been divorced from his wife, X, and B to intermarry when X dies is not invalid.³ So a contract whereby A agrees to make a will in favor of B⁴ is not of itself void on any ground of public policy. A contract whereby A agrees to make B

⁷ *Lebanon, etc., Co. v. Faulkner*, — Ky. —; 76 S. W. 1083.

⁸ *Pierce v. Railroad*, 173 U. S. 1; affirming *Pierce v. Ry.*, 110 Ala. 533; 19 So. 22; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109; 51 Am. St. Rep. 289; 32 N. E. 802.

⁹ *Howard College v. Turner*, 71 Ala. 429; 46 Am. Rep. 326.

¹⁰ *Ritter v. Ins. Co.*, 169 U. S. 139.

¹ *Earle v. Angell*, 157 Mass. 294; 32 N. E. 164.

² *Krell v. Codman*, 154 Mass. 454; 26 Am. St. Rep. 260; 14 L. R. A. 860; 28 N. E. 578; *Hess' Estate*, *Re*, 57 Minn. 282; 59 N. W. 193.

³ *Brown v. Odill*, 104 Tenn. 250;

78 Am. St. Rep. 914; 52 L. R. A. 660; 56 S. W. 840. If A had not been divorced from X such contract would have been invalid. See § 429.

⁴ *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46; 5 So. 572; *Owens v. McNally*, 113 Cal. 444; 33 L. R. A. 369; 45 Pac. 710; *Croft v. Layton*, 68 Conn. 91; 35 Atl. 783; *Huguley v. Lanier*, 86 Ga. 636; 22 Am. St. Rep. 487; 12 S. E. 922; *Dicken v. McKinley*, 163 Ill. 318; 54 Am. St. Rep. 471; 45 N. E. 134; *Whiton v. Whiton*, 179 Ill. 32; 53 N. E. 722; affirming 76 Ill. App. 553; *Garard v. Yeager*, 154 Ind. 253; 56 N. E. 237; *Woods v. Matlack*, 19 Ind. App. 364; 48 N. E.

his "heir" is held invalid in some jurisdictions⁵ on the somewhat technical ground that one cannot constitute another his "heir" except by complying with statutes for designating an heir,⁶ and that a contract to make an heir is invalid if not in compliance with statute. The popular meaning of "heir" in such connection is undoubtedly that of "devisee" or "legatee,"⁷ and accordingly such contract is upheld, as amounting simply to a contract to make a will.⁸

§398. Contract to commit breach of the peace.

Parties cannot contract for permission to one to inflict wilful injury thereafter on the person of the other which amounts to a breach of the peace. Thus a contract to fight is no bar to an action for such assault and battery,¹ nor does it relieve

384; *Bird v. Jacobus*, 113 Ia. 194; 84 N. W. 1062; *Allbright v. Hannah*, 103 Ia. 98; 72 N. W. 421; *Howe v. Watson*, 179 Mass. 30; 60 N. E. 415; *Krell v. Codman*, 154 Mass. 454; 26 Am. St. Rep. 260; 14 L. R. A. 860; 28 N. E. 578; *Wright v. Wright*, 99 Mich. 170; 23 L. R. A. 196; 58 N. W. 54; *Carmichael v. Carmichael*, 72 Mich. 76; 16 Am. St. Rep. 528; 1 L. R. A. 596; 40 N. W. 173; *Svanburg v. Fosseen*, 75 Minn. 350; 74 Am. St. Rep. 490; 43 L. R. A. 427; 78 N. W. 4; *Kleeburg v. Schrader*, 69 Minn. 136; 72 N. W. 59; *Newton v. Newton*, 46 Minn. 33; 48 N. W. 450; *Steele v. Steele*, 161 Mo. 566; 61 S. W. 815; *Sharkey v. McDermott*, 91 Mo. 647; 60 Am. Rep. 270; 4 S. W. 107; *Kofka v. Rosicky*, 41 Neb. 328; 43 Am. St. Rep. 685; 25 L. R. A. 207; 59 N. W. 788; *Peterborough Savings Bank v. Hartshorn*, 67 N. H. 156; 33 Atl. 729; *Duval v. Duval*, 54 N. J. Eq. 581; 35 Atl. 750; *Eggers v. Anderson*, 63 N. J. Eq. 264; *sub. nom. Anderson v. Eggers*, 55 L. R. A. 570; 49 Atl. 578; re-

versing 47 Atl. 727; *Cullen v. Woolverton*, 65 N. J. L. 279; 47 Atl. 626; *Johnson v. Hubbell*, 2 Stockt. Ch. (N. J.) 332; 66 Am. Dec. 773; *Lipe v. Houck*, 128 N. Car. 115; 38 S. E. 297; *Phipps v. Hope*, 16 O. S. 586; *Hoffner's Estate*, 161 Pa. St. 331; 29 Atl. 33; *Bruce v. Moon*, 57 S. Car. 60; 35 S. E. 415; *Fogle v. Church*, 48 S. Car. 86; 26 S. E. 99; *Green v. Broyles*, 3 Humph. (Tenn.) 167; 39 Am. Dec. 156; *Brinton v. Van Cott*, 8 Utah 480; 33 Pac. 218; *Burdine v. Burdine*, 98 Va. 515; 81 Am. St. Rep. 741; 36 S. E. 992.

⁵ *Davis v. Jones' Adm'r.*, 94 Ky. 320; 42 Am. St. Rep. 360; 22 S. W. 331.

⁶ *Davis v. Jones' Adm'r.*, 94 Ky. 320; 42 Am. St. Rep. 360; 22 S. W. 331.

⁷ *Wilkins v. Hukill*, 115 Mich. 594; 73 N. W. 898.

⁸ *Winne v. Winne*, 166 N. Y. 263; 82 Am. St. Rep. 647; 59 N. E. 832.

¹ *Adams v. Waggoner*, 33 Ind. 531; 5 Am. Rep. 230; *Fitzgerald v. Cavin*, 110 Mass. 153; *Bell v.*

against criminal liability.² A contract which tends to cause breach of the peace is invalid; as a clause allowing the customers of a water company to take by force such water as they demand if the company refuses to deliver it.³ On the other hand, if there is no breach of the peace, agreement may prevent what would otherwise have been an assault from being either a tort or a crime.⁴

§399. Illegal sale of intoxicating liquors.

By statute in many jurisdictions the sale of intoxicating liquors is forbidden, either totally, or to a limited extent, or in the absence of certain circumstances. Such statutes are intended to prevent or restrict the sale of intoxicating liquors, and sales in violation of such statutes are illegal. No recovery, accordingly, can be had for the purchase price of liquor so sold,¹ especially where such contracts are made void by the express terms of the statute;² nor can a tenant under a lease of

Hansley, 48 N. C. 131; Barholt v. Wright, 45 O. S. 177; 4 Am. St. Rep. 535; 12 N. E. 185; Willey v. Carpenter, 64 Vt. 212; 23 Atl. 630; 15 L. R. A. 853; Shay v. Thompson, 59 Wis. 540; 48 Am. Rep. 538; 18 N. W. 473.

² State v. Newland, 27 Kan. 764; Commonwealth v. Collberg, 119 Mass. 350; 20 Am. Rep. 328; Wilson v. State, 37 Tex. Crim. Rep. 156; 38 S. W. 1013.

³ Farmers', etc., Co. v. White, 5 Colo. App. 1; 31 Pac. 345.

⁴ O'Brien v. Steamship Co., 154 Mass. 272; 13 L. R. A. 329; 28 N. E. 266; Smith v. Simon, 69 Mich. 481. But where A agreed to furnish B an excessive amount of liquor if B would drink and B agreed to do so, and did so; and died of the drinking, B's consent was not a bar to an action by his wife for death by wrongful act.

McCue v. Klein, 60 Tex. 168; 48 Am. Rep. 260.

¹ Miller v. Ammon, 145 U. S. 421; Wempen v. Girard, 84 Ill. App. 130; Dreyfus v. Goss, 67 Kan. 57; 72 Pac. 537; Stansfield v. Kunz, 62 Kan. 797; 64 Pac. 614; National Bank v. Gerson, 50 Kan. 582; 32 Pac. 905; Gerlach v. Skinner, 34 Kan. 86; 55 Am. Rep. 240; 8 Pac. 257; Korman v. Henry, 32 Kan. 49, 343; 3 Pac. 764; 4 Pac. 262; Wirth v. Roche, 92 Me. 383; 42 Atl. 794; Webster v. Munger, 8 Gray (Mass.) 584; P. Schoenhofen Brewing Co. v. Whipple (Neb.); 89 N. W. 751; Adams v. Hackett, 27 N. H. 289; 59 Am. Dec. 376; Lewis v. Welch, 14 N. H. 294; Aiken v. Blaisdell, 41 Vt. 655; Gaylord v. Soragen, 32 Vt. 110; 76 Am. Dec. 154.

² Fegler v. Shipman, 33 Ia. 194; 11 Am. Rep. 118. Conveyances in

property for the illegal sale of liquor maintain an action against the landlord for a breach of contract.³ The methods in which these statutes can be violated are as manifold as the statutes themselves. No recovery can be had for sales of intoxicating liquors in violation of statutes requiring a license to be taken out for permission to make such sales and making it a crime to sell without such license,⁴ nor for commissions for making sales of such liquors where neither principal nor agent was licensed.⁵ No recovery can be had for sales made before the vendor has paid his tax and filed his bond if this is required by statute.⁶ So if by law the vendor may sell only on his premises, delivering liquor elsewhere is illegal.⁷ So if by law no liquor can be sold to be drunk on the premises, no recovery can be had for such sales.⁸ Some statutes provide that liquor cannot be sold in quantities less than fixed by statute. No recovery can be had for the sale of a smaller quantity;⁹ but such statute does not make void the payment of a debt by delivering liquor in smaller quantities.¹⁰ The pleadings and proof must establish the fact that the sale was

payment of such debts are made void by statute. *Lindt v. Uihlein*, 109 Ia. 591; 79 N. W. 73; 80 N. W. 658.

* As to furnish ice for use in conducting such illegal business. *Kelly v. Courter*, 1 Okla. 277; 30 Pac. 372.

* *Miller v. Ammon*, 145 U. S. 421; *Moog v. Hannon's Adm'r.*, 93 Ala. 503; *sub nomine Moog v. Espalla*, 9 So. 596; *Farrow v. Vedder*, 19 Ill. App. 305; *Woodford v. Hamilton*, 139 Ind. 481; 39 N. E. 47; *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596; 49 N. E. 864; *Glass v. Alt*, 17 Kan. 444; *Alexander v. O'Donnell*, 12 Kan. 608; *Dolson v. Hope*, 7 Kan. 161; *Vannoy v. Patton*, 5 B. Mon. (Ky.) 248; *Dixie v. Abbott*, 7 Cush. (Mass.) 610; *Solomon v. Dreschler*, 4 Minn. 278; *Rocco v. Frapoli*, 50

Neb. 665; 70 N. W. 236; *Lewis v. Welch*, 14 N. H. 294; *Bancroft v. Dumas*, 21 Vt. 456; *Melchoir v. McCarty*, 31 Wis. 252; 11 Am. Rep. 605. *Contra*, recovery is allowed unless the statute expressly prohibits such sale. *Rahter v. Bank*, 92 Pa. St. 393; *Eberstadt v. Jones*, 19 Tex. Civ. App. 480; 48 S. W. 558.

⁵ *Rocco v. Frapoli*, 50 Neb. 665; 70 N. W. 236.

⁶ *Deering v. Chapman*, 22 Me. 488; 39 Am. Dec. 592.

⁷ *Murphy v. McNulty*, 145 Mass. 464; 14 N. E. 532.

⁸ *Widoe v. Webb*, 20 O. S. 431; 5 Am. Rep. 664.

⁹ *Stallings v. Lee*, 123 Ala. 464; 26 So. 211.

¹⁰ *Hart v. Hudson* (Del.), 43 Atl. 172.

in less than the quantity fixed by statute, to make it illegal.¹¹ So no recovery can be had for liquor sold to an habitual drunkard after notice given by his wife to vendor not to sell.¹² So if the statute requires sales of intoxicating liquors to be for cash only, no recovery can be had for sales on credit.¹³ Under the South Carolina statute, however, it has been held that the question of the validity of the sale of intoxicating liquor sold in violation of the statute can be raised only by the state.¹⁴ Since such contracts are invalid, no recovery thereon can be had, even if a subsequent express promise to pay therefor is made.¹⁵

In the absence of statute, there is nothing illegal in the sale of intoxicating liquor. Accordingly sales made in compliance with the statute are legal. If the license is paid it is lawful to sell liquor, and a lease¹⁶ or loan of money¹⁷ for that purpose is valid, as is a contract to indemnify a surety on a liquor dealer's bond.¹⁸ So recovery can be had for the sale of wood alcohol, a substance not suitable for use as a beverage.¹⁹

§400. Contract to commit sexual immorality.

Sexual intercourse except between husband and wife is immoral and illegal, though not necessarily criminal. A contract in consideration of future unlawful sexual intercourse,¹ such as a contract to marry in the future in consideration of

¹¹ Carter v. Fischer, 127 Ala. 52; 28 So. 376.

¹² Loranger v. Jardine, 56 Mich. 518; 23 N. W. 203.

¹³ Mansfield v. Stoneham, 15 Gray (Mass.) 149.

¹⁴ *Ex parte* Neal Loan & Banking Co., 58 S. C. 269; 36 S. E. 584.

¹⁵ Melchoir v. McCarty, 31 Wis. 255; 11 Am. Rep. 605.

¹⁶ Goodall v. Gerke Brewing Co., 56 O. S. 257; 46 N. E. 983.

¹⁷ Germantown Brewing Co. v. Booth, 162 Pa. St. 100; 29 Atl. 386.

¹⁸ Smith v. Delaney, 64 Conn.

264; 42 Am. St. Rep. 181; 29 Atl. 496.

¹⁹ Fabor v. Green, 72 Vt. 117; 47 Atl. 391.

¹ Boigneres v. Boulon, 54 Cal. 146; Drennan v. Douglas, 102 Ill. 341; 40 Am. Rep. 595; Winebrinner v. Weisiger, 3 T. B. Mon. (Ky.) 35; Simpson v. Normand, 51 La. Ann. 1355; 26 So. 266; Brown v. Tuttle, 80 Me. 162; 13 Atl. 583; Massey v. Wallace, 32 S. Car. 149; 10 S. E. 937; Cusack v. White, 2 Mill. (S. Car.) 279; 12 Am. Dec. 669; Bivins v. Jarnigan, 3 Baxt. (Tenn.) 282.

intercourse before marriage,² or a contract to make a will³ is illegal. If a valid contract to marry has been entered into, subsequent unlawful intercourse, under promise to marry at once if pregnancy ensues, does not avoid the original valid contract.⁴ No allowance can be made on a claim against decedent's estate for services as domestic servant rendered by one who was living with decedent as his mistress when such services were rendered,⁵ even on an express promise to pay therefor.⁶ But if services were rendered without reference to any unlawful relations existing between the parties, recovery can be had therefor, even though the parties were also maintaining unlawful relations,⁷ as where the services were rendered for some time before unlawful relations began.⁸ A woman living in such relations with a man may recover for money loaned by her to him.⁹

A past consideration is no consideration, but merely a motive.¹⁰ Hence a contract for past unlawful intercourse is not on that account alone invalid, if supported by sufficient consideration or under seal.¹¹ The commonest forms of such contracts are compromises of bastardy proceedings,¹² or contracts to support the bastard offspring of such unlawful intercourse,

² *Boigner v. Boulon*, 54 Cal. 146; *Saxon v. Wood*, 4 Ind. App. 242; 30 N. E. 797; *Edmonds v. Hughes*, — Ky. —; 74 S. W. 283; *Goodall v. Thurman*, 1 Head. (Tenn.) 208; *Burke v. Shaver*, 92 Va. 345; 23 S. E. 749.

³ *Drennan v. Douglas*, 102 Ill. 341; 40 Am. Rep. 595.

⁴ *Kurtz v. Frank*, 76 Ind. 594; 40 Am. Rep. 275.

⁵ *McDonald v. Fleming*, 12 B. Mon. (Ky.) 285; *Simpson v. Normand*, 51 La. Ann. 1355; 26 So. 266. (Citing *Beard's Succession*, 14 La. Ann. 121.) *Cooper v. Cooper*, 147 Mass. 370; 9 Am. St. Rep. 721; 17 N. E. 892.

⁶ *Simpson v. Normand*, 51 La. Ann. 1355; 26 So. 266.

⁷ *Pereuilhet's Succession v. Hau-tho*, 23 La. Ann. 294; 8 Am. Rep. 595; *Viens v. Brickley*, 8 Mart. O. S. (La.) 6.

⁸ *Lytle v. Newell* (Ky.); 68 S. W. 118.

⁹ *McDonald v. Fleming*, 12 B. Mon. (Ky.) 285.

¹⁰ See § 319.

¹¹ *Smith v. Du Bose*, 78 Ga. 413; 6 Am. St. Rep. 260; 3 S. E. 309; *Winebrinner v. Weisiger*, 3 T. B. Mon. (Ky.) 35; *Brown v. Kinsey*, 81 N. Car. 245; *Wyant v. Leshner*, 23 Pa. St. 338; *Massey v. Wallace*, 32 S. Car. 149; 10 S. E. 937.

¹² This may be done even though they are criminal in form.

based on the legal liability of the putative father to support such child.¹³ If the facts are such that the parties have reason to believe, and do believe, that their relations are lawful, no illegality exists.¹⁴ No objection can be urged against a contract which was to restrain one from sexual immorality. Hence a provision in a contract of employment of a salesman, requiring him to discontinue his association with a certain woman of bad repute, is valid.¹⁵

¹³ *Benge v. Hiatt*, 82 Ky. 666; 56 Am. Rep. 912; *Hook v. Pratt*, 78 N. Y. 371; 34 Am. Rep. 539; *Maxwell v. Campbell*, 8 O. S. 265.

¹⁴ Where A agreed to and did settle property on B on his marriage with her such settlement was upheld, though B's husband C, while not heard from for twelve years,

was still alive, A and B living together till A's death and A knowing of C's disappearance. *Ogden v. McHugh*, 167 Mass. 276; 57 Am. St. Rep. 456; 45 N. E. 731.

¹⁵ *Gould v. Metal Co.*, 207 Ill. 172; 69 N. E. 896; affirming 108 Ill. App. 203.

CHAPTER XXII.

CONTRACTS TENDING TO INJURE THIRD PERSONS.

§401. Contracts to invade the legal rights of others.

A contract between A and B to invade the legal rights of C is illegal.¹ A contract to cause a legislative investigation of the affairs of a corporation, thereby depressing its market value, and to share in profits from "short" sales of such stock is void.² A contract between A and B to commit a tort against C's person,³ reputation⁴ or property⁵ is invalid.⁶ Under these principles a contract to take possession of public property or to injure it, is illegal.⁷ Examples of such contracts are those to keep cattle on government land where such keeping is forbidden,⁸

¹ *Moody v. Newmark*, 121 Cal. 446; 53 Pac. 944; reversing in banc, 50 Pac. 758; *Kirkpatrick v. Clark*, 132 Ill. 342; 22 Am. St. Rep. 531; 8 L. R. A. 511; 24 N. E. 71; *Wright v. Gardner*, 98 Ky. 454; 33 S. W. 622; rehearing denied, 98 Ky. 463; 35 S. W. 1116; *Ayer v. Hutchins*, 4 Mass. 370; 3 Am. Dec. 232; *St. Mary's Benevolent Association v. Lynch*, 64 N. H. 213; 9 Atl. 98; *Adams v. Outhouse*, 45 N. Y. 318.

² *Veazey v. Allen*, 173 N. Y. 359; 62 L. R. A. 362; 66 N. E. 103.

³ As for an unauthorized arrest. *Cumpston v. Lambert*, 18 Ohio 81; 51 Am. Dec. 442.

⁴ Such as libel. *Lea v. Collins*, 4 Sneed (Tenn.) 393; *Atkins v. Johnson*, 43 Vt. 78; 5 Am. Rep. 260. But a contract for indemnity

against libel, made with a publisher, has been upheld where it did not appear that a libel was intended. *C. F. Jewett Publishing Co. v. Butler*, 159 Mass. 517; 22 L. R. A. 253; 34 N. E. 1087.

⁵ As to infringe a copyright. *Nichols v. Ruggles*, 3 Day (Conn.) 145; 3 Am. Dec. 262.

⁶ The more common torts are discussed in detail in the following sections. See §§ 402-408.

⁷ *Barrett v. Cemetery Association*, 159 Ill. 385; 50 Am. St. Rep. 168; 31 L. R. A. 109; 42 N. E. 891; *Shortall v. Connell Co.*, 93 Ill. App. 231; *Friend v. Porter*, 50 Mo. App. 89; *Garst v. Love*, 6 Okla. 46; 7 Okla. 666; 55 Pac. 19.

⁸ *Garst v. Love*, 6 Okla. 46; 7 Okla. 666; 55 Pac. 19.

to sink a shaft in a public street,⁹ or to build a wall out into a lake, the title to the ground underlying which is in the state,¹⁰ or a lease of lands in an Indian reservation, made by an Indian without authority from acts of Congress.¹¹ A contract between A and B whereby B agrees to break a pre-existing contract with C, as a contract of bailment,¹² or a promise of marriage,¹³ is invalid.

A person has the right of dealing with whomsoever he pleases. Accordingly a contract between an employer and a store-keeper whereby the employer agrees to influence his employees to buy of the store-keeper and to accept no orders against the wages of his employees given to any other store-keeper is unlawful at Common Law.¹⁴ In many states, statutes specifically forbid employers to pay their employees in checks, orders or anything but money; and contracts in violation of such statutes are void.¹⁵ Hence a purchaser of such checks or orders cannot enforce them against the employer,¹⁶ and a contract between an employer and a store-keeper, requiring the latter to keep a store and to redeem orders given to the men by the employer is invalid.¹⁷

⁹ *Friend v. Porter*, 50 Mo. App. 89.

¹⁰ *Shortall v. Connell Co.*, 93 Ill. App. 231.

¹¹ *Chaffee v. Garrett*, 6 Ohio 421.

¹² *Moody v. Newmark*, 121 Cal. 446; 53 Pac. 944; reversing in banc, 50 Pac. 758.

¹³ Thus where A was engaged to be married to C, and A agreed with B to break her contract with C and marry B, A had no cause of action against B for breaking such agreement. *Trammell v. Vaughan*, 158 Mo. 214; 81 Am. St. Rep. 302; 51 L. R. A. 854; 59 S. W. 79.

¹⁴ *Crawford v. Wick*, 18 O. S. 190; 98 Am. Dec. 103. But an agreement to give the employer a commission on sales to his employees was held valid. *George v. Coal Co.*, 15 Lea (Tenn.) 455; 54 Am. Rep.

425. And a contract whereby the employer guarantees to his lessee the custom of his employees as far as he is able to control it has been held valid. *Dionne v. New Iberia, etc., Association*, 50 La. Ann. 690; 23 So. 624. See ch. lxxxii. for discussion of such statutes as interfere with the right to make contracts.

¹⁵ *Naglebaugh v. Mining Co.*, 21 Ind. App. 551; 51 N. E. 427; *Hudnall v. Iron Syndicate* (Ky.), 49 S. W. 21.

¹⁶ *Naglebaugh v. Mining Co.*, 21 Ind. App. 551; 51 N. E. 427.

¹⁷ *Hudnall v. Iron Syndicate* (Ky.), 49 S. W. 21. Such a contract is void under the Texas anti-trust act. *Texas, etc., Co. v. Lawson*, 89 Tex. 394; 32 S. W. 871; 34 S. W. 919. See ch. lxxxii. for similar statutory provisions.

§402. Contracts to defraud the public.

Contracts which tend to defraud and deceive the general public are illegal.¹ Thus a contract which tends to mislead the public as to the identity of the person rendering services such as a musical director² or physician³ in which the personality of such party is a controlling factor, is void. So contracts tending to deceive the public as to the quality and kind of goods sold,⁴ as a contract to sell at wholesale "domestic sardines," put up in boxes with "fancy labels," which was a way of contracting for a fish not a sardine put up in boxes which purported on the lid to contain imported sardines,⁵ or a contract to assign a trade-mark which purported to designate a particular person as manufacturer⁶ are illegal. "Bohemian Oats" contracts were agreements whereby A sold B oats at an inflated price, took B's note therefor and gave B a bond to sell for him during the following year twice as many bushels of such oats as B had purchased, at the same price. In some jurisdictions these contracts were held wagers;⁷ in others, not.⁸ Some courts hold that such contracts are illegal as they cannot be performed without defrauding a third person.⁹ A contract whereby A agreed that if B would return a given coupon and fifteen dol-

¹ Church v. Proctor, 66 Fed. 240; 13 C. C. A. 426; Jerome v. Bigelow, 66 Ill. 452; 16 Am. Rep. 597; McDonnell v. Rigney, 108 Mich. 276; 66 N. W. 52; McNamara v. Gargett, 68 Mich. 454; 13 Am. St. Rep. 355; 36 N. W. 218; Materne v. Horwitz, 101 N. Y. 469; 5 N. E. 331; Blakely v. Sousa, 197 Pa. St. 305; 80 Am. St. Rep. 821; 47 Atl. 286.

² Blakely v. Sousa, 197 Pa. St. 305; 80 Am. St. Rep. 821; 47 Atl. 286.

³ Jerome v. Bigelow, 66 Ill. 452; 16 Am. Rep. 597.

⁴ Church v. Proctor, 66 Fed. 240; 13 C. C. A. 426.

⁵ Materne v. Horwitz, 101 N. Y. 469; 5 N. E. 331.

⁶ Mayer v. Flannigan, 12 Tex. Civ. App. 405; 34 S. W. 785. So equity will not protect a trade-mark intended to deceive the public. Joseph v. Macowsky, 96 Cal. 518; 19 L. R. A. 53; 31 Pac. 914.

⁷ Schmuck v. Waters, 125 Ind. 265; 25 N. E. 281; McNamara v. Gargett, 68 Mich. 454; 13 Am. St. Rep. 355; 36 N. W. 218.

⁸ Ebersole v. Bank, 36 Ill. App. 267; Merrill v. Packer, 80 Ia. 542; 45 N. W. 1076; Kitchen v. Loudonback, 48 O. S. 177; 29 Am. St. Rep. 540; 26 N. E. 979; Stewart v. Simpson, 2 Ohio C. C. 415.

⁹ Knight v. Linzey, 80 Mich. 396; 8 L. R. A. 476; 45 N. W. 337; McNamara v. Gargett, 68 Mich. 454; 13 Am. St. Rep. 355; 36 N. W.

lars, A would furnish him four coupons which he could sell for three dollars and seventy-five cents each: thus getting back his fifteen dollars, and when the vendees of these four coupons each sent in fifteen dollars, A was to let B have sixty dollars worth of merchandise, was held against public policy as it could not be performed without working a fraud on the last vendees of such coupons.¹⁰

§403. Contracts to defraud third persons.

A contract whereby A and B unite to defraud C must be distinguished from a contract for some lawful purpose into which A by his fraud induces B to enter. The first contract is defective because its subject-matter is illegal; the second, because B's acceptance of A's offer is induced by fraud.¹ Contracts between two persons to wrong or defraud a third are illegal and unenforceable.² Thus a contract whereby a broker is to receive commissions on sales of lots made by him to persons who are induced to buy because such broker pretends to buy some of said lots,³ a contract for advancing money to a stockholder to enable him to recover for his own benefit a judgment which of right belongs to the corporation,⁴ a contract between A and B to get C to bet with them and to win from him by cheating, A getting possession of the entire fund and refusing to pay B his share,⁵ a contract between two out of three co-

218; *Shirey v. Ulsh*, 2 Ohio C. C. 401; 1 Ohio C. D. 554; *Cowell v. Harris*, 2 Ohio C. C. 404; *Carter v. Lillie*, 3 Ohio C. C. 364. In *Jacobs v. Mitchell*, 46 O. S. 601, such contract was held probably not to be invalid, though the decision was not based on such ground.

¹⁰ *Hubbard v. Freiburger*, — Mich. —; 94 N. W. 727.

¹ See § 56.

² *Buchtella v. Stepanek*, 53 Kan. 373; 36 Pac. 749; *Bennett v. Tierney*, 78 Ky. 580; *Selby v. Case*, 87 Md. 459; 39 Atl. 1041; *St. Mary's Benevolent Association v. Lynch*, 64 N. H. 213; *Wittkowsky v. Baruch*,

127 N. Car. 313; 37 S. E. 449; *Crawford v. Wick*, 18 O. S. 190; 98 Am. Dec. 103; *State v. Coke Co.*, 18 O. S. 262; *Leach v. Devereaux* (Tex. Civ. App.); 32 S. W. 837; *Barnett v. Barnett*, 83 Va. 504; 2 S. E. 733.

³ *McDonnell v. Rigney*, 108 Mich. 276; 66 N. W. 52.

⁴ *Davis v. Gemmell*, 73 Md. 530; 21 Atl. 712.

⁵ *Morrison v. Bennett*, 20 Mont. 560; 40 L. R. A. 158; 52 Pac. 553. On a similar state of facts see *Dakin v. Rumsey*, 104 Mich. 636; 62 N. W. 990.

owners to have the property sold at tax sale to a third party, and then to have him deed it to them free from the claims of the remaining co-owner, such purchaser refusing to carry out the contract, and claiming the land as his own,⁶ are all invalid. So A entered into a scheme with X to represent to B that B's mine was salted and thus obtain it below its value. The mine was really worthless and the plan was really one between B and A's supposed confederate X to sell A the mine. It was held that A was not entitled to any relief in equity.⁷ A contract whereby one creditor who is ostensibly acting with the other creditors contracts for a secret advantage to himself,⁸ as to obtain payment of his debt and then cause an action to set aside a fraudulent conveyance to be dismissed,⁹ or to give one creditor a note in excess of the pro rata share agreed upon by the other creditors, to induce him to consent to the settlement¹⁰ or to pay one creditor a given sum to induce him to withdraw his opposition to the debtor's discharge in bankruptcy,¹¹ or to induce him to sign a compromise agreement,¹² or to induce him to

⁶ *Lawton v. Estes*, 167 Mass. 181; 57 Am. St. Rep. 450; 45 N. E. 90. For a similar case, involving fraud on the remaining heirs and on the creditors of the ancestor, see *Smith v. Humphreys*, 88 Me. 345; 34 Atl. 166. And on the same point see *Tappan v. Brewing Co.*, 80 Cal. 570; 13 Am. St. Rep. 174; 5 L. R. A. 428; 22 Pac. 257.

⁷ *Bearden v. Jones* (Tenn. Civ. App.), 48 S. W. 88.

⁸ *Benicia Agricultural Works v. Estes* (Cal.), 32 Pac. 938; *Smith v. Owens*, 21 Cal. 11; *McFarland v. Garber*, 10 Ind. 151; *Goodwin v. Blake*, 3 T. B. Mon. (Ky.) 106; 16 Am. Dec. 87; *John T. Hardie's Sons & Co. v. Scheen*, 110 La. 612; 34 So. 707; *Brown v. Nealley*, 161 Mass. 1; 36 N. E. 464; *Case v. Gerrish*, 15 Pick. (Mass.) 49; *Vreeland v. Turner*, 117 Mich. 366; 72 Am. St. Rep. 562; 75 N. W. 937; *Newell*

v. Higgins, 55 Minn. 82; 56 N. W. 577; *Adams v. Outhouse*, 45 N. Y. 318; *Wheeler v. Pettyjohn* — Okl. —; 76 Pac. 117; *Willis v. Morris*, 63 Tex. 458; 51 Am. Rep. 655.

⁹ *Vreeland v. Turner*, 117 Mich. 366; 72 Am. St. Rep. 562; 75 N. W. 937; *Lewis v. Walker*, 61 Mo. App. 550.

¹⁰ *John T. Hardie's Sons & Co. v. Scheen*, 110 La. 612; 34 So. 707.

¹¹ *Benicia Agricultural Works v. Estes* (Cal.), 32 Pac. 938; *Tirrell v. Freeman*, 139 Mass. 297; 1 N. E. 350; *Dexter v. Snow*, 12 Cush. (Mass.) 594; 59 Am. Dec. 206; *Sharp v. Teese*, 4 Halst. (N. J.) 352; 17 Am. Dec. 479; *Wiggin v. Bush*, 12 Johns. (N. Y.) 306; 7 Am. Dec. 324.

¹² *Case v. Gerrish*, 15 Pick. (Mass.) 49; *Way v. Langley*, 15 O. S. 392.

withdraw his support from an action against the debtor brought by himself and other creditors,¹³ is illegal, as it works a fraud on the remaining creditors. No such objections can be urged against contracts which do not tend to defraud third parties. A contract whereby the debtor withdraws his opposition to being adjudicated a bankrupt is valid.¹⁴ A contract whereby A who is not a member of the firm of B & C agrees with X, a creditor of such firm, to assume the liability to him of a member of the firm, though as to the firm A is a creditor, is valid.¹⁵

§404. Contracts to defraud creditors.

If A transfers property to B under an agreement intended to defraud A's creditors, A cannot enforce such agreement if B refuses to perform it.¹ Thus if B has agreed to reconvey the property, and refuses to do so, A has no remedy.² This rule is expressed in the other form, that such conveyance is not void, but is voidable at the instance of the creditors injured thereby.³

¹³ *Vreeland v. Turner*, 117 Mich. 366; 72 Am. St. Rep. 562; 75 N. W. 937.

¹⁴ *Sanford v. Huxford*, 32 Mich. 313; 20 Am. Rep. 647. See § 291.

¹⁵ *Moran v. Bentley*, 69 Conn. 392; 37 Atl. 1092.

¹ *Kirkpatrick v. Clark*, 132 Ill. 342; 22 Am. St. Rep. 531; 8 L. R. A. 511; 24 N. E. 71; *Kitts v. Willson*, 130 Ind. 492; 29 N. E. 401; *Gentry v. Field*, 143 Mo. 399; 45 S. W. 286; *Pass v. Pass*, 109 N. Car. 484; 13 S. E. 908; *Brinkerhoff v. Tracy*, 55 O. S. 558; 45 N. E. 1100.

² *Castellow v. Brown*, — Ga. —; 46 S. E. 632; *Cronic v. Smith*, 96 Ga. 794; 22 S. E. 915; *Muller v. Balke*, 154 Ill. 110; 39 N. E. 658; *Kassing v. Durand*, 41 Ill. App. 93; *Whitaker v. Whitaker*, 157 Mo. 342; 58 S. W. 5; *Mulock v. Mulock*, 156 Mo. 431; 57 S. W. 122; *Sell v. West*, 125 Mo. 621; 46 Am. St. Rep.

508; 28 S. W. 969; *McManus v. Tarleton*, 126 N. C. 790; 36 S. E. 338; *Lockren v. Rustan*, 9 N. D. 43; 81 N. W. 60; *Pride v. Andrew*, 51 O. S. 405; 38 N. E. 84; *Walton v. Blackman* (Tenn. Ch. App.), 36 S. W. 195; *Herndon v. Reed*, 82 Tex. 647; 18 S. W. 665; *Shoemaker v. Finlayson* 22 Wash. 12; 60 Pac. 50; *McClintock v. Loisseau*, 31 W. Va. 865; 2 L. R. A. 816; 8 S. E. 612. Hence if grantor's wife is grantee, such property is treated as her separate estate. *Flannery v. Coleman*, 112 Ga. 648; 37 S. E. 878. The heirs of the grantor cannot avoid such deed. *Helton v. Cunagim*, 21 Ky. L. Rep. 1244; 54 S. W. 851. Nor can his administrator. *Burges v. Ins. Co.* (Tex. Civ. App.), 53 S. W. 602.

³ *Stillings v. Turner*, 153 Mass. 534; 27 N. E. 671; *Harvey v. Varney*, 98 Mass. 118; *Dyer v. Homer*, 22 Pick. (Mass.) 253.

So if A has conveyed realty to his son B to defraud A's creditors, A cannot invoke such contract to rebut the presumption of an advancement,⁴ nor can A recover if B has promised to pay him for such conveyance and refuses to do so.⁵ So if A conveys property to B to avoid paying alimony, he cannot compel a reconveyance from B.⁶ A mortgage given to defraud the creditors of the mortgagor cannot be enforced.⁷ If there was no consideration for the contract, no recovery can be had on a fraudulent note,⁸ as where such note was given to a bank without consideration to increase its apparent assets and thus deceive inspecting government officials⁹ or mortgage.¹⁰ Where A owned realty on which liquor was sold unlawfully with his knowledge and to establish a false defense in a suit for damages arising from such unlawful sales he deeded the property

⁴ McClintock v. Loisseau, 31 W. Va. 865; 2 L. R. A. 816; 8 S. E. 612.

⁵ Norris v. Norris, 9 Dana (Ky.) 317; 35 Am. Dec. 138; Church v. Muir, 33 N. J. L. 318; Powell v. Inman, 8 Jones. L. (N. Car.) 436; 82 Am. Dec. 426; Bradford v. Beyer, 17 O. S. 389; Goudy v. Gebhart, 1 O. S. 262. There is authority, and perhaps the weight of authority, to the contrary. Harcrow v. Harcrow (Ark.), 58 S. W. 553; Butler v. Moore, 73 Me. 151; 40 Am. Rep. 348; Stillings v. Turner, 153 Mass. 534; 27 N. E. 671; Sauter v. Leveridge, 103 Mo. 615; 15 S. W. 981. The earlier Indiana cases did not allow the vendor to recover. Welby v. Armstrong, 21 Ind. 489; but this case has been overruled in Springer v. Drosch, 32 Ind. 486; 2 Am. Rep. 356. The view that the fraudulent vendor can recover is based on the theory that he can make out a *prima facie* case without invoking the illegal contract. See § 517. It is hard to see, if this is so, why recovery cannot be had

on any sale in the performance of an illegal contract; since in all such sales it is possible to sue on the sale without showing the illegality.

⁶ Fiske v. Fiske, 173 Mass. 413; 53 N. E. 916. *Contra*, Rivera v. White, 94 Tex. 538; 63 S. W. 125, where A's wife was not allowed alimony and hence did not finally prove to be a creditor.

⁷ O'Kane v. Terrill, 144 Ind. 599; 43 N. E. 869; Williams v. Clink, 90 Mich. 297; 30 Am. St. Rep. 443; 51 N. W. 453; Schroeder v. Pratt, 21 Utah 176; 60 Pac. 512. *Contra*, Pierce v. Le Monier, 172 Mass. 508; 53 N. E. 125; Barwick v. Moyse, 74 Miss. 415; 60 Am. St. Rep. 512; 21 So. 238; Bradtfeldt v. Cooke, 27 Or. 194; 50 Am. St. Rep. 701; 40 Pac. 1.

⁸ McTighe v. McKee, 70 Ark. 293; 67 S. W. 754; Sternberg v. Bowman, 103 Mass. 325.

⁹ Chicago Title & Trust Co. v. Brady, 165 Mo. 197; 65 S. W. 303; Clay County Bank v. Keith, 85 Mo. App. 409.

¹⁰ Miller v. Marckle, 21 Ill. 152.

to B and took back a note and mortgage to prove that he was in possession as mortgagee, A cannot recover on such note¹¹ while the law will leave the parties where it finds them.¹² There is some divergence of authority in applying this maxim to such contracts. If the fraudulent grantor remains in possession, the weight of authority is that the fraudulent grantee can maintain ejectment,¹³ though there is well-considered authority to the contrary, on the theory that the law will aid neither party.¹⁴ So a judgment confessed in fraud of creditors is valid as between the parties thereto.¹⁵ If the grantee or his heirs reconvey to grantor voluntarily, they cannot subsequently avoid their conveyance,¹⁶ nor can his creditors,¹⁷ and if he attempts to reconvey to the heir of grantor, a mistake as to who the heir is does not give the rightful heir a cause of action to reclaim the land.¹⁸ The unenforceable agreement is that "founded on the unlawful thing done or intended to be done"¹⁹ and does not include other rights. Thus where A gave B a deed absolute on its face but in fact a mortgage to secure an honest debt by giving an unlawful preference, A may redeem.²⁰ So a convey-

¹¹ *Bates v. Cain*, 70 Vt. 144; 40 Atl. 36; citing *Miller v. Lamery*, 62 Vt. 116; 20 Atl. 199.

¹² See §§ 506-519.

¹³ *Elmore v. Elmore* (Ky.); 22 Ky. L. Rep. 856; 58 S. W. 980; *Jones v. Jenkins*, 83 Ky. 391; *Bibb v. Baker*, 17 B. Mon. (Ky.) 292; *Boyle v. Rankin*, 22 Pa. St. 168; *Epperson v. Young*, 8 Tex. 135.

¹⁴ *Harrison v. Hatcher*, 44 Ga. 638; *Kirkpatrick v. Clark*, 132 Ill. 342; 22 Am. St. Rep. 531; 8 L. R. A. 511; 24 N. E. 71. So where grantee is grantor's surety, and grantor acted in good faith, replevin was held not to lie. *Hays v. Windsor*, 130 Cal. 230; 62 Pac. 395.

¹⁵ *Pitkin v. Burnham*, 62 Neb. 385; 55 L. R. A. 280; 87 N. W. 160.

¹⁶ *Detwiler v. Detwiler*, 30 Neb. 338; 46 N. W. 624.

¹⁷ *Bicocchi v. Casey-Swasey Co.*, 91 Tex. 259; 66 Am. St. Rep. 875; 42 S. W. 963; reversing 40 S. W. 209.

¹⁸ *Kihlken v. Kihlken*, 59 O. S. 106; 51 N. E. 969 (though in this case the grantee did in fact reconvey to the heir; the claim of others to be the real heirs being based on their mistake of law).

¹⁹ *Halloran v. Halloran*, 137 Ill. 100; 27 N. E. 82.

²⁰ *Halloran v. Halloran*, 137 Ill. 100; 27 N. E. 82. Otherwise, where not given for a debt, but merely to delay and defraud creditors. *Apponaug, etc., Co. v. Rawson*, 22 R. I. 123; 46 Atl. 455.

ance by A to B in trust for A's creditors, and the balance to A, cannot be avoided for any secret fraudulent intent.²¹

§405. Contracts to stifle bidding.

Contracts to stifle bidding partake of the nature of contracts in restraint of trade and of contracts to defraud a third person.¹ Contracts between two or more prospective competitors to prevent competition in bids for letting public contracts are invalid.² Where the parties agree to let one party bid, the profits to be divided among them all, no action can be maintained for the recovery of such profits;³ nor can an action be maintained on a promise to pay a certain sum in consideration of refraining from bidding.⁴

Contracts to prevent competitive bidding at judicial sales, or other sales where the property is to be sold to the highest bidder are invalid,⁵ and if one competitor promises to pay an-

²¹ *Neresheimer v. Smyth*, 167 N. Y. 202; 60 N. E. 449.

¹ It is the duty of the court to "set the seal of disapproval upon all transactions whereby competition at sales of this character is attempted to be stifled." *McClelland v. Bank*, 60 Neb. 90; 82 N. W. 319. It is also said that they are a form of bribery. *Camp v. Bruce*, 96 Va. 521; 70 Am. St. Rep. 873; 43 L. R. A. 146; 31 S. E. 901.

² *Hoffman v. McMullen*, 83 Fed. 372; 28 C. C. A. 178; 45 L. R. A. 410; reversing 75 Fed. 547; *Woodruff v. Berry*, 40 Ark. 251; *Swan v. Charpenning*, 20 Cal. 182; *Hunter v. Pfeiffer*, 108 Ind. 197; 9 N. E. 124; *Weld v. Lancaster*, 56 Me. 453; *Gibbs v. Smith*, 115 Mass. 592; *Hannah v. Fife*, 27 Mich. 172; *Durfee v. Moran*, 57 Mo. 374; *Whalen v. Harrison*, 26 Mont. 316; 67 Pac. 934; *Whalen v. Brennan*, 34 Neb. 129; 51 N. W. 759; *Gulick v. Ward*, 10 N. J. L. 87; 18 Am.

Dec. 389; *Atcheson v. Mallon*, 43 N. Y. 147; 3 Am. Rep. 678; *King v. Winants*, 71 N. Car. 469; 17 Am. Rep. 11.

³ *Hoffman v. McMullen*, 83 Fed. 372; 28 C. C. A. 178; 45 L. R. A. 410; reversing 75 Fed. 547; *Atcheson v. Mallon*, 43 N. Y. 147; 3 Am. Rep. 678; *King v. Winants*, 71 N. Car. 469; 17 Am. Rep. 11; *Daily v. Hollis*, 27 Tex. Civ. App. 570; 66 S. W. 586.

⁴ *Gulick v. Ward*, 10 N. J. L. 87; 18 Am. Dec. 389.

⁵ *Atlas National Bank v. Hahn*, 71 Fed. 489; *Goldman v. Oppenheimer*, 118 Ind. 95; 20 N. E. 635; *Hallam v. Huffman*, 5 Kan. App. 303; 48 Pac. 602; *Gardiner v. Morse*, 25 Me. 140; *Boyle v. Adams*, 50 Minn. 255; 17 L. R. A. 96; 52 N. W. 860; *McClelland v. Bank*, 60 Neb. 90; 82 N. W. 319; *De Baun v. Brand*, 60 N. J. L. 283; 37 Atl. 726; *Kine v. Turner*, 27 Or. 356; 41 Pac. 664; *Barton v. Benson*, 126

other money to refrain from bidding no recovery can be had on such promise.⁶ A contract whereby A agrees to pay B money if B will withdraw an offer that he has made for property belonging to the state and offered by it for sale is invalid whether the sale is a private sale or a public one.⁷ A contract by a guardian to sell his ward's land without the bidding required by law is unenforceable. Hence if another person obtains the land by outbidding the prospective vendee at such sale, such prospective vendee cannot maintain an action against the guardian.⁸ So an agreement made by an administratrix to pay to a prospective vendee any amount in excess of twelve thousand dollars which such vendee is compelled to bid for the realty contracted for cannot be enforced.⁹ The tendency and not the specific result of a contract of this class determines its validity. Such contracts are invalid even if in the particular case competition was not stifled,¹⁰ as where the party agreeing not to bid, bids secretly.¹¹

Contracts with reference to bidding, if invalid, are so because of their working a fraud on third persons.¹² Accordingly agreements between bidders are not invalid if free from fraud upon the party who receives the bids, and bases his contract

Pa. St. 431; 12 Am. St. Rep. 883; 17 Atl. 642; Nitrophosphate Syndicate v. Johnson, 100 Va. 774; 42 S. E. 995; Camp v. Bruce, 96 Va. 521; 70 Am. St. Rep. 873; 43 L. R. A. 146; 31 S. E. 901.

⁶ Atlas National Bank v. Holm, 71 Fed. 489; Hallam v. Huffman, 5 Kan. App. 303; 48 Pac. 602; Fisher v. Transportation Co., — Mich. —; 93 N. W. 1012; Boyle v. Adams, 50 Minn. 255; 17 L. R. A. 96; 52 N. W. 860; McClelland v. Bank, 60 Neb. 90; 82 N. W. 319; Jones v. Caswell, 3 Johns. Cas. (N. Y.) 29; Dudley v. Odom, 5 S. Car. 131; 22 Am. Rep. 6; Camp v. Bruce, 96 Va. 521; 70 Am. St. Rep. 873; 43 L. R. A. 146; 31 S. E. 901.

⁷ Boyle v. Adams, 50 Minn. 255; 17 L. R. A. 96; 52 N. W. 860.

⁸ Clark v. Stanhope, 109 Ky. 521; 59 S. W. 856.

⁹ Beatrice Creamery Co. v. Fitzgerald, — Neb. —; 97 N. W. 301.

¹⁰ Hoffman v. McMullen, 83 Fed. 372; 28 C. C. A. 178; 45 L. R. A. 410; Gibbs v. Smith, 115 Mass. 592; Atcheson v. Mallon, 43 N. Y. 147; 3 Am. Rep. 678; Woodworth v. Bennett, 43 N. Y. 273; 3 Am. Rep. 706.

¹¹ McClelland v. Bank, 60 Neb. 90; 82 N. W. 319.

¹² Hunt v. Elliott, 80 Ind. 245; 41 Am. Rep. 794; Phippen v. Stickney, 3 Met. (Mass.) 384; Hopkins v. Ensign, 122 N. Y. 144; 9 L. R. A. 731; 25 N. E. 306.

thereon.¹³ If the party letting the contract does not rely on the bids,¹⁴ or voluntarily lets the contract knowing of the restriction on bidding,¹⁵ or if the party whose property is offered at public sale himself enters into an agreement which involves his abstention from bidding thereat,¹⁶ or if two or more parties neither of whom could bid alone, unite to make a bid possible,¹⁷ such contracts are valid. A contract employing an agent to bid, his compensation to be the difference between the bid he makes and a given sum in excess of which he is forbidden to bid without special instructions from his principal is valid.¹⁸ However, a contract to pool interests in bidding for a public contract and obtain a higher price thereby is not made valid though the city subsequently with full knowledge of the pool pays the contract price.¹⁹ Contracts for mortgaging realty conditioned on the validity of execution sales are valid.²⁰ So a contract to protect one entitled to part of the proceeds of a judicial sale from loss in case such sale is set aside is not necessarily a fraud on the rights of others.²¹ So where public officers at a sale of public property know that the successful bidder

¹³ *Camden v. Dewing*, 47 W. Va. 310; 81 Am. St. Rep. 797; 34 S. E. 911.

¹⁴ *Brady v. Yost*, 6 Ida. 273; 55 Pac. 542 (where the printing bid for was regularly divided among the newspapers of the county).

¹⁵ *Culver v. Nester*, 116 Mich. 191; 74 N. W. 532; *Jageman v. Necco* (Tex. Civ. App.), 59 S. W. 822.

¹⁶ *De Baun v. Brand*, 61 N. J. L. 624; 41 Atl. 958; *Hopkins v. Ensign*, 122 N. Y. 144; 9 L. R. A. 731; 25 N. E. 306; *Barnes v. Morrison*, 97 Va. 372; 34 S. E. 93. See § 117.

¹⁷ *Irving v. McWilliams*, 1 N. B. Eq. 217; *Hyer v. Traction Co.*, 168 U. S. 471; *Wicker v. Hoppock*, 6 Wall. 94; *Fidelity, etc., Co. v. Ry. Co.*, 98 Fed. 475; *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 134; *Buck-*

ner v. Chambliss, 30 Ga. 652; *Olson v. Lamb*, 56 Neb. 104; 71 Am. St. Rep. 670; 76 N. W. 433; *Bellows v. Russell*, 20 N. H. 427; 51 Am. Dec. 238; *Smith v. Greenlee*, 2 Dev. L. (N. Car.) 126; 18 Am. Dec. 564; *Holmes v. Holmes*, 3 Rich. Eq. (S. Car.) 61; *McMinn v. Phipps*, 3 Sneed (Tenn.) 195; *James v. Fulerod*, 5 Tex. 512; 55 Am. Dec. 743; *Camp v. Bruce*, 96 Va. 521; 70 Am. St. Rep. 873; 43 L. R. A. 146; 31 S. E. 901; *Roudabush v. Miller*, 32 Gratt. (Va.) 454.

¹⁸ *Culver v. Nester*, 116 Mich. 191; 74 N. W. 532.

¹⁹ *Hoffman v. McMullen*, 83 Fed. 372; 28 U. C. A. 178; 45 L. R. A. 410.

²⁰ *Henry, etc., Co. v. Halter*, 58 Neb. 685; 79 N. W. 616.

²¹ *Wick v. Dawson*, 42 W. Va. 43; 24 S. E. 587.

is bidding on two lots, one for himself and one for another, such conduct on the part of the bidder is not invalid.²² Contracts between lien-holders whereby one is to bid at a given figure to protect the interests of the others at the public sale are held valid by some courts,²³ and invalid by others.²⁴ An agent in whose hands his principal places money to buy property at a judicial sale cannot refuse to account for the surplus on the ground that his principal bought the property under a contract to stifle competition.²⁵

Whether an agreement between bidders, made after the bids are in, to share the profits, is valid, is a question on which the authorities differ. An agreement between three contractors, who had, without collusion, offered similar bids, to bid among themselves and let the bid go to the one who would pay the largest sum to the others therefor was held invalid.²⁶ A contract between competing architects who have submitted their plans already to divide the reward for the successful plans between themselves is valid.²⁷ A contract between two bidders, one of whom has submitted his bid and the other of whom is about to do so, to form a partnership in such contract if awarded to either, is valid unless it is shown that such contract influenced the bid of one or both.²⁸

§406. Contract to influence agent of other.

A contract whose tendency is to induce an agent to be unfaithful to his principal's interests is invalid.¹ Thus a prom-

²² *State v. Follmer*, — Neb. —; 94 N. W. 103.

²³ *Hunt v. Elliott*, 80 Ind. 245; 41 Am. Rep. 794.

²⁴ *Atlas National Bank v. Holm*, 71 Fed. 489; *McClelland v. Bank*, 60 Neb. 90; 82 N. W. 319.

²⁵ *Hardy v. Jones*, 63 Kan. 8; 88 Am. St. Rep. 223; 64 Pac. 969.

²⁶ *Conway v. Post Co.*, 190 Ill. 89; 60 N. E. 82; reversing 90 Ill. App. 104. (Citing *Hannah v. Fife*, 27 Mich. 172; *Weld v. Lancaster*, 56 Me. 453; *Boyle v. Adams*, 50 Minn. 255; 17 L. R. A. 96; 52 N. W. 860;

Gibbs v. Smith, 115 Mass. 592); *Swan v. Chorpenning*, 20 Cal. 182.

²⁷ *Flanders v. Wood*, 83 Tex. 277; 18 S. W. 572.

²⁸ *Breslin v. Brown*, 24 O. S. 565; 15 Am. Rep. 627.

¹ *Continental Trust Co. v. Ry. Co.*, 86 Fed. 929; *Levy v. Spencer*, 18 Colo. 532; 36 Am. St. Rep. 303; 33 Pac. 415; *Byrd v. Hughes*, 84 Ill. 174; 25 Am. Rep. 442; *Hambleton v. Rhind*, 84 Md. 456; 40 L. R. A. 216; 36 Atl. 597; *Scribner v. Col-lar*, 40 Mich. 375; 29 Am. Rep. 541.

ise to give an agent a secret commission on goods sold through him to his employer,² or on fees to be paid by his employer to an attorney retained by the agent,³ or to pay him for using his influence with his principal to induce to change the location of his mill,⁴ or to locate a railroad depot at a given place, the principal being a railroad company,⁵ or to pay him to disclose information concerning his principal's mine, acquired by him in the course of his employment⁶ is invalid. A contract by an incorporated state farmers' and laborers' union to sell its franchise for the purchase and sale of different products, is invalid since this franchise is substantially an agency representing subordinate unions.⁷ The agent of A cannot act for B, an adversary party to A, in the same transaction without the assent of both his principals.⁸ If A knows that his agent X is also representing B, but B does not know that X is A's agent, the illegality affects the entire transaction and X cannot recover even from A.⁹ So a contract to release a cashier from individual liability as surety in consideration of his making a loan to his co-sureties of the bank's funds,¹⁰ and a contract between two agents, each representing an adversary principal, to divide their commissions on such transaction¹¹ are invalid. Still more clearly

² *Rice v. Wood*, 113 Mass. 133; 18 Am. Rep. 459; *Atlee v. Fink*, 75 Mo. 100; 42 Am. Rep. 385.

³ *Byrd v. Hughes*, 84 Ill. 174; 25 Am. Rep. 442; *In re Evans*, 22 Utah 366; 83 Am. St. Rep. 794; 53 L. R. A. 952; 62 Pac. 913.

⁴ *Lum v. McEwen*, 56 Minn. 278; 57 N. W. 662.

⁵ *Linder v. Carpenter*, 62 Ill. 309; *Bestor v. Wathen*, 60 Ill. 138; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Reed v. Johnson*, 27 Wash. 42; 57 L. R. A. 404; 67 Pac. 381.

⁶ *Clark v. Mining Co.*, 122 Fed. 243; 58 C. C. A. 607.

⁷ *Farmers', etc., Union v. Union Co.*, 19 Ky. L. Rep. 1235; 42 S. W. 1096.

⁸ *Byrd v. Hughes*, 84 Ill. 174; 25 Am. Rep. 442; *Holcomb v. Weaver*,

136 Mass. 265; *Leathers v. Canfield*, 117 Mich. 277; 45 L. R. A. 33; 75 N. W. 612; *Scribner v. Col- lar*, 40 Mich. 375; 29 Am. Rep. 541; *Lum v. McEwen*, 56 Minn. 278; 57 N. W. 662; *Moinett v. Days*, 1 Baxt. (Tenn.) 431; *In re Evans*, 22 Utah 366; 83 Am. St. Rep. 794; 53 L. R. A. 952; 62 Pac. 913.

⁹ *Rice v. Wood*, 113 Mass. 133; 18 Am. Rep. 459; *Capener v. Hogan*, 40 O. S. 203; *Rice v. Davis*, 136 Pa. St. 439; 20 Atl. 513; *Everhart v. Searle*, 71 Pa. St. 256.

¹⁰ *Northwestern National Bank v. Opera House Co.*, 23 Mont. 1; 57 Pac. 440.

¹¹ *Levy v. Spencer*, 18 Colo. 532; 36 Am. St. Rep. 303; 33 Pac. 415. An agreement by a contractor to divide his profits with the engineer

a contract between vendor's agent and vendee's agent to divide between themselves a difference between the price which the vendor has agreed to accept and that which the vendee has agreed to pay, believing that it is the price which the vendor demands is invalid.¹²

If the contract does not tend to cause a breach of trust the principle under discussion does not apply. Thus X may act as the agent of both adversary parties, if both know of such relation,¹³ and may receive compensation from both, even if neither knew that the other was to pay such agent.¹⁴ A contract whereby A, one of two partners, is to receive a commission of which A's partner knows and in which he shares, is not invalid because of a provision that such commission is to be kept secret.¹⁵ A contract between A and B whereby B is to use his personal influence with C is held invalid even though B is not C's agent.¹⁶

§407. Contract to influence fiduciary.

A contract which tends to influence the conduct of one who is acting in a fiduciary capacity is invalid.¹ Thus a note to A on consideration of his renouncing his right to act as executor,²

of the adversary party, under whose supervision such work is to be done is invalid; *Smythe's Estate v. Evans*, 209 Ill. 376; 70 N. E. 906; reversing 108 Ill. App. 145.

¹² *Howard v. Murphy*, — N. J. L. —; 56 Atl. 143.

¹³ *Goad v. Hart*, 128 Cal. 197; 60 Pac. 761, 964; *Pungs v. Brake Beam Co.*, 200 Ill. 306; 65 N. E. 645; affirming 102 Ill. App. 76; *Montross v. Eddy*, 94 Mich. 100; 53 N. W. 916; *Ranney v. Donovan*, 78 Mich. 318; 44 N. W. 276; *Bell v. McConnell*, 37 O. S. 396; 41 Am. Rep. 528; *Orton v. Scofield*, 61 Wis. 382; 21 N. W. 261.

¹⁴ *Friar v. Smith*, 120 Mich. 411; 46 L. R. A. 229; 79 N. W. 633.

¹⁵ *Gleason v. Ry. Co.*, 82 Ia. 745; 48 N. W. 88.

¹⁶ *Holcomb v. Weaver*, 136 Mass.

265; *McEwen v. Shannon*, 64 Vt. 583; 25 Atl. 661.

¹ *Melone v. Ruffino*, 129 Cal. 514; 79 Am. St. Rep. 127; 62 Pac. 93; *Cox v. Grubb*, 47 Kan. 435; 27 Am. St. Rep. 303; 28 Pac. 157; *Re King's Estate*, 110 Mich. 203; 68 N. W. 154; *Ellicott v. Chamberlin*, 38 N. J. Eq. 604; 48 Am. Rep. 327.

² *Ellicott v. Chamberlin*, 38 N. J. Eq. 604; 48 Am. Rep. 327; *Bowers v. Bowers*, 26 Pa. St. 74; 67 Am. Dec. 398. But in *Greer v. Nutt*, 54 Mo. App. 4, a contract by an administrator A to divide his fees with B, who had a prior right to be appointed administrator, was held valid, it not appearing that B was induced to renounce her right by anticipating such contract. A contract to resign as executor is void.

an assignment by executrix of her future fees,³ or a note to secure the election of the maker as trustee of a savings association,⁴ or a contract for the sale of property of the estate, which the executor is to carry into effect by proceedings in the Probate Court,⁵ are all invalid. So where fees are fixed by law a promise to pay greater fees is illegal. A contract between an assignee for the benefit of creditors and his assignor giving the assignee an extra percentage on any surplus that might belong to the assignor;⁶ and a contract between the parties to a will contest allowing attorney's fees in addition to the costs allowed by law⁷ are invalid. A contract between decedent's widow and his surviving partner for disposing of decedent's partnership interest in a manner other than that provided by the administration laws is invalid where decedent left minor children whose interests might be affected.⁸ But others owning an interest in the property in which the minor is interested may of course sell their interests without reference to the purchaser of such interest.⁹ But a contract by testatrix,¹⁰ or by a creditor of the estate,¹¹ to pay the executor for his services; or a contract with the beneficiaries fixing the compensation of the executor or administrator,¹² or a contract by an administrator to serve without

Currier v. Clark, — Colo. App. —; 75 Pac. 927.

³ *Re King's Estate*, 110 Mich. 203; 68 N. W. 154.

⁴ *Dickson v. Kittson*, 75 Minn. 168; 74 Am. St. Rep. 447; 77 N. W. 820.

⁵ *Melone v. Ruffino*, 129 Cal. 514; 79 Am. St. Rep. 127; 62 Pac. 93; *Myers v. Hodges*, 2 Watts 381; 27 Am. Dec. 319; *Specht v. Collins*, 81 Tex. 213; 16 S. W. 934. Such contracts are invalid because the estate should have the benefit of competitive bidding. See § 405. The illegality is still clearer where the sale by a guardian gives her personally a benefit. *Zander v. Feely*, 47 Ill. App. 659.

⁶ *Carpenter v. Taylor*, 164 N. Y. 171; 58 N. E. 53.

⁷ *Fox v. Martin*, 108 Wis. 99; 84 N. W. 23; reversing 104 Wis. 581; 80 N. W. 921.

⁸ *Cox v. Grubb*, 47 Kan. 435; 27 Am. St. Rep. 303; 28 Pac. 157; *Ravenscroft v. Pratt*, 22 Kan. 20.

⁹ *Gardner v. Gardner*, 106 Mich. 18; 63 N. W. 988.

¹⁰ *Orr v. Sanford*, 74 Mo. App. 187.

¹¹ *Lowe v. Ring*, 106 Wis. 647; 82 N. W. 571.

¹² *In re Mansfield*, 80 Ia. 681; 46 N. W. 65; *Newell v. West*, 149 Mass. 520; 21 N. E. 954; *Koch's Estate*, 148 Pa. St. 159; 23 Atl. 1057.

compensation,¹³ are held not contrary to public policy. One in a fiduciary capacity may waive his personal and private rights. In order to be invalid, the contract must influence official action. Thus a contract by decedent's widow not to sue for the death of her husband was held valid if she was not administratrix.¹⁴ So a receiver of property appointed in a foreclosure suit may act as agent in effecting a sale of the note and mortgage involved in litigation.¹⁵

§408. Contract affecting corporate interests.

Contracts between stockholders with reference to the management and control of the corporation are valid if not designed to work a fraud on the other stockholders.¹ Stockholders who control a majority of the stock may unite to elect a board of directors and thus to control the corporation.² According to the weight of authority they may deposit their shares with the trustees, vesting in them the legal title and the power to vote.³ They may give proxies for voting their stock so that one person may vote the stock of several owners.⁴ Thus a contract between owners of a majority of stock whereby they were to vote solidly for such directors as they should previously have agreed upon in caucus was held valid.⁵ In many of the cases, however, the objection to the validity of the contract was made by minority

¹³ *Mott v. Fowler*, 85 Md. 676; 37 Atl. 717.

¹⁴ *Baker v. Ry.*, 64 N. J. L. 53; 44 Atl. 868.

¹⁵ *De Jarnatt v. Peake*, 123 Cal. 607; 56 Pac. 467.

¹ They may agree to advance money to the corporation to be repaid out of its earnings. *Crane v. Bayley*, 126 Mich. 323; 85 N. W. 874.

² *Beitman v. Steiner*, 98 Ala. 241; 13 So. 87; *Mobile, etc., Ry. v. Nicholas*, 98 Ala. 92; 12 So. 723; *Smith v. Ry.*, 115 Cal. 584; 56 Am. St. Rep. 119; 35 L. R. A. 309; 47 Pac. 582; *Faulds v. Yates*, 57 Ill. 416; 11 Am. Rep. 24.

³ *Moses v. Scott*, 84 Ala. 608; 4 So. 742; *Brightman v. Bates*, 175 Mass. 105; 55 N. E. 809; *Clowes v. Miller*, 60 N. J. Eq. 179; 47 Atl. 345. "We know of nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote it." *Brightman v. Bates*, 175 Mass. 105; 55 N. E. 809; citing *Brown v. Steamship Co.*, 5 Blatchf. 525.

⁴ *Smith v. Ry.*, 115 Cal. 584; 56 Am. St. Rep. 119; 35 L. R. A. 309; 47 Pac. 582.

⁵ *Faulds v. Yates*, 57 Ill. 416; 11 Am. Rep. 24.

stockholders.⁶ They are in no position to object to the performance of such a contract if the parties thereto are satisfied therewith. If, however, the parties to the contract, such as the real owner of the stock, become dissatisfied, a different question is presented. Voting trusts are held by some courts to be revocable at will.⁷ So are proxies, though by their terms made irrevocable.⁸ In other jurisdictions provisions that a proxy shall be irrevocable are enforced.⁹ So a contract to buy stock is valid though it is entered into with the intention of acquiring control of the corporation.¹⁰

At the same time the parties to contracts of this sort must deal fairly with the corporation and with the other stockholders. A contract to make private gain at the expense of the corporation is a fraud upon the corporation and the other stockholders.¹¹ Accordingly a contract between less than all the stockholders of a corporation for the election of one or more of the parties thereto to a lucrative office in the corporation is invalid.¹² Thus a contract by the directors and a majority of the stockholders with A, providing that if A will buy certain stock and act as manager of the corporation for a certain time

⁶ Ohio, etc., Ry. v. State, 49 O. S. 668; 32 N. E. 933.

⁷ Shepaug Voting Cases, 60 Conn. 553; 24 Atl. 32; White v. Tire Co., 52 N. J. Eq. 178; 28 Atl. 75.

⁸ Woodruff v. Ry., 30 Fed. 91; Schmidt v. Mitchell, 101 Ky. 570; 72 Am. St. Rep. 427; 41 S. W. 929; Harvey v. Improvement Co., 118 N. C. 693; 54 Am. St. Rep. 749; 32 L. R. A. 265; 24 S. E. 489.

⁹ Smith v. Ry., 115 Cal. 584; 56 Am. St. Rep. 119; 35 L. R. A. 309; 47 Pac. 582; Chapman v. Bates, 61 N. J. Eq. 658; 88 Am. St. Rep. 459; 47 Atl. 638.

¹⁰ Jones v. Green, 129 Mich. 203; 95 Am. St. Rep. 433; 88 N. W. 1047.

¹¹ West v. Camden, 135 U. S. 507; Guernsey v. Cook, 117 Mass. 548; 120 Mass. 501; Fuller v.

Dame, 18 Pick. (Mass.) 472; Cone v. Russell, 48 N. J. Eq. 208; 21 Atl. 847.

¹² West v. Camden, 135 U. S. 507; Forbes v. McDonald, 54 Cal. 98; Noel v. Drake, 28 Kan. 265; 42 Am. Rep. 162; Woodruff v. Wentworth, 133 Mass. 309; Noyes v. Marsh, 123 Mass. 286; Guernsey v. Cook, 120 Mass. 501; Fuller v. Dame, 18 Pick. (Mass.) 472; Wilbur v. Stoepel, 82 Mich. 344; 21 Am. St. Rep. 568; 46 N. W. 724; Harris v. Scott, 67 N. H. 437; 32 Atl. 770; White v. Tire Co., 52 N. J. Eq. 178; 28 Atl. 75; Cone v. Russell, 48 N. J. Eq. 208; 21 Atl. 847; Gage v. Fisher, 5 N. D. 297; 31 L. R. A. 557; 65 N. W. 809; Withers v. Edward, 26 Tex. Civ. App. 189; 62 S. W. 795.

they will pay him a specified salary and pay a certain amount for his stock at the end of such time, was held invalid.¹³ So a contract whereby A who was the chief stockholder in a corporation and the holder of a mortgage on its realty to sell its personality and to make title to the realty by foreclosing such mortgage, is invalid.¹⁴ So a contract by the director of a corporation to resign for a valuable consideration is illegal.¹⁵

A contract between stockholders or officers of a corporation to violate or evade the laws controlling corporations, is invalid;¹⁶ as a contract giving bondholders the right to vote at stockholders' meetings,¹⁷ or providing that a given stockholder may withdraw his capital before the corporate debts are paid.¹⁸

A contract whereby a corporation gives A stock in consideration of A's acting as director and aiding the corporation is valid,¹⁹ unless the statute forbids a corporation to issue stock or bonds except for property, services and the like furnished to the corporation, or for money paid therefor.²⁰ Under such statute a fictitious increase of stock is illegal, and a note given for such increased stock is unenforceable.²¹ A contract to appoint an agent in whose ability the public has an interest, is invalid,

¹³ *Wilbur v. Stoepel*, 82 Mich. 344; 21 Am. St. Rep. 568; 46 N. W. 724. (A was not allowed to maintain an action on the contract to repurchase his stock.) A somewhat similar contract, in which it appeared that A was secured as president and manager solely for the interests of the corporation, and that he was given full control provided the profits of the corporation reached a certain sum, was held valid in *Jones v. Williams*, 139 Mo. 1; 61 Am. St. Rep. 436; 37 L. R. A. 682; 39 S. W. 486; by three judges out of six, two dissenting and one not voting. Dissenting opinion in 40 S. W. 353. It appeared that all the stockholders acquiesced in such contract.

¹⁴ *Peck v. Levinger*, 6 Dak. 54; 50 N. W. 481.

¹⁵ *Forbes v. McDonald*, 54 Cal. 98.

¹⁶ *Tompkins v. Compton*, 93 Ga. 520; 21 S. E. 79; *McNulta v. Bank*, 164 Ill. 427; 56 Am. St. Rep. 203; 45 N. E. 954; affirming 63 Ill. App. 593.

¹⁷ *Durkee v. People*, 155 Ill. 354; 46 Am. St. Rep. 340; 40 N. E. 626; affirming 53 Ill. App. 396.

¹⁸ *Guaranty Trust Co. v. Ry. Co.*, 107 Fed. 311; 46 C. C. A. 305.

¹⁹ *Almy v. Orne*, 165 Mass. 126; 42 N. E. 561; *Rich v. Bank*, 7 Neb. 201; 29 Am. Rep. 382.

²⁰ *Altenberg v. Grant*, 85 Fed. 345; 29 C. C. A. 185.

²¹ *Alabama National Bank v. Halsey*, 109 Ala. 196; 19 So. 522.

even if not operating as a fraud on private owners. A contract by which the owners of a vessel sell three-sixteenths interest to A, under a contract that he shall always act as master for a share of one-half the profits is void, not as prejudicing the owners, for they have all entered into the contract, but as being inconsistent with the duties which ship-owners owe the public.²²

²² *Smith-Green Co. v. Bird*, 96 Me. 916. So *Rogers v. Sheerer*, 77 Me. 425; 90 *Am. St. Rep.* 353; 52 *Atl.* 323.

CHAPTER XXIII.

CONTRACTS TENDING TO INTERFERE WITH THE OPERATION OF THE GOVERNMENT.

§409. Contracts to defraud the government.

Contracts intended to operate as a fraud on the government are invalid.¹ Thus an assignment of a note and mortgage to avoid taxation,² or a contract between A and B whereby A presents fraudulent bills to a city council for B's services, and gets them allowed³ are all invalid. Thus a contract by which A, the owner of property destroyed by federal troops during the Civil War, agrees with B who has no interest in such property that B shall present such claim to the government in B's name as owner, and that A and B will divide whatever B recovers is unenforceable.⁴ Equity will give no relief in such cases. Thus where a village got authority from the Legislature to issue bonds by representing falsely that they were needed for internal improvements, equity will give no relief but will leave the parties to their remedies at law.⁵ A collusive suit

¹ Moore v. Moore, 130 Cal. 110; 80 Am. St. Rep. 78; 62 Pac. 294; Sneldon v. Pruessner, 52 Kan. 579; 22 L. R. A. 709; 35 Pac. 201; Fisher Electric Co. v. Iron Works, 116 Mich. 293; 74 N. W. 493; Leveroos v. Reis, 52 Minn. 259; 53 N. W. 1155.

² Sheldon v. Pruessner, 52 Kan. 579; 22 L. R. A. 709; 35 Pac. 201. But the *bona fide* assignee of a note and mortgage may enforce the same though the assignment is kept off the record to avoid taxation. Terry v. Land Co., 112 Mich. 665; 71 N. W. 525. Taking a note and mortgage in the name of a third person

who has no interest therein, to avoid taxation, does not make the note and mortgage void. Gilmore v. Roberts, 79 Wis. 450; 48 N. W. 522.

³ Leveroos v. Reis, 52 Minn. 259; 53 N. W. 1155. (A having collected the sum and refused to pay B his share.)

⁴ Spottswood v. Bently, 130 Ala. 310; 30 So. 493. Hence A cannot recover from B any part of what B recovers from the government.

⁵ Cedar Springs v. Schlich, 81 Mich. 405; 8 L. R. A. 851; 45 N. W. 994.

between parties not really adverse in interest is a fraud on the court,⁶ amounts to contempt⁷ and will be dismissed by the court when such facts become apparent.⁸ Accordingly a contract between a county and a bidder for the bonds of such county by which the county is to pay the expenses of a feigned suit which the bidder is to cause to have brought to test the validity of the bonds and prosecuted to the supreme court of the state, and if the bonds are held valid the bidder is to take them at a fixed price is void.⁹ However, a contract by a private person whereby he agrees to release a surety on an official bond is not *per se* illegal; as it may be performed lawfully by paying to the state the amount of such surety's liability.¹⁰

§410. Contract to obtain public office.

A contract for obtaining the election or appointment of a person to an office in consideration of something of value is invalid.¹ Thus an attempted sale of a public office,² as where

⁶ "The objection in the case before us is not that the proceedings were amicable but that there is no real conflict of interest." Lord v. Veazie, 8 How. (U. S.) 251.

⁷ Smith v. Ry., 29 Ind. 546; Haley v. Bank, 21 Nev. 127; 12 L. R. A. 815; 26 Pac. 64.

⁸ Haley v. Bank, 21 Nev. 127; 12 L. R. A. 815; 26 Pac. 64.

⁹ Van Horn v. Killitas County, 112 Fed. 1.

¹⁰ Culver v. Caldwell, 137 Ala. 125; 34 So. 13.

¹ Meguire v. Corwine, 101 U. S. 108; Edwards v. Randle, 63 Ark. 318; 58 Am. St. Rep. 108; 36 L. R. A. 174; 38 S. W. 343; Liness v. Hesing, 44 Ill. 113; 92 Am. Dec. 153; Conner v. Canter, 15 Ind. App. 690; 44 N. E. 656; Stout v. Ennis, 28 Kan. 706; Outon v. Rodes, 3 A. K. Mar. (Ky.) 432; 13 Am. Dec. 193; Faurie v. Morin, 4 Martin (La.) 39; 6 Am. Dec. 701; Groton

v. Waldaborough, 11 Me. 306; 26 Am. Dec. 530; Harris v. Chamberlain, 126 Mich. 280; 85 N. W. 728; Gaston v. Drake, 14 Nev. 175; 33 Am. Rep. 548; Basket v. Moss, 115 N. Car. 448; 44 Am. St. Rep. 463; 48 L. R. A. 842; 20 S. E. 733; Wishek v. Hammond, 10 N. D. 72; 84 N. W. 587; Gray v. Hook, 4 N. Y. 449; Wilkes-Barre v. Rockafellow, 171 Pa. St. 177; 50 Am. St. Rep. 795; 30 L. R. A. 393; 33 Atl. 269; Filson v. Himes, 5 Pa. St. 452; 47 Am. Dec. 422.

² Reynel's Case, 9 Coke 95a; Parsons v. Thompson, 1 H. Bl. 322; Blachford v. Preston, 8 T. R. 89; Edwards v. Randle, 63 Ark. 318; 58 Am. St. Rep. 108; 36 L. R. A. 174; 38 S. W. 343; Groton v. Waldaborough, 11 Me. 306; 26 Am. Dec. 530; Basket v. Moss, 115 N. Car. 448; 44 Am. St. Rep. 463; 48 L. R. A. 842; 20 S. E. 733.

by one contract a postmaster sold all his furniture and fixtures, and agreed to resign his office and recommend the appointment of the other party as his successor;³ or a contract whereby A agrees to pay B for B's influence in securing A's appointment or election to office,⁴ as a promise by a candidate for city treasurer to pay interest on the city's funds in his hands,⁵ or a promise whereby partners were to procure the appointment of one of their number to office, the fees of which were to belong to the firm,⁶ or a promise by A to appoint B as his deputy if A were elected county treasurer,⁷ have each been held illegal. So a contract whereby a candidate agrees to pay the owner of a newspaper for the support of such newspaper in the campaign is void.⁸ A contract by a candidate to pay party workers for obtaining votes for him, is held invalid.⁹ A contract intended to influence electors by giving them something of value in return for their political support is invalid as bribery.¹⁰

§411. Contract to assign official remuneration.

Remuneration is given by law to public officials from considerations of public policy, in order to secure adequate public service. An assignment thereof, before such remuneration is

³ *Edwards v. Randle*, 63 Ark. 318; 58 Am. St. Rep. 108; 36 L. R. A. 174; 38 S. W. 343.

⁴ *Meguire v. Corwine*, 101 U. S. 108; *Edwards v. Randle*, 63 Ark. 318; 58 Am. St. Rep. 108; 36 L. R. A. 174; 38 S. W. 343; *Conner v. Canter*, 15 Ind. App. 690; 44 N. E. 656; *Stout v. Ennis*, 28 Kan. 706; *Outon v. Rodes*, 3 A. K. Mar. (Ky.) 432; 13 Am. Dec. 193; *Wishek v. Hammond*, 10 N. D. 72; 84 N. W. 587; *Wilkes-Barre v. Rockafellow*, 171 Pa. St. 177; 50 Am. St. Rep. 795; 30 L. R. A. 393; 33 Atl. 269.

⁵ *Wilkes-Barre v. Rockafellow*, 171 Pa. St. 177; 50 Am. St. Rep. 795; 30 L. R. A. 393; 33 Atl. 269.

⁶ *Wishek v. Hammond*, 10 N. D. 72; 84 N. W. 587.

⁷ *Conner v. Canter*, 15 Ind. App. 690; 44 N. E. 656; *Stout v. Ennis*, 28 Kan. 706. To the same effect see *Robertson v. Robinson*, 65 Ala. 610; 39 Am. Rep. 17. So of a contract by A to appoint as his deputies such persons as B should name; *Burek v. Abbott*, 22 Tex. Civ. App. 216; 54 S. W. 314.

⁸ *Livingston v. Page*, 74 Vt. 356; 93 Am. St. Rep. 901; 59 L. R. A. 336; 52 Atl. 965.

⁹ *Martin v. Wade*, 37 Cal. 168; *Whitman v. Ewin* (Tenn. Ch. App.); 39 S. W. 742.

¹⁰ *Liness v. Hesing*, 44 Ill. 113; 92 Am. Dec. 153; *Burden Bank v. Phelps*, 5 Kan. App. 685; 48 Pac. 938; *Swayze v. Hull*, 8 N. J. L. 54; 14 Am. Dec. 399.

earned, tends to place the assignor in straightened circumstances, to induce him to engage in unofficial work, and to destroy his interest in the duties of his office. Accordingly a contract to assign such unearned remuneration¹ in whole² or in part³ is invalid. Thus where a partner agrees that if elected to office he will divide his fees with his partners,⁴ or a deputy agrees to divide with the sheriff fees which belong to the deputy,⁵ or agrees to do all the work of the sheriff in a certain district and take all the fees, paying the sheriff one hundred dollars a year,⁶ such contracts are invalid as being in effect a sale of the office. But

¹ *Barwick v. Reade*, 1 H. Bl. 627; *Flarty v. Odlum*, 3 T. R. 681; *Davis v. Duke of Marlborough*, 1 Swanst. 79; *Lidderdale v. Montrose*, 4 T. R. 248; *Arbuckle v. Cowtan*, 3 Bos. & P. 321; *Stone v. Lidderdale*, 2 Anstr. 533; *Wells v. Foster*, 8 Mees. & W. 149; *Palmer v. Bate*, 2 Brod. & B. 673; *Shannon v. Bruner*, 36 Fed. Rep. 147; *Schloss v. Hewlett*, 81 Ala. 266; 1 So. 263; *Robertson v. Robinson*, 65 Ala. 610; 39 Am. Rep. 17; *Bangs v. Dunn*, 66 Cal. 72; 4 Pac. 963; *Holt v. Thurman* (Ky.); 63 S. W. 280; *Dickinson v. Johnson*, 110 Ky. 236; 96 Am. St. Rep. 434; 54 L. R. A. 566; 61 S. W. 267; *Field v. Chipley*, 79 Ky. 260; 42 Am. Rep. 215; *State v. Williamson*, 118 Mo. 146; 40 Am. St. Rep. 358; 21 L. R. A. 827; 35 S. W. 929; *Beal v. McVicker*, 8 Mo. App. 202; *First National Bank v. State*, — Neb. —; 94 N. W. 633; *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548; *Schwenk v. Wyckoff*, 46 N. J. Eq. 560; 19 Am. St. Rep. 438; 9 L. R. A. 221; 20 Atl. 259; *Bowery National Bank v. Wilson*, 122 N. Y. 478; 19 Am. St. Rep. 507; 9 L. R. A. 706; 25 N. E. 855; *Bliss v. Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273; *Wishek v. Hammond*, 10 N. D. 72; 84 N. W. 587; *State v. Barnes*, 10 S. D. 306;

73 N. W. 80; *El Paso National Bank v. Fink*, 86 Tex. 303; 40 Am. St. Rep. 833; 24 S. W. 256.

² *Field v. Chipley*, 79 Ky. 260; 42 Am. Rep. 215.

³ *Robertson v. Robinson*, 65 Ala. 610; 39 Am. Rep. 17; *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548; *State v. Barnes*, 10 S. D. 306; 73 N. W. 80; *Williams v. Ford* (Tex. Civ. App.); 27 S. W. 723. *Contra*, *Brackett v. Blake*, 7 Met. (Mass.) 335; 41 Am. Dec. 442; *Macomber v. Doane*, 2 All. (Mass.) 541.

⁴ *Wishek v. Hammond*, 10 N. D. 72; 84 N. W. 587; *Santleben v. Froboese*, 17 Tex. Civ. App. 626; 43 S. W. 571. *Contra*, that such a contract is valid as an agreement for the application of the salary when paid. *McGregor v. McGregor*, 130 Mich. 505; 97 Am. St. Rep. 492; 90 N. W. 284.

⁵ *Deyoe v. Woodworth*, 144 N. Y. 448; 39 N. E. 375.

⁶ *White v. Cook*, 51 W. Va. 201; 90 Am. St. Rep. 775; 57 L. R. A. 417; 41 S. E. 410. (Under a statute forbidding an officer to sell or farm his office.) For similar cases see *Willis v. Compress Co.* (Tex. Civ. App.); 66 S. W. 472; *Stephenson v. Salisbury*, 53 W. Va. 366; 44 S. E. 217.

a promise by A, a sheriff, after election to appoint B as deputy and pay him half the net fees and salary is valid.⁷ An assignment of remuneration for official duties after it is earned is valid.⁸ This principle forbids assignment of the unearned compensation of a sheriff,⁹ a mail carrier,¹⁰ an assessor¹¹ and an executor.¹² The principle forbids the assignment of unearned fees¹³ as well as of unearned salary.¹⁴ The same principle has been held to forbid the assignment by a retired army officer of his unearned pay.¹⁵ On the other hand the assignment of the salary of a workhouse and infirmary chaplain is not void.¹⁶ A sale of a part of commissions to be earned, or of an allowance made to the jailer by a county for his services has been held valid.¹⁷

§412. Contract changing legal rate of compensation.

Where the law fixes the compensation of public officials and employees, a promise by them to accept less,¹ or a promise to

⁷ *Stout v. Ennis*, 28 Kan. 706.

⁸ Especially after the claim therefor is allowed and certified by the proper officials. *Watkins v. State*, 151 Ind. 123; 49 N. E. 169; rehearing denied, 151 Ind. 129; 51 N. E. 79. So if the assignment is unnecessary but made for greater precaution, the assignee being the proper person to sue before the assignment. *People v. Board*, 170 N. Y. 93; 62 N. E. 1069.

⁹ *Bowery National Bank v. Wilson*, 122 N. Y. 478; 19 Am. St. Rep. 507; 9 L. R. A. 706; 25 N. E. 855.

¹⁰ *State v. Williamson*, 118 Mo. 146; 40 Am. St. Rep. 358; 21 L. R. A. 827; 23 S. W. 1054.

¹¹ *El Paso National Bank v. Fink*, 86 Tex. 303; 40 Am. St. Rep. 833; 24 S. W. 256; *Stevenson v. Kyle*, 42 W. Va. 229; 57 Am. St. Rep. 854; 24 S. E. 886.

¹² *In re Worthington*, 141 N. Y. 9; 23 L. R. A. 97; 35 N. E. 929.

¹³ *In re Worthington*, 141 N. Y. 9; 23 L. R. A. 97; 35 N. E. 929; *Bowery National Bank v. Wilson*, 122 N. Y. 478; 19 Am. St. Rep. 507; 9 L. R. A. 706; 25 N. E. 855; *El Paso National Bank v. Fink*, 86 Tex. 303; 40 Am. St. Rep. 833; 24 S. W. 256.

¹⁴ *State v. Williamson*, 118 Mo. 146; 40 Am. St. Rep. 358; 21 L. R. A. 827; 23 S. W. 1054.

¹⁵ *Schwenk v. Wyckoff*, 46 N. J. Eq. 560; 19 Am. St. Rep. 438; 9 L. R. A. 221; 20 Atl. 259.

¹⁶ *In re Mirams* (1891), 1 Q. B. 594.

¹⁷ *Stephenson v. Salisbury*, 53 W. Va. 366; 44 S. E. 217.

¹ *Ohio National Bank v. Hopkins*, 8 App. D. C. 146; *Brown v. Bank*, 137 Ind. 655; 24 L. R. A. 206; 37 N. E. 158; *Hawkeye Ins. Co. v. Brainard*, 72 Ia. 130; 33 N. W. 603; *Willem v. Bateson*, 63 Mich. 309; 29 N. W. 734; *Nelson v. Superior*, 109 Wis. 618; 85 N. W. 412.

them to pay more² than the compensation fixed by law is not only without consideration³ but is void as being against public policy. This is especially true where the law imposes a penalty for exacting fees greater than the law allows.⁴ Thus a sheriff whose duty it is to arrest persons who bring stolen property into his county, cannot recover even on an express promise for arresting a thief who brings stolen money into such county.⁵ So a contract by a commissioner who is to be paid in fees, whereby he agrees not to charge fees unless the party at whose instance such costs were incurred recovers costs from the adversary party;⁶ or a contract whereby a sheriff agrees not to charge for serving writs unless the plaintiff is successful⁷ is invalid. A promise by a notary public to accept less than legal fees in consideration of his receiving all the paper of a given bank to be protested is unenforceable.⁸ However, where A agreed to act as clerk and notary for fifty dollars per month and the bank paid him this amount, it was held that he could not repudiate the contract and recover his fees, which were less than the amount paid to him.⁹ A promise by a candidate made to the electors before election to charge less than half the legal fees if elected is a form of bribery.¹⁰ But if the

² *Buck v. Eureka*, 109 Cal. 504; 30 L. R. A. 409; 42 Pac. 243; *In re Russell*, 51 Conn. 577; 50 Am. Rep. 55; *Decatur v. Vermillion*, 77 Ill. 315; *Mitchell v. Vance*, 5 T. B. Mon. (Ky.) 528; 17 Am. Dec. 96; *State v. Edwards*, 86 Me. 102; 41 Am. St. Rep. 528; 25 L. R. A. 504; 29 Atl. 947; *Foley v. Platt*, 105 Mich. 635; 63 N. W. 520; *Gilmore v. Lewis*, 12 Ohio 281; *Keith v. Fountain*, 3 Tex. Civ. App. 391; 22 S. W. 191; *Ring v. Devlin*, 68 Wis. 384; 32 N. W. 121.

³ See § 323.

⁴ *Edgerly v. Hale*, 71 N. H. 138; 51 Atl. 679.

⁵ *Foley v. Platt*, 105 Mich. 635; 63 N. W. 520.

⁶ *Watson v. Fales*, 97 Me. 366; 94

Am. St. Rep. 504; 54 Atl. 853.

⁷ *Edgerly v. Hale*, 71 N. H. 138; 51 Atl. 679. *Contra*, in *Bloom v. Hazzard*, 104 Cal. 310; 37 Pac. 1037, a contract between a judgment creditor, A, and a constable, B, whereby B was to charge A less than the legal fees for a levy on realty (a certain sum per day), but was to charge the full amount on his return against the judgment debtor, was held valid.

⁸ *Ohio National Bank v. Hopkins*, 8 App. D. C. 146.

⁹ *Second National Bank v. Ferguson* — Ky. —; 71 S. W. 429.

¹⁰ *State v. Collier*, 72 Mo. 13; 37 Am. Rep. 417. So of a contract before appointment between an appointive officer and a city council.

services are rendered in a private and not in an official capacity, a contract to take less¹¹ or to pay more¹² than the legal fees is valid. Thus a promise to pay a deputy sheriff for time, travel and outlay in getting information about the sale of intoxicating liquor,¹³ a promise to pay a jailer additional fees for nursing a sick prisoner,¹⁴ or a promise by a town to pay the commissioners of highways an additional sum for supervising the laying of water-pipes,¹⁵ is valid. An agreement with a sheriff to pay to him the wages of special deputies furnished at promisor's request to preserve the peace has been held valid.¹⁶ Where during a strike a sheriff, who is ready to keep the peace with his regular force, is requested by a railroad company to hire extra men to guard their property, the company promising to pay for such men, and he appoints a number of special deputies for that purpose and pays them, it is held that he can recover from the company for such payments.¹⁷ A contract for delay in paying costs, giving collateral security therefor, is valid.¹⁸ Where the statute specifically authorizes contracts by certain public officers whereby they agree to do certain extra work for increased compensation, such contracts are clearly legal.¹⁹ A contract whereby one is appointed in a fiduciary capacity in considera-

Gallagher v. Lincoln, 63 Neb. 339; 88 N. W. 505.

See § 410.

¹¹ Thus where one who is a justice of the peace acts as a private citizen in collecting delinquent taxes he must accept the agreed compensation. *Peters v. Davenport*, 104 Ia. 625; 74 N. W. 6.

¹² *Trundle v. Riley*, 17 B. Mon. (Ky.) 396; *Studley v. Ballard*, 169 Mass. 295; 61 Am. St. Rep. 286; 47 N. E. 1000; *Niles v. Muzzy*, 33 Mich. 61; 20 Am. Rep. 670; *Nicoll v. Sands*, 131 N. Y. 19; 2 N. E. 818; *Russell v. Stewart*, 44 Vt. 170.

¹³ *Studley v. Ballard*, 169 Mass. 295; 61 Am. St. Rep. 286; 47 N. E. 1000. So *Harris v. More*, 70 Cal. 502; 11 Pac. 780. (Where the dep-

uty sheriff got evidence outside of his county.)

¹⁴ *Warner v. Grace*, 14 Minn. 487.

¹⁵ *Nicoll v. Sands*, 131 N. Y. 19; 2 N. E. 818. (Such supervision being outside of their official duties.)

¹⁶ *Clark v. Cook*, 197 Pa. St. 643; 47 Atl. 851.

¹⁷ *McCandless v. Steel Co.*, 152 Pa. St. 139; 25 Atl. 579. Even if it is the statutory duty of the sheriff to suppress riots and he is forbidden to take fees not allowed by law. *Sullivan v. Ry.*, 11 Mont. 236; 28 Pac. 307.

¹⁸ *McDonald v. Young* (Tex. Civ. App.); 41 S. W. 885.

¹⁹ *Tippecanoe County v. Mitchell*, 131 Ind. 370; 15 L. R. A. 520; 30 N. E. 409; *State v. Crites*, 48 O. S. 142; 26 N. E. 1052.

tion of his agreement not to charge any compensation for his services is valid.²⁰ Thus a contract whereby one who is to act as receiver agrees that if appointed he will not charge any compensation is valid.²¹ So a promise whereby an administrator agrees to serve gratuitously if appointed is valid.²²

§413. Contract with public officer to influence official conduct.

A contract whereby a public officer in consideration of a personal benefit to himself agrees to exercise his official power and discretion in certain specified ways, is invalid;¹ especially if such method of exercising discretion is itself a violation of official duty,² or tends thereto,³ as where a county treasurer agrees not to collect certain taxes,⁴ or a sheriff agrees to credit his attorney's charges on the taxes due from said attorney,⁵ or a justice of the peace before whom an affidavit has been filed charging A with a crime, agrees to go to a foreign state to which A has fled, secure his arrest and return him to the state from which he

²⁰ McIntire v. McIntire, 192 U. S. 116; Ephraim v. Bank, 136 Cal. 646, 648; 69 Pac. 436; Bate v. Bate, 74 Ky. 639; Bowker v. Pierce, 130 Mass. 262; Rote v. Warner, 17 Ohio C. C. 342; Steel v. Holladay, 19 Or. 517; 25 Pac. 77; *In re Hay's Estate*, 183 Pa. St. 296; 38 Atl. 622.

²¹ Polk v. Johnson, 160 Ind. 292; 98 Am. St. Rep. 274; 66 N. E. 752.

²² McIntire v. McIntire, 192 U. S. 116.

¹ Washington Irrigation Co. v. Krutz, 119 Fed. 279; Spence v. Harvey, 22 Cal. 336; 83 Am. Dec. 69; Dorsett v. Garrard, 85 Ga. 734; Howell v. Fountain, 3 Ga. 176; 46 Am. Dec. 415; Lake Fork, etc., Commissioners v. People, 138 Ill. 87; 27 N. E. 857; Brown v. Bank, 137 Ind. 655; 24 L. R. A. 206; 37 N. E. 158; Elkhart County Lodge v. Crary, 98 Ind. 238; 49 Am. Rep. 746; Stropes v. Board, 72 Ind. 42; Cass County v. Beck, 76 Ia. 487; 41 N. W. 200;

Hawkeye Ins. Co. v. Brainard, 72 Ia. 130; 33 N. W. 603; Woodman v. Innes, 47 Kan. 26; 27 Am. St. Rep. 274; 27 Pac. 125; Lucas v. Allen, 80 Ky. 681; Hope v. Horse Association, 58 N. J. L. 627; 55 Am. St. Rep. 614; 34 Atl. 1070; McCortle v. Bates, 29 O. S. 419; 23 Am. Rep. 758; Railroad v. Morris, 10 Ohio C. C. 502; affirmed without report, 57 O. S. 657; 50 N. E. 1132.

² Buffendeau v. Brooks, 26 Cal. 643; Howell v. Fountain, 3 Ga. 176; 46 Am. Dec. 415; Cole v. Parker, 7 Ia. 168; 71 Am. Dec. 439; Harrington v. Crawford, 136 Mo. 467; 58 Am. St. Rep. 653; 35 L. R. A. 477; 38 S. W. 80.

³ Goodyear v. Brown, 155 Pa. St. 514; 35 Am. St. 903; 20 L. R. A. 838; 26 Atl. 665.

⁴ Brule County v. King, 11 S. D. 294; 77 N. W. 107.

⁵ Miller v. Wisener, 45 W. Va. 59; 30 S. E. 237.

fled for preliminary trial before such justice,⁶ or a constable agrees not to levy an execution.⁷ To make such a contract illegal, it is not necessary that the officer bind himself to exercise his official power in any specific manner. It is sufficient if he is given a financial interest in acting in a certain manner which might be contrary to his official duty.⁸ So to make such contract illegal it is not necessary to show that the officer was corruptly influenced. The tendency of the contract to influence the official to the detriment of the public interest, and not the fact that he acts contrary to the public interest, is the element that makes the contract illegal.⁹ So a contract to refrain from exercising the duties of office,¹⁰ or a contract for transferring official duties to others, as independent contractors and not mere deputies,¹¹ is invalid. So a contract whereby a tax collector guarantees the collection of taxes and the town agrees that after such tax-collector has paid such taxes, the tax-warrants shall continue in force for his benefit until he has been reimbursed by the taxpayers, is invalid.¹² An agreement on valuable consideration to indemnify an officer for a past neglect is valid.¹³ An agreement to indemnify a public officer for the consequences of an act which he has reason to believe is not illegal, but as to the validity of which there is some doubt, is not illegal.¹⁴ If, how-

⁶ *Brown v. Bank*, 137 Ind. 655; 24 L. R. A. 206; 37 N. E. 158.

⁷ *Barnes v. Jackson*, 2 Sneed (Tenn.) 416. So with a sheriff. *Harrington v. Crawford*, 136 Mo. 467; 35 L. R. A. 477; 38 S. W. 80.

⁸ *Oscanyan v. Arms Co.*, 103 U. S. 261; *Spence v. Harvey*, 22 Cal. 336; 83 Am. Dec. 69; *Brown v. Bank*, 137 Ind. 655; 24 L. R. A. 206; 37 N. E. 158; *Robinson v. Patterson*, 71 Mich. 141; 39 N. W. 21; *Hope v. Horse Association*, 58 N. J. L. 627; 55 Am. St. Rep. 614; 34 Atl. 1070; *Goodyear v. Brown*, 155 Pa. St. 514; 35 Am. St. Rep. 903; 20 L. R. A. 838; 26 Atl. 665.

⁹ *Oscanyan v. Arms Co.*, 103 U. S. 261; *Brown v. Bank*, 137 Ind. 655;

24 L. R. A. 206; 37 N. E. 158; *McCortle v. Bates*, 29 O. S. 419; 23 Am. Rep. 758.

¹⁰ *Burck v. Abbott*, 22 Tex. Civ. App. 216; 54 S. W. 314.

¹¹ *Cansler v. Penland*, 125 N. Car. 578; 48 L. R. A. 441; 34 S. E. 683. (The sheriff, the official tax-collector, turned over the taxes to another to collect upon commission, contrary to a statute forbidding him to let them to farm.) *Moore v. Cassily*, 16 Ohio C. C. 708; 9 Ohio C. D. 305.

¹² *Page v. Claggett*, 71 N. H. 85; 51 Atl. 686.

¹³ *Hall v. Huntoon*, 17 Vt. 244; 44 Am. Dec. 332.

¹⁴ *Mays v. Joseph*, 34 O. S. 22; *Miller v. Rhoads*, 20 O. S. 494.

ever, the act in question is clearly illegal, a contract to indemnify the officer for doing such act is illegal.¹⁵

§414. Conduct to influence official conduct of third person.

A contract whereby A employs B to obtain the action of some department of the government favorable to A's interests, is legal or not, according to the nature of the services contemplated.¹ If B is to act avowedly as A's agent or attorney, doing for A what A might lawfully do,² such as drafting a bill,³ making arguments in its favor before a committee,⁴ preparing and circulating explanatory pamphlets,⁵ making an argument concerning the status of certain public lands to the Secretary of the Interior⁶ and the like, the contract of employment is valid;⁷ even if the compensation is contingent,⁸ or if the agent is of the same

¹⁵ *Buffindeau v. Brooks*, 28 Cal. 643. As a promise to indemnify sheriff for violating an injunction. *Buffindeau v. Brooks*, 28 Cal. 643.

¹ The same principles apply to contracts to influence the executive and legislative departments of the government, and no distinction is here made between the two.

² *Hunt v. Test*, 8 Ala. 713; 42 Am. Dec. 659; *McBratney v. Chandler*, 22 Kan. 692; 31 Am. Rep. 213; *Sweet v. Slough* (Tex. Civ. App.); 51 S. W. 854; reversed on rehearing on another point; 52 S. W. 1043.

³ *Miles v. Thorne*, 38 Cal. 335; 99 Am. Dec. 384; *Chesebrough v. Conover*, 140 N. Y. 382; 35 N. E. 633.

⁴ *Foltz v. Cogswell*, 86 Cal. 542; 25 Pac. 60.

⁵ *Barber, etc., Co. v. Botsford*, 56 Kan. 532; 44 Pac. 3; *Kansas Pacific Ry. v. McCoy*, 8 Kan. 538.

⁶ *Houlton v. Nichol*, 93 Wis. 393; 57 Am. St. Rep. 928; 33 L. R. A. 166; 67 N. W. 715.

⁷ *Stanton v. Embrey*, 93 U. S. 548; *Bergen v. Frisbie*, 125 Cal. 168; 57

Pac. 784; *Foltz v. Cogswell*, 86 Cal. 542; 25 Pac. 60; *Barry v. Capen*, 151 Mass. 99; 6 L. R. A. 808; 23 N. E. 735; *Chesebrough v. Conover*, 140 N. Y. 382; 35 N. E. 633; *Winpenny v. French*, 18 O. S. 469; *Powers v. Skinner*, 34 Vt. 274; 80 Am. Dec. 677; *Houlton v. Nichol*, 93 Wis. 393; 57 Am. St. Rep. 928; 33 L. R. A. 166; 67 N. W. 715.

⁸ *Bergen v. Frisbie*, 125 Cal. 168; 57 Pac. 784; *Houlton v. Nichol*, 93 Wis. 393; 57 Am. St. Rep. 928; 33 L. R. A. 166; 67 N. W. 715. While there are some obiter to the effect that contingent compensation always makes contracts to influence public officials illegal, (See *Trist v. Child*, 21 Wall. (U. S.) 441; *Critchfield v. Paving Co.*, 174 Ill. 466; 42 L. R. A. 347; 51 N. E. 552; affirming, 62 Ill. App. 221; *Wood v. McCann*, 6 Dana (Ky.) 367; *Spalding v. Ewing*, 149 Pa. St. 375; 34 Am. St. Rep. 608; 15 L. R. A. 727; 24 Atl. 219); and it is said to be champertous and void as against public policy, *Coquillard v. Bearss*, 21 Ind. 479; 83 Am. Dec. 362; in all these

political party as the administration and is in part selected on that account,⁹ or if the agent is a near relation of the public officer whose conduct it is sought in a public open way to influence.¹⁰ So a contract whereby A employs B to act openly and legally in securing a reduction of an excessive claim against A for taxes is valid.¹¹ But if the agent is to use his personal influence with the public officials whose favorable action he seeks to obtain, and if he is to resort to private solicitation therefor,¹² the contract of employment is illegal, even if the fact of employment as lobbying agent is not a secret,¹³ and if no improper influence is to be used.¹⁴ Thus the employment of an attorney to render services which in part consist of personal solicitation of legislators is illegal.¹⁵ The invalidity is especially clear when the compensation of the agent is in part or in whole dependent on his success in obtaining the passage of an ordi-

cases there is some additional element of unlawful use of personal influence, secret solicitation and the like.

⁹ *Lyon v. Mitchell*, 36 N. Y. 235; 93 Am. Dec. 502.

¹⁰ *Southard v. Boyd*, 51 N. Y. 177.

¹¹ *Dunlap v. Lebus*, 112 Ky. 237; 65 S. W. 441.

¹² *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Marshall v. R. R.*, 16 How. (U. S.) 314; *Trist v. Child*, 21 Wall. (U. S.) 441; *County of Colusa v. Welch*, 122 Cal. 428; 55 Pac. 243; *Owens v. Wilkinson*, 20 App. D. C. 51; *Weed v. Black*, 2 McArth. (D. C.) 268; 29 Am. Rep. 618; *Critchfield v. Paving Co.*, 174 Ill. 466; 42 L. R. A. 347; 51 N. E. 552; affirming, 62 Ill. App. 221; *Doane v. Ry.*, 160 Ill. 22; 35 L. R. A. 588; 45 N. E. 507; *Coquillard v. Bearss*, 21 Ind. 479; 83 Am. Dec. 362; *Wood v. McCann*, 6 Dana (Ky.) 366; *Gil v. Williams*, 12 La. Ann. 219; 68 Am. Dec. 767; *Frost v. Belmont*, 6 All. (Mass.) 152; *Houlton v. Dunn*, 60 Minn. 26; 51 Am.

St. Rep. 493; 30 L. R. A. 737; 61 N. W. 898; *Richardson v. Scott's Bluff County*, 59 Neb. 400; 80 Am. St. Rep. 682; 48 L. R. A. 294; 81 N. W. 309; *Mills v. Mills*, 40 N. Y. 543; 100 Am. Dec. 535; *Sedgwick v. Stanton*, 14 N. Y. 289; *Sweeney v. McLeod*, 15 Or. 330; 15 Pac. 275; *Spalding v. Ewing*, 149 Pa. St. 375; 34 Am. St. Rep. 608; 15 L. R. A. 727; 24 Atl. 219; *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315; 40 Am. Dec. 519; *Powers v. Skinner*, 34 Vt. 274; 30 Am. Dec. 677; *Chippewa, etc., Ry. Co. v. Ry. Co.*, 75 Wis. 224; 6 L. R. A. 601; 44 N. W. 17; *Houlton v. Nichol*, 93 Wis. 393; 57 Am. St. Rep. 928; 33 L. R. A. 166; 67 N. W. 715; *Bryan v. Reynolds*, 5 Wis. 200; 68 Am. Dec. 55.

¹³ *Powers v. Skinner*, 34 Vt. 274; 80 Am. Dec. 677.

¹⁴ *Owens v. Wilkinson*, 20 App. D. C. 51.

¹⁵ *Owens v. Wilkinson*, 20 App. D. C. 51.

nance.¹⁶ Thus a promise by A to give his creditor B an extension of time if B would induce C, a county treasurer, to deposit public funds in A's bank¹⁷ is invalid. A contract to induce one to withdraw opposition to a bill is invalid.¹⁸ A contract to cause a legislative investigation of a corporation and thereby to depreciate the value of its stock is illegal.¹⁹ Some courts take a more lenient view of such contracts and hold that private solicitation does not make such a contract of employment illegal if neither personal influence nor improper means of persuasion are to be used.²⁰ Employment to explain a bill to individual members of the legislature has been held valid.²¹ Further, a contract requiring the agent to persuade the individual members of the legislature to act favorably on a given bill has been held valid if no unfair secret or dishonest means are to be used.²² An agreement by A to repay to B money advanced by B if the city council did not pass a certain resolution, is not necessarily invalid where it did not appear that A was to do anything to get such resolution passed;²³ and a contract to pay the expenses of an agent in getting certain criminal cases dismissed cannot be said as a matter of law to be illegal as contemplating bribery of the prosecuting attorney.²⁴ A contract to

¹⁶ *Critchfield v. Paving Co.*, 174 Ill. 466; 42 L. R. A. 347; 51 N. E. 552; affirming, 62 Ill. App. 221. (In this case the street paving company hired an agent to work for the passage of an ordinance, for a compensation which except as to a certain fixed amount was dependent on his success. In *Barber, etc., Co. v. Botsford*, 56 Kan. 532; 44 Pac. 3, a substantially similar contract in which the compensation was contingent on securing paving contracts which involved the passage of ordinances to that end was held valid.) *Spalding v. Ewing*, 149 Pa. St. 375; 34 Am. St. Rep. 608; 15 L. R. A. 727; 24 Atl. 219.

¹⁷ *Boyd v. Cochrane*, 18 Wash. 281; 51 Pac. 383. On the same point see *Ramsay's Estate v. Whit-*

beck, 183 Ill. 550; 56 N. E. 322; reversing, 81 Ill. App. 210.

¹⁸ *Pingry v. Washburn*, 1 Aikens (Vt.) 264; 15 Am. Dec. 676.

¹⁹ *Veazey v. Allen*, 173 N. Y. 359; 66 N. E. 103.

²⁰ *Miles v. Thorne*, 38 Cal. 335; 99 Am. Dec. 384.

²¹ *Chesebrough v. Conover*, 140 N. Y. 382; 35 N. E. 633.

²² *Foltz v. Coggs*, 86 Cal. 542; 25 Pac. 60. (The compensation in this case was payable when the bill was passed, but the court in deciding the case held that the compensation was not contingent.)

²³ *Millbank v. Jones*, 127 N. Y. 370; 24 Am. St. Rep. 454; 28 N. E. 31.

²⁴ *Rogers v. Hill*, 22 R. I. 496; 48 Atl. 670.

oppose the passage of an act confirming a land-grant as an avowed attorney has been held valid on the theory that such acts are "in effect judicial decisions."²⁵ The legislature of a state may provide for the appointment of a state agent to collect a claim from the United States and for paying him a fee contingent on his success, though he must procure legislation from Congress for the payment of such claim.²⁶ The legislative authority does away with any objection that such a contract is champertous. The question has been complicated by a Federal Statute providing that no part of certain claims shall be paid to any agent. The United States court holds that such statute makes a contract for such contingent fee invalid.²⁷ State courts have held that after the United States has paid the money over to the state, the former government has no power to prevent the latter from disposing of it as it pleases; and that it may employ and reimburse an agent.²⁸ Where a private individual employs an agent to collect a claim from the United States by the use of "diplomatic negotiations" among other means, such contract cannot be said as a matter of law to be illegal.²⁹

§415. Contract dealing with public improvements.

The public has a paramount interest in roads and streets and the use thereof. Accordingly private individuals cannot make contracts for aiding in establishing or vacating streets for their private gain.¹ Thus a promise to pay an abutting property-owner for his consent to lay railway tracks in the street,² or for

²⁵ *Hunt v. Test*, 8 Ala. 713; 42 Am. Dec. 659. (The fee being contingent on success.)

²⁶ *Davis v. Commonwealth*, 164 Mass. 241; 30 L. R. A. 743; 41 N. E. 292.

²⁷ *Wailes v. Smith*, 157 U. S. 271.

²⁸ *Davis v. Commonwealth*, 164 Mass. 241; 30 L. R. A. 743; 41 N. E. 292.

²⁹ *Knut v. Nutt*, — Miss. —; 35 So. 686.

¹ *McGuire v. Smock*, 42 Ind. 1; 13

Am. Rep. 353; *Jacobs v. Tobiason*, 65 Ia. 245; 54 Am. Rep. 9; 21 N. W. 590.

² *Amestoy v. Transit Co.*, 95 Cal. 311; 30 Pac. 550; *Doane v. Ry.*, 160 Ill. 22; 35 L. R. A. 588; 45 N. E. 507; affirming, 51 Ill. App. 353. (See later Illinois case below.) *Contra*, *Union Elevated Ry. v. Nixon*, 199 Ill. 235; 65 N. E. 314; affirming, 99 Ill. App. 502; *Montclair Military Academy v. Ry. Co.*, 65 N. J. L. 328; 47 Atl. 890; *Ham-*

his consent to a street improvement,³ or to induce him to abandon a proceeding, already begun, to establish a highway,⁴ or to withdraw opposition to the opening of a highway,⁵ or a contract whereby one agrees to oppose the opening of a street,⁶ or a note given to obtain the written consent of a property-owner necessary by statute to permit a saloon to be established,⁷ are all invalid; nor can a city agree not to oppose a railroad's closing certain of its streets in consideration of compensation by the railroad to private individuals.⁸ Where the consent of a certain per cent of the frontage is necessary purchasing individual consents is a form of bribery.⁹ But where no speculative purpose is to be subserved and no discrimination between the different property owners is sought, a promise to compensate one owner for a special loss which he will sustain by reason of the improvement in question is valid.¹⁰ Thus where A's lands were abutting on an established highway and B, to induce A to join in a petition to change said highway so that his property would abut thereon, agrees to give A a private right of way over B's land, such contract is valid.¹¹ So where a canal has been constructed, which injures A's water rights without his consent, a contract whereby A, in consideration of compensation for such damages consents to the continuance of the canal, is valid.¹² A contract to secure the location or retention of a post-office for the private advantage of the promisor is illegal, as the location should be made to suit the public interests.¹³ A promise by A, the owner

ilton, etc., *Traction Co. v. Parish*, 67 O. S. 181; 60 L. R. A. 531; 65 N. E. 1011.

³ *McGuire v. Smock*, 42 Ind. 1; 13 Am. Rep. 353.

⁴ *Jacobs v. Tobiason*, 65 Ia. 245; 54 Am. Rep. 9; 21 N. W. 590.

⁵ *Smith v. Applegate*, 23 N. J. L. 352.

⁶ *Slocum v. Wooley*, 43 N. J. Eq. 451; 11 Atl. 264.

⁷ *Greer v. Severson*, 119 Ia. 84; 93 N. W. 72.

⁸ *New Haven v. R. R. Co.*, 62 Conn. 252; 18 L. R. A. 256; 25 Atl. 316.

⁹ *Doane v. Ry.*, 160 Ill. 22; 35 L. R. A. 588; 45 N. E. 507; affirming, 51 Ill. App. 353; *Brieske v. Ry. Co.*, 82 Ill. App. 256.

¹⁰ *Corns v. Clouser*, 137 Ind. 201; 36 N. E. 848; *Weeks v. Lippincott*, 42 Pa. St. 474; *Case v. Hoffman*, 100 Wis. 314; 44 L. R. A. 728; 75 N. W. 945.

¹¹ *Corns v. Clouser*, 137 Ind. 201; 36 N. E. 848.

¹² *Case v. Hoffman*, 100 Wis. 314; 44 L. R. A. 728; 75 N. W. 945.

¹³ *Elkhart County Lodge v. Crary*, 98 Ind. 238; 49 Am. Rep. 746; *Wodman v. Innes*, 47 Kan. 26; 27

of a building, to B, the owner of an adjacent building, to pay him a certain annual sum if he would offer his building to the government for a post-office for ten years at a nominal rent and use "proper persuasion" to have his offer accepted, was held invalid.¹⁴ But a contract similar in terms except that the promisee was not to use any influence or persuasion to induce the government to accept his offer was held valid.¹⁵ A promise, in the nature of a subscription to a public object, is valid, though it may influence the action of the government.¹⁶ Thus promises to pay part of the expense of opening a street,¹⁷ or to donate a site for a court-house if accepted for such purpose,¹⁸ or to pay money for park purposes if the park is located at a certain place,¹⁹ or to pay money for library purposes if a school district will vote a bond issue therefor,²⁰ are all valid. So a promise to donate lots to persons who would live thereon if the county-seat was located on the lands of the promisor is valid.²¹

§416. Contracts interfering with public duties of common carriers.

A common carrier is charged with certain duties to the public of which he cannot rid himself by contract. In other respects he is as free to contract as persons not charged with public

Am. St. Rep. 274; 27 Pac. 125. If the appointment of a postmaster is involved the contract is more clearly illegal. *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422.

¹⁴ *Elkhart County Lodge v. Crary*, 98 Ind. 238; 49 Am. Rep. 746.

¹⁵ *Fearnley v. De Mainville*, 5 Colo. App. 441; 39 Pac. 73.

¹⁶ *Kansas City School District v. Sheidley*, 138 Mo. 672; 60 Am. St. Rep. 576; 37 L. R. A. 406; 40 S. W. 656; *State v. Orange*, 54 N. J. L. 111; 14 L. R. A. 62; 22 Atl. 1004; *Island County v. Babcock*, 17 Wash. 438; 50 Pac. 54.

¹⁷ *State v. Orange*, 54 N. J. L. 111; 14 L. R. A. 62; 22 Atl. 1004.

¹⁸ *Island County v. Babcock*, 17 Wash. 438; 50 Pac. 54.

¹⁹ *Meddis v. Park Commissioners* (Ky.), 42 S. W. 98.

²⁰ *Kansas City School District v. Sheidley*, 138 Mo. 672; 60 Am. St. Rep. 576; 37 L. R. A. 406; 40 S. W. 656. (The board had already voted in favor of a new library but had no means to buy a new site, and for this purpose the subscription note was given.)

²¹ *Roby v. Carter*, 6 Tex. Civ. App. 295; 25 S. W. 725 (nothing appearing to show that this was a bribe to the voters who were to choose the county-seat).

duties.¹ Thus if a railroad attempts by contract to bind itself to locate its depot in a given locality at a specified point and not to erect another depot in such locality, such contract is invalid, since the needs of the public alone should control the location of other depots.² So a covenant in a deed to the railroad company not to build a depot on the land conveyed is invalid.³ So a railroad cannot make a valid agreement not to build a side-track in a certain town;⁴ nor can a street-railway agree not to lay a second track without the consent of abutting property-owners, if such assent is not required by law.⁵ But if there is no restriction on the railroad company's locating other depots where it pleases, a contract to erect a depot at a specified place is valid;⁶ and a contract to construct a railroad upon a specified route is valid if the railroad company is free to build further if necessary.⁷ So contracts to establish a private switch,⁸ or to keep open a private crossing across a railroad,⁹ are valid. There seems some apparent divergence of authority on these last propositions.¹⁰ So a contract by which A agrees to convey half as

¹ *Coe v. Aikin*, 61 Fed. 24; *Queen City Coal Co. v. Ry. Co. (Ky.)*; 44 S. W. 103.

² *Beasley v. Ry.*, 191 U. S. 492; affirming, 115 Fed. 952; 53 C. C. A. 434; *Texas Pacific Ry. v. Marshall*, 136 U. S. 393; *People v. R. R.*, 130 Ill. 175; 22 N. E. 857; *St. Louis, etc., R. R. v. Mathers*, 71 Ill. 592; 22 Am. Rep. 122; *Chicago, etc., Ry. v. Ry.*, — Ind. App. —; 70 N. E. 843; *Marsh v. Ry.*, 64 Ill. 414; 16 Am. Rep. 564; *Williamson v. R. R.*, 53 Ia. 126; 36 Am. Rep. 206; 4 N. W. 870; *St. Joseph, etc., Ry. v. Ryan*, 11 Kan. 602; 15 Am. Rep. 357; *Holladay v. Patterson*, 5 Or. 177.

³ *St. Louis, etc., R. R. v. Mathers*, 104 Ill. 257.

⁴ *Pueblo, etc., R. R. v. Taylor*, 6 Colo. 1; 45 Am. Rep. 512.

⁵ *Doane v. Ry. Co.*, 160 Ill. 22; 35 L. R. A. 588; 45 N. E. 507.

⁶ *Lyman v. R. R.*, 190 Ill. 320; 52 L. R. A. 645; 60 N. E. 515; *Gray v. Ry.*, 189 Ill. 400; 59 N. E. 950; *C. C. & I. Ry. v. Coburn*, 91 Ind. 557; *McClure v. R. R.*, 9 Kan. 373; *Griswold v. Ry.*, — N. D. —; 97 N. W. 538; *Horner v. Ry.*, 38 Wis. 165.

⁷ *New Albany, etc., Ry. v. McCormick*, 10 Ind. 499; 71 Am. Dec. 337; *Jewett v. R. R.*, 10 Ind. 539; *First National Bank v. Hendrie*, 49 Ia. 402; 31 Am. Rep. 153.

⁸ *Missouri, etc., Ry. v. Carter*, 95 Tex. 461; 68 S. W. 159.

⁹ *Gulf, etc., Ry. v. Clay*, 28 Tex. Civ. App. 176; 66 S. W. 1115.

¹⁰ *Burney v. Ludeling*, 47 La. Ann. 73; 16 So. 507, holds that a contract to erect a depot at a specified point is illegal. The contract may have been not with the company but with an agent, a contract for his private gain, and the cases cited are

much land to B as B is obliged to convey to a railroad company to induce it to locate a depot on such land, in consideration of B's agreeing to make such conveyance, is valid.¹¹ A contract whereby a railroad company agrees in consideration of a right of way to allow other railroads to make use of its right of way is, if not absolutely valid, at least a contract under which the railroad cannot take the right of way and refuse the use of it to other railroads.¹² Such a contract for joint use of a right of way is not avoided by the promise of the road to which such right of way is granted not to take freight to be transferred east of a specified place, or to be delivered to connecting lines at certain places.¹³ A contract whereby a railroad company agrees to give to a certain coal company the exclusive right to use a certain switch for hauling coal in consideration of permission by such coal company to permit such switch to be built in part over its land is void.¹⁴ A contract whereby a railroad agrees to operate solely in exclusive connection with a specific road, and in active competition with certain other roads, has been held not to be void as a matter of law. Its validity depends on whether such contract is reasonably calculated to serve public interests.¹⁵ A contract by a railroad company to retain an employee as long as he is able to do, and does do, faithful work, is valid and consistent with public policy.¹⁶

on this point. Citing, *Marsh v. Ry.*, 64 Ill. 414; 16 Am. Rep. 564; *Bestor v. Wathen*, 60 Ill. 138; *Fuller v. Dame*, 18 Pick. (Mass.) 472.

Florida, etc., R. R. Co. v. State, 31 Fla. 482; 34 Am. St. Rep. 30; 20 L. R. A. 419; 13 So. 103, expresses a similar view of the invalidity of such a contract; but this was an action in which it was sought to mandamus the railroad company to perform such a contract, which of course could not be done. The remarks of the court as to the invalidity of such a contract are obiter.

¹¹ *Harris v. Roberts*, 12 Neb. 631; 41 Am. Rep. 779.

¹² *Joy v. St. Louis*, 138 U. S. 1.

¹³ *Michigan Central R. R. v. R. R.*, 128 Mich. 333; 87 N. W. 271.

¹⁴ *Louisville, etc., Ry. v. Coal Co.*, 111 Ky. 960; 55 L. R. A. 601; 64 S. W. 969. (Hence such contract is no excuse for the railroad's refusal to haul coal for another coal company over such switch.)

So a contract by a railway not to run a switch to a quarry is invalid. *Chicago, etc., Ry. v. Ry.*, — Ind. App.—; 70 N. E. 843.

¹⁵ *Bras v. McConnell*, 114 Ia. 401; 87 N. W. 290. (Decided in a suit to enjoin an election to vote a tax to a railroad company on condition that it would make such contract.)

¹⁶ *St. Louis, etc., Ry. Co. v. Mat-*

§417. Contract to stifle criminal prosecution.

Criminal prosecution should be instituted, pressed, or dismissed solely for the good of the state and not for private gain. Accordingly a contract for preventing criminal proceedings from being instituted or for dismissing them after they are instituted, is invalid if for the private gain of the party causing them to be instituted or dismissed.¹ It is equally unlawful to contract for suppressing prosecution for a felony² and for a misde-

thews, 64 Ark. 398; 39 L. R. A. 467; Pennsylvania Co. v. Dolan, 6 Ind. App. 109; 51 Am. St. Rep. 289; 32 N. E. 802; Jessup v. Ry. Co., 82 Ia. 243; 48 N. W. 77; Louisville, etc., Ry. v. Offutt, 99 Ky. 427; 59 Am. St. Rep. 467; 36 S. W. 181; Sax v. Ry., 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314. Such contracts are also attacked as lacking consideration; see § 303 *et seq.*; and for indefiniteness see § 28.

¹ United States Fidelity & Guaranty Co. v. Charles, 131 Ala. 658; 57 L. R. A. 212; 31 So. 558; Kirkland v. Benjamin, 67 Ark. 480; 55 S. W. 840; Morrill v. Nightingale, 93 Cal. 452; 27 Am. St. Rep. 207; 28 Pac. 1068; Giles v. De Cow, 30 Colo. 412; 70 Pac. 681; Jones v. Dannenberg Co., 112 Ga. 426; 52 L. R. A. 271; 37 S. E. 729; Harris v. Webb, 101 Ga. 84; 28 S. E. 620; Rhodes v. Neal, 64 Ga. 704; 37 Am. Rep. 93; Henderson v. Palmer, 71 Ill. 579; 22 Am. Rep. 117; Weston Paper Co. v. Comstock (Ind.); 58 N. E. 79; Stout v. Turner, 102 Ind. 418; 26 N. E. 85; Budd v. Rutherford, 4 Ind. App. 386; 30 N. E. 1111; Rosenbaum Bros. v. Levitt, 109 Ia. 292; 80 N. W. 393; Friend v. Miller, 52 Kan. 139; 39 Am. St. Rep. 340; 34 Pac. 397; Averbek v. Hall, 14 Bush. (Ky.) 505; Bishop v. Matney (Ky.); 78 S. W. 856;

Koons v. Vauconsant, 129 Mich. 260; 95 Am. St. Rep. 438; 88 N. W. 630; Smith Premier Typewriter Co. v. Mayhew, 65 Neb. 65; 90 N. W. 939; Davis v. Smith, 68 N. H. 253; 73 Am. St. Rep. 584; 44 Atl. 384; Lindsay v. Smith, 78 N. Car. 328; 24 Am. Rep. 463; Tracy v. Deatrick, 10 Ohio C. C. 111; 6 Ohio C. D. 427; affirmed without report, 56 O. S. 770; 49 N. E. 1118; Pearce v. Wilson, 111 Pa. St. 14; 56 Am. Rep. 243; 2 Atl. 99; Cameron v. McFarland, 2 Car. Law Repos. (N. C.) 415; 6 Am. Dec. 566; Lucas v. Johnson (Tex. Civ. App.); 64 S. W. 823; Mack v. Campeau, 69 Vt. 558; 60 Am. St. Rep. 948; 38 Atl. 149; Barron v. Tucker, 53 Vt. 338; 38 Am. Rep. 684; Woodruff v. Himman, 11 Vt. 592; 34 Am. Dec. 712; Wight v. Rindskopf, 43 Wis. 344. Even if such contract is void it seems to bar an action by defendant if a party thereto for malicious prosecution. Craig v. Ginn, 3 Penn. (Del.) 117; 53 L. R. A. 715; 48 Atl. 192.

² Morrill v. Nightingale, 93 Cal. 452; 27 Am. St. Rep. 207; 28 Pac. 1068; Henderson v. Palmer, 71 Ill. 579; 22 Am. Rep. 117; Peed v. McKee, 42 Ia. 689; 20 Am. Rep. 631; Friend v. Miller, 52 Kan. 139; 39 Am. St. Rep. 340; 34 Pac. 397; Gardner v. Maxey, 9 B. Men.

meanor.³ An agreement made between a prosecuting attorney and the attorney of the accused that if the judgment of conviction rendered on one indictment already tried is affirmed the accused shall plead guilty to three of the remaining indictments and the other nine shall be dismissed, is invalid.⁴ Contracts for preventing criminal prosecution are invalid though not made with a prosecuting witness or prosecuting attorney. A contract by an attorney to prevent an indictment of his client by the grand-jury,⁵ or a contract made with one not the prosecuting witness, whereby he agrees to obtain from the governor a *nolle prosequi* dismissing a criminal charge against a third party, or a contract between the accused and his attorney whereby the attorney agrees to induce the prosecuting attorney to enter a *nolle*, the accused to testify under the advice of his attorney,⁷ is invalid. So a contract with the surety company which was on the employment bond of a defaulter, whereby notes were given to the company by a third person to indemnify the company for the loss caused by the defalcation on consideration that such surety company would not cause prosecution of the defaulter is illegal.⁸ A contract to pay an attorney for defending one ac-

(Ky.) 90; Haynes v. Rudd, 102 N. Y. 372; 55 Am. Rep. 815; 7 N. E. 287; Raguet v. Roll, 7 Ohio 1st pt. 76; Roll v. Raguet, 4 Ohio 400; 22 Am. Dec. 759; Foley v. Greene, 14 R. I. 618; 51 Am. Rep. 419; Porter v. Jones, 6 Coldw. (Tenn.) 313; Hinesburg v. Sumner, 9 Vt. 23; 31 Am. Dec. 599; Dodson v. Swan, 2 W. Va. 511; 98 Am. Dec. 787; Schultz v. Catlin, 78 Wis. 611; 47 N. W. 946.

³ Windhill, etc., v. Vint, L. R. 45 Ch. D. 351; Leggatt v. Brown, 30 Ont. 225; Jones v. Dannenberg Co., 112 Ga. 426; 52 L. R. A. 271; 37 S. E. 729; Weston Paper Co. v. Comstock (Ind.); 58 N. E. 79; Partridge v. Hood, 120 Mass. 403; 21 Am. Rep. 524; Jones v. Rice, 18 Pick. (Mass.) 440; 29 Am. Dec. 612.

Contra, by express terms of some statutes certain misdemeanors may be compounded. Partridge v. Hood, 120 Mass. 403; 21 Am. Rep. 524; Rothermal v. Hughes, 134 Pa. St. 510; 19 Atl. 677; Geier v. Shade, 109 Pa. St. 180.

⁴ Spalding v. Hill, — Ky. —; 72 S. W. 307.

⁵ Weber v. Shay, 56 O. S. 116; 60 Am. St. Rep. 743; 37 L. R. A. 230; 46 N. E. 377.

⁶ Wildey v. Collier, 7 Md. 273; 61 Am. Dec. 346.

⁷ Wight v. Rindskopf, 43 Wis. 344. In Rogers v. Hill, 22 R. I. 496; 48 Atl. 670, a somewhat similar contract was held valid.

⁸ United States Fidelity & Guaranty Co. v. Charles, 131 Ala. 658; 57 L. R. A. 212; 31 So. 558.

cused of crime then committed, and about to be tried, before a petit-jury is of course valid. But a contract to defend one against prosecution for crimes to be committed by him in the future is invalid.⁹

§418. Contract to obtain restitution.

A contract whereby restitution is to be made to one whose property has been unlawfully appropriated or injured, is valid as long as the party to whom restitution is to be made does not agree to refrain from criminal prosecution of the offender.¹ Some cases go as far as to say that only an express agreement not to prosecute will make a contract of restitution illegal.² A mere threat to prosecute made before the contract of restitution is entered into is not conclusive that the contract involved an agreement not to prosecute;³ nor does a promise not to prosecute, made out of pity and after the contract of restitution was entered into, avoid such contract.⁴ But if a promise not to prosecute forms a part of the consideration of the contract of restitution, the whole contract is void.⁵

⁹ *Bowman v. Phillips*, 41 Kan. 364; 13 Am. St. Rep. 292; 3 L. R. A. 631; 21 Pac. 230.

¹ *School District v. Alderson*, 6 Dak. 145; 41 N. W. 466; *Johnston v. Allen*, 22 Fla. 224; 1 Am. St. Rep. 180; *Wheaton v. Ansley*, 71 Ga. 35; *Powell v. Flanary*, 109 Ky. 342; 59 S. W. 5; *Miller v. Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524; 57 N. W. 101; *Harlan County v. Whitney*, 65 Neb. 105; 90 N. W. 993; *Tecumseh National Bank v. Chamberlain*, 63 Neb. 163; 57 L. R. A. 811; 88 N. W. 186; *Cass County Bank v. Bricker*, 34 Neb. 516; 33 Am. St. Rep. 649; 52 N. W. 575; *Barrett v. Weber*, 125 N. Y. 18; 25 N. E. 1068; *Portner v. Kirschner*, 169 Pa. St. 472; 47 Am. St. Rep. 925; 32 Atl. 442; *Loud v. Hamilton*

(Tenn. Chan. App.); 45 L. R. A. 400; 51 S. W. 140.

² *Powell v. Flanary*, 109 Ky. 342; 59 S. W. 5.

³ *Ford v. Cratty*, 52 Ill. 313; *Wolf v. Troxell*, 94 Mich. 573; 54 N. W. 383.

⁴ *Ward v. Allen*, 2 Met. (Mass.) 53; 35 Am. Dec. 387.

⁵ *Tracy v. Deatrick*, 10 Ohio C. C. 111; 6 Ohio C. D. 427; affirmed without report, 56 O. S. 770; 49 N. E. 1118. See § 509. In *Bibb v. Hitchcock*, 49 Ala. 468; 20 Am. Rep. 288, it was held that while a promise to give a note with security in consideration of a promise to refrain from prosecution was invalid, a note with security given in pursuance of such contract was "not affected with the vice of the agreement."

§419. Effect of innocence of accused.

If no crime has been committed by the accused, a promise by his friends to pay money to suppress criminal prosecution threatened by one who states that the accused has committed the crime charged is caused by duress or by fraud or by both. It would seem unnecessary to go further in ascertaining the facts, as such contracts can be attacked successfully by the promisor, either as illegal stifling of criminal prosecution on the one hand, or as caused by fraud or duress on the other.¹ While recognizing in general the accuracy of this view, the courts have placed their decisions on the ground that to make such a contract illegal, it is necessary as a ground of defense to the promisor only to show that the accused is charged with a crime;² or that as far as it affects the legality of the contract sought to be enforced against the promisor, a contract by which A employs B to effect the suppression of a criminal charge is an admission for the purpose of action on such contract that A is guilty.³ If part of the contract provides for suppressing a threatened criminal prosecution, the contract is not made legal by the fact that the accused was innocent.⁴ One who has by reason of such fraud or duress paid in money to avoid criminal prosecution of himself⁵ or another⁶ is said not to be guilty of compounding a

¹ "If the declarations of the plaintiff were false, that would not alter the motive, inducement or consideration of the contract with respect to its illegality. It would only give it the additional quality of fraud, and it would be extraordinary, indeed, if the two combined should have less effect in nullifying the contract at law than would be conceded to the first if it stood alone." *Garner v. Qualls*, 4 Jones Law (N. Car.) 223, 225. That money paid under duress to stifle a criminal prosecution may be recovered see *Bentley v. Robson*, 117 Mich. 691; 76 N. W. 146.

² *Chandler v. Johnson*, 29 Ga. 85; *Crowder v. Reed*, 80 Ind. 1.

³ *Mack v. Campeau*, 69 Vt. 558; 60 Am. St. Rep. 948; 38 Atl. 149; citing and following, *Bowen v. Buck*, 28 Vt. 308; *Dixon v. Olmstead*, 9 Vt. 310; 31 Am. Dec. 629.

⁴ *Koons v. Vauconsant*, 129 Mich. 260; 95 Am. St. Rep. 438; 88 N. W. 630.

⁵ *Smith v. Blachley*, 188 Pa. St. 550; 68 Am. St. Rep. 887; 41 Atl. 619 (an extreme case of blackmail).

⁶ *Woodham v. Allen*, 130 Cal. 194; 62 Pac. 398.

felony⁷ and hence not a party to the illegality. This reasoning is used to show that the party who has paid in money under such circumstances can recover it;⁸ but as the parties are not *in pari delicto*,⁹ such reasoning seems unnecessary even if correct. If the contract is one of restitution of property which has been converted by the accused to his own use, and it is sought to avoid such contract of restitution by showing that it is illegal as stifling criminal prosecution, some courts hold that it must appear either that a crime was in fact committed or that criminal proceedings were pending when such contract was made.¹⁰

§420. Contract to secure pardon.

A contract to represent a convict sentenced by a court of competent jurisdiction in applying for a pardon, as his avowed agent or attorney, without using improper means to obtain it, is valid.¹ A contract to obtain a pardon in any other way,² as by promising to pay money to the prosecuting witness to petition the court for a light sentence,³ or to petition the governor for a pardon,⁴ or a contract to withdraw opposition to granting a pardon for a pecuniary consideration,⁵ is invalid. Concealing the fact of employment to secure a pardon is improper.⁶ Working on a contingent fee is held improper by some courts;⁷

⁷ Keith v. Buck, 16 Ill. App. 121; Heckman v. Swartz, 50 Wis. 267; 6 N. W. 891.

⁸ Schultz v. Culbertson, 46 Wis. 313; 1 N. W. 19.

⁹ "It can never be predicated as *par delictum* when one holds the rod and the other bows to it." Smith v. Cuff, 6 Maule & S. 160; quoted in Woodham v. Allen, 130 Cal. 194, 199; 62 Pac. 398.

¹⁰ Manning v. Columbian Lodge, 57 N. J. Eq. 338; 45 Atl. 1092; affirming 38 Atl. 444; citing Plant v. Gunn, 2 Woods 372; Steuben County Bank v. Mathewson, 5 Hill 249; Catlin v. Henton, 9 Wis. 476.

¹ Timothy v. Wright, 8 Gray (Mass.) 522; Chadwick v. Knox, 31 N. H. 226; 64 Am. Dec. 329.

² Haines v. Lewis, 54 Ia. 301; 37 Am. Rep. 202; 6 N. W. 495; William Deering & Co. v. Cunningham, 63 Kan. 174; 54 L. R. A. 410; 65 Pac. 263; Buck v. Bank, 27 Mich. 293; 15 Am. Rep. 189; Adams Express Co. v. Reno, 48 Mo. 264; Hatzfield v. Gulden, 7 Watts (Pa.) 152; 32 Am. Dec. 750.

³ Buck v. Bank, 27 Mich. 293; 15 Am. Rep. 189.

⁴ Haines v. Lewis 54 Ia. 301; 37 Am. Rep. 202; 6 N. W. 495.

⁵ William Deering & Co. v. Cunningham, 63 Kan. 174; 54 L. R. A. 410; 65 Pac. 263.

⁶ Wildey v. Collier, 7 Md. 273; 61 Am. Dec. 346.

⁷ Kribben v. Haycraft, 26 Mo. 396.

proper, by others.⁸ If one is under sentence imposed by a tribunal without jurisdiction a contract to obtain his release is not illegal. This is not a case of securing pardon but of obtaining release from unlawful imprisonment. Thus where a military court had, without having jurisdiction of the case, sentenced A to death, a contract by B to use his personal influence with the commanding general to secure a pardon or commutation of sentence for A is not illegal.⁹

§421. Compromise of civil action.

A compromise of a civil action is valid.¹ The public has no interest in having such action instituted or prosecuted if the injured party is satisfied with the compensation made to him by the wrong-doer. The distinction between civil and criminal suits in this connection is one of real substance and not merely of outward form. Hence a suit for the protection of private rights which takes the outward form of a criminal action, such as a bastardy suit,² may be lawfully compromised and such a contract will be valid. On the other hand, the action may be in outward form one of a private nature, and yet the state may have such an interest therein that the parties are not free to contract as they please concerning the conduct of such action. An example of a contract of this sort is one concerning divorce.³

§422. Contract for obtaining or suppressing evidence.

One who is confronted with actual or threatened litigation may purchase information which will assist him therein.¹ Thus

⁸ *Moyer v. Cantieny*, 41 Minn. 242; 42 N. W. 1060.

⁹ *Thompson v. Wharton*, 7 Bush (Ky.) 563; 3 Am. Rep. 306.

¹ See §§ 289, 290.

² *Van Epps v. Redfield*, 68 Conn. 39; 34 L. R. A. 360; 35 Atl. 809; *Jones v. Peterson*, 117 Ga. 58; 43 S. E. 417; *Burgen v. Straughan*, 7 J. J. Mar. (Ky.) 583; *Moore v. Campbell*, 8 O. S. 265; *Wyant v.*

Leshner, 23 Pa. St. 338; *Billingsley v. Clelland*, 41 W. Va. 234; 23 S. E. 812. See § 289.

³ See § 429.

¹ *Wilkinson v. Oliveira*, 1 Bing. (N. C.) 490; *Lucas v. Pico*, 55 Cal. 126; *Wood v. Casserleigh*, 30 Colo. 287; 97 Am. St. Rep. 138; 71 Pac. 360; affirming, *Casserleigh v. Wood*, 14 Colo. App. 265; 59 Pac. 1024. (But in *Casserleigh v. Wood*, 119

a contract to disclose the names of witnesses,² or to give information to a defendant in ejectment, of an outstanding legal title,³ or a contract offering a reward for information which will lead to the arrest of a criminal,⁴ is valid. But if he employs persons to swear falsely, or to manufacture false evidence, such contracts of employment are illegal.⁵ For the same reason, a contract which gives persons a financial interest in testifying, or in furnishing testimony of a specific fact, tends to subornation of perjury and is illegal. In accordance with these principles a contract whereby A agrees to pay B to testify in A's behalf in litigation between A and another is illegal.⁶ Thus a contract to pay a party to an alleged fraud on another to testify in favor of such other in an action between him and other parties to such fraud, is void.⁷ So a contract to pay such witness if the party on whose behalf he is to testify is successful,⁸ or to give him a share of the proceeds,⁹ or to pay him more if the party for whom he testifies wins than if he loses,¹⁰ is void. So a promise to pay one to get a witness to testify to a certain fact,¹¹ or to fur-

Fed. 308, such contract was held void.) *Bank of Minneapolis v. Griffin*, 168 Ill. 314; 48 N. E. 154; affirming, 66 Ill. App. 577; *Quirk v. Muller*, 14 Mont. 467; 43 Am. St. Rep. 647; 25 L. R. A. 87; 36 Pac. 1077; *Wellington v. Kelly*, 84 N. Y. 543; *Cobb v. Cowdery*, 40 Vt. 25; 94 Am. Dec. 370; *Chandler v. Mason*, 2 Vt. 193.

² *Chandler v. Mason*, 2 Vt. 193.

³ *Lucas v. Pico*, 55 Cal. 126.

⁴ *Bank of Minneapolis v. Griffin*, 168 Ill. 314; 48 N. E. 154; affirming, 66 Ill. App. 577.

⁵ Cases involving such contracts do not usually reach the courts.

⁶ *Goodrich v. Tenney*, 144 Ill. 422; 36 Am. St. Rep. 459; 19 L. R. A. 371; 33 N. E. 44; affirming, 44 Ill. App. 331; *Boehmer v. Foval*, 55 Ill. App. 71; *Barnett v. Spencer*, 4 Blackf. (Ind.) 206; *Lucas v. Allen*, 80 Ky. 681; *Thomas v. Caulkett*, 57

Mich. 392; 58 Am. Rep. 369; 24 N. W. 154; *Chippewa, etc., Ry. v. Ry.*, 7 Wis. 224; 6 L. R. A. 601; 44 N. W. 17.

⁷ *Goodrich v. Tenney*, 144 Ill. 422; 36 Am. St. Rep. 459; 19 L. R. A. 371; 33 N. E. 44; affirming, 44 Ill. App. 331; *Hagan v. Wellington*, 7 Kan. App. 74; 52 Pac. 909.

⁸ *Stanley v. Jones*, 7 Bing. 369; *Patterson v. Donner*, 48 Cal. 369; *Kennedy v. Hodges*, 97 Ga. 753; 25 S. E. 493; *Gillett v. Board*, 67 Ill. 256; *Bowling v. Blum* (Tex. Civ. App.); 52 S. W. 97.

⁹ *Stanley v. Jones*, 7 Bing. 369; *Goodrich v. Tenney*, 144 Ill. 422; 36 Am. St. Rep. 459; 19 L. R. A. 371; 33 N. E. 44; *Getchell v. Wellday*, 2 Ohio N. P. 390.

¹⁰ *Dawkins v. Gill*, 10 Ala. 206.

¹¹ *Patterson v. Donner*, 48 Cal. 369.

nish evidence that will win the lawsuit,¹² is invalid. It does not aid such a contract that in the particular case there was, in fact, no perjury.¹³ This rule has been extended to include promises to pay a witness for his time and trouble.¹⁴ To the rule in this extreme form there are at least two exceptions. One exists where an expert witness is employed to make a special examination into the facts in controversy and testify with reference thereto.¹⁵ Thus a contract whereby A is to make a careful investigation of land values and to testify as a witness in a condemnation suit for a compensation, is valid.¹⁶ The other exists where a witness outside the jurisdiction of the court agrees for a recompense in value to attend at the trial and testify.¹⁷

Where the evidence is record evidence, the chance of fabricating which is very slight, a contract to furnish it for a share of the proceeds of the litigation has been held valid.¹⁸

A contract to disclose evidence may, of course, be invalid for entirely distinct and different reasons from those arising out of the supplying of evidence. Thus a contract by a city clerk to supply evidence to show that city ordinances imposing assessments are void, is illegal, as it tends to a breach of his official duty.¹⁹

¹² Quirk v. Muller, 14 Mont. 467; 43 Am. St. Rep. 647; 25 L. R. A. 87; 36 Pac. 1077.

¹³ Young v. Thompson, 14 Colo. App. 294; 59 Pac. 1030; Goodrich v. Tenney, 144 Ill. 422; 36 Am. St. Rep. 459; 19 L. R. A. 371; 33 N. E. 44; affirming, 44 Ill. App. 331; Quirk v. Muller, 14 Mont. 467; 43 Am. St. Rep. 647; 25 L. R. A. 87; 36 Pac. 1077.

¹⁴ Moor v. Adam, 5 Maule & S. 156; Collins v. Godefray, 1 Barn. & Adol. 950; Dodge v. Stiles, 26 Conn. 463. This is not the universal rule, see Nickelson v. Wilson, 60 N. Y. 362.

¹⁵ Severn v. Olive, 3 Brod. & B.

72; Barrus v. Phaneuf, 166 Mass. 123; 32 L. R. A. 619; 44 N. E. 141.

¹⁶ Johnson v. Pietsch, 94 Ill. App. 459.

¹⁷ Schimmel v. Lousada, 4 Taunt. 695; Lonergan v. Exchange Society, 7 Bing. 729.

¹⁸ Wood v. Casserleigh, 30 Colo. 287; 97 Am. St. Rep. 138; 71 Pac. 360; affirming, Casserleigh v. Wood, 14 Colo. App. 265; 59 Pac. 1024. (This contract was held invalid in Casserleigh v. Wood, 119 Fed. 308.) Wellington v. Kelley, 84 N. Y. 543.

¹⁹ Lucas v. Allen, 80 Ky. 681; citing Oscanyan v. Arms Co., 103 U. S. 262; Steele v. Curle, 4 Dana (Ky.) 381.

A contract whereby one party agrees to suppress certain evidence necessarily involves a wrong toward the person whose interest is affected thereby, if a civil matter, or the suppression of criminal prosecution, if a criminal matter, and in either case it is illegal.²⁰ Thus a promise to pay money on consideration that payee conceals the fact that payer has been guilty of adultery is void.²¹ So is a promise made by a legatee in consideration that the promisee will suppress evidence of the incapacity of testator and thus prevent the will from being set aside.²² The rule that a contract which tends to induce one to give false testimony is illegal is not restricted to litigation. A contract by one injured in a railroad accident with the attending physician that the latter should state to the railroad company the injuries of the former, and should receive three hundred dollars if fifteen hundred dollars was recovered, and five hundred dollars if two thousand dollars was recovered, is illegal.²³

²⁰ *Bierbauer v. Wirth*, 5 Fed. 336; *Folmar v. Siler*, 132 Ala. 297; 31 So. 719; overruling, *Bibb v. Hitchcock*, 49 Ala. 468; 20 Am. Rep. 288; *Valentine v. Stewart*, 15 Cal. 387; *Hoyt v. Macon*, 2 Colo. 502; *Young v. Thompson*, 14 Colo. App. 294; 59 Pac. 1030; *Haines v. Lewis*, 54 Ia. 301; 37 Am. Rep. 202; 6 N. W. 495; *Friend v. Miller*, 52 Kan. 139; 39 Am. St. Rep. 340; 34 Pac. 397; *Case v. Smith*, 107 Mich. 416; 61 Am. St. Rep. 341; 31 L. R. A.

282; 65 N. W. 279; *Cobb v. Cowdery*, 40 Vt. 25; 94 Am. Dec. 370.

²¹ *Case v. Smith*, 107 Mich. 416; 61 Am. St. Rep. 341; 31 L. R. A. 282; 65 N. W. 279.

²² *Wyckoff v. Weaver*, 66 N. J. L. 648; 52 Atl. 356. (The promisee was not an heir; the case was therefore not a lawful compromise. See § 403.)

²³ *Thomas v. Caulkett*, 57 Mich. 392; 58 Am. Rep. 369; 24 N. W. 154.

CHAPTER XXIV.

CONTRACTS CONCERNING STATUS.

§423. Nature of contracts concerning status.

The law attaches certain definite consequences to each of the various forms of status. These consequences are not created by contract and have no connection with it. A few of them can be modified by contract; but most of them cannot. Of those which cannot be modified some are of such a nature that contracts whereby they are sought to be modified are merely void; while contracts which seek to modify other consequences of status are illegal. For these reasons contracts of this sort cannot be classed as all void or all illegal. A consideration of the various kinds of contract whereby it is sought to modify the consequences of status is necessary to determine the validity and effect of each.

§424. Contracts in restraint of marriage.

A contract whereby a person who has never married binds himself not to marry,¹ or subjects himself to loss if he marries,² is invalid. The fact that the time for which the restraint is to last is limited does not make such contracts valid.³ A contract

¹ King v. King, 63 O. S. 363; 81 Am. St. Rep. 635; 52 L. R. A. 157; 59 N. E. 111.

² White v. Benefit Union, 76 Ala. 251; Chalfant v. Payton, 91 Ind. 202; 46 Am. Rep. 586; Sterling v. Sinnickson, 5 N. J. L. 756.

³ As a limit of six months, Sterling v. Sinnickson, 5 N. J. L. 756. Two years, Chalfant v. Payton, 91 Ind. 202; 46 Am. Rep. 586. Or where the party taking out so called

insurance was to receive nothing if he married within three months after joining, and then should receive \$40 per month on each \$1,000 of his certificate of membership, not to exceed the amount of \$3,000 in all. White v. Benefit Union, 76 Ala. 251. During the life of another, King v. King, 63 O. S. 363; 81 Am. St. Rep. 635; 52 L. R. A. 157; 59 N. E. 111.

for "marriage benefit" insurance, which is a form of wager on the date of the marriage of the insured, is invalid.⁴

A contract restraining one who has once married not to marry a second time is held valid. Thus a promise to pay one's divorced wife a certain sum each month as long as she remains unmarried is valid.⁵ A promise to marry is valid and not illegal though it necessarily binds each party not to marry any one else under penalty of a damage suit.⁶ A contract in restraint of marriage is void but not illegal.⁷ Thus a contract by an uncle to provide for his niece by will if she would live with him and take care of him during his life, and not marry during that time, is valid in that if the niece performs her part of the contract she may have an action against her uncle or his estate for breach.⁸

§425. Marriage brokerage contracts.

A contract whereby A agrees to pay money to B if B will aid in influencing or inducing C to marry A is known as a marriage brokerage contract, and is invalid,¹ even if when A makes his promise to B, C has agreed to marry A.² Thus a contract whereby A agrees to pay money to B if B will introduce him to C and C will marry A is void.³ This principle has been so applied as to make invalid a contract designed to hasten an intended marriage.⁴ Thus a mortgage given by A to B condi-

⁴ James v. Jellison, 94 Ind. 292; 48 Am. Rep. 151; Chalfant v. Payton, 91 Ind. 202; 46 Am. Rep. 586.

⁵ Jones v. Jones, 1 Colo. App. 28; 27 Pac. 85.

⁶ Brown v. Odill, 104 Tenn. 250; 78 Am. St. Rep. 914; 52 L. R. A. 660; 56 S. W. 840.

⁷ King v. King, 63 O. S. 363; 81 Am. St. Rep. 635; 52 L. R. A. 157; 59 N. E. 111; reversing 18 Ohio C. C. 30.

⁸ King v. King, 63 O. S. 363; 81 Am. St. Rep. 635; 52 L. R. A. 157; 59 N. E. 111; reversing 18 Ohio C. C. 30.

¹ Morrison v. Rogers, 115 Cal. 252; 56 Am. St. Rep. 95; 46 Pac. 1072; Johnson v. Hunt, 81 Ky. 321; Autcliff v. June, 81 Mich. 477; 21 Am. St. Rep. 533; 10 L. R. A. 621; 45 N. W. 1019; Duval v. Wellman, 124 N. Y. 156; 26 N. E. 343.

² Morrison v. Rogers, 115 Cal. 252; 56 Am. St. Rep. 95; 46 Pac. 1072.

³ Hellen v. Anderson, 83 Ill. App. 506; Duval v. Wellman, 124 N. Y. 156; 26 N. E. 343.

⁴ Jangraw v. Perkins, — Vt. —; 56 Atl. 532.

tioned that X should marry B's daughter and support her for six years, in which event the mortgage should be void; but if X did not, that on three months' notice A should pay to B five hundred dollars in trust for B's daughter and her children was held void.⁵ A note given by A to B to secure the release of X from her contract of employment with B, in order that she might marry A was held valid.⁶

§426. Contracts concerning duties of husband and wife.

The mutual rights and liabilities of husband and wife are fixed by law. The preservation of this status and the mutual duties attendant thereon is one of the cherished objects of the law. Any contract between them whereby they attempt to modify their personal duties to each other and yet leave their relationship subsisting is contrary to public policy and void.¹ The husband is bound to support his wife if he is able. Hence a contract whereby a wife agrees for value to support her husband is void.² Personal services rendered by the wife to the husband do not and cannot impose liability upon him. Thus a contract by a husband to pay his wife for her services as a housekeeper is void.³ A contract between husband and wife to assist in caring for and supporting each other, any surplus over living expenses to be the property of the wife, is contrary to public policy.⁴ In cases of this sort the objection to the validity of the contract is generally made not by the parties thereto but by the creditors of the husband. A contract whereby a husband agrees to live in a specified state, and not to remove therefrom

⁵ *Jangraw v. Perkins*, — Vt. —; 56 Atl. 532.

⁶ *Holz v. Hanson*, 115 Wis. 236; 91 N. W. 663.

¹ *Barnett v. Harshbarger*, 105 Ind. 410; 5 N. E. 718; *Dempster Mill Mfg. Co. v. Bundy*, 64 Kan. 444; 56 L. R. A. 739; 67 Pac. 816.

² *Corcoran v. Corcoran*, 119 Ind. 138; 12 Am. St. Rep. 390; 4 L. R. A. 782; 21 N. E. 468.

³ *Miller v. Miller*, 78 Ia. 177; 16 Am. St. Rep. 431; 35 N. W. 464; 42 N. W. 641; *Michigan Trust Co. v. Chapin*, 106 Mich. 384; 58 Am. St. Rep. 490; 64 N. W. 334.

⁴ *Dempster Mill Mfg. Co. v. Bundy*, 64 Kan. 444; 56 L. R. A. 739; 67 Pac. 816. (Hence such surplus may be taken for his debts.)

is void, as bargaining away his right to select the domicile of his family.⁵

§427. Contracts for custody of children.

The custody of a minor child is of concern to both the child and the state, and not merely a private property right of its parents. In all questions of the right of custody of a minor child, the welfare of the child is of paramount importance. Accordingly, considered solely as a contract, the general rule is that a contract whereby a parent disposes of his right to the custody of the child and the adversary party assumes sole liability for its support is void as contrary to public policy,¹ unless such contracts are made in accordance with the provisions of a statute.² Accordingly the parent may repudiate the contract and regain possession of the child at any time,³ provided that he is a fit person to have control.⁴ If the contract is performed by a change of custody of the child, and ties of affection bind the child to its custodian, the courts may refuse to allow the parents to recover

⁵ *Isaacs v. Isaacs*, — Neb. —; 99 N. W. 268.

¹ *Hamilton v. Hector*, L. R. 6 Ch. App. 701; *Swift v. Swift*, 34 Beav. 266; *Washaw v. Gimble*, 50 Ark. 351; 7 S. W. 389; *Beller v. Jones*, 22 Ark. 92; *Johnson v. Terry*, 34 Conn. 259; *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177; 13 N. E. 669; *Wishard v. Medaris*, 34 Ind. 168; *Kuhn v. Breen*, 101 Ia. 665; 70 N. E. 722; *Drumb v. Keen*, 47 Ia. 435; *In re Bullen*, 28 Kan. 781; *Chopsky v. Wood*, 26 Kan. 650; 40 Am. Rep. 321; *Stapleton v. Poynter*, 111 Ky. 264; 53 L. R. A. 784; 62 S. W. 730; *Farnsworth v. Richardson*, 35 Me. 267; *Grime v. Borden*, 166 Mass. 198; 44 N. E. 216; *Hibette v. Baines*, 78 Miss. 695; 51 L. R. A. 839; 29 So. 80; *Weir v. Marley*, 99 Mo. 484; 12 S. W. 798; *In re Scarritt*, 76 Mo. 565; 43 Am.

Rep. 768; *State v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 399; *State v. Deaton*, 93 Tex. 243; 54 S. W. 901; reversing, 52 S. W. 591; *Casanover v. Massengale* (Tex. Civ. App.), 54 S. W. 317; *Lovell v. House of Good Shepherd*, 9 Wash. 419; 43 Am. St. Rep. 839; 37 Pac. 660; *Sheers v. Stein*, 75 Wis. 44; 5 L. R. A. 781; 43 N. W. 728. Especially where made by the mother during coverture. *Stapleton v. Poynter*, 111 Ky. 264; 53 L. R. A. 784; 62 S. W. 730.

² *Sargent v. Sargent*, 106 Cal. 541; 39 Pac. 931; *Miller v. Wallace*, 76 Ga. 479; 2 Am. St. Rep. 48; *State v. Smith*, 6 Me. 462; 20 Am. Dec. 324.

³ *Hussey v. Whiting*, 145 Ind. 580; 57 Am. St. Rep. 220; 44 N. E. 639.

⁴ *Sheers v. Stein*, 75 Wis. 44; 5 L. R. A. 781; 43 N. W. 728.

the custody of the child, if plainly not for its interests.⁵ But this does not rest on the binding force of the original contract, but solely on the fact that a change from the custody and surroundings in which the child has been placed voluntarily by his parents would be injurious to his interests, which must first be considered.⁶

But if it does not appear that the child is so fond of its custodian that separation will be detrimental⁷ the contract will be ignored and the parent given custody of his child. There are, however, some cases in which it is held that such contracts are "not against public policy, because of the special facts and on the ground that the contract was for the welfare of the child."⁸ This view makes the contract valid except when the welfare of the child demands that the contract be disregarded.⁹ Thus where A agreed with his son's divorced wife that he would pay her a certain sum and pay her son a certain sum when he came of age if she would allow A to have the custody of her son, A's grandson, till he came of age, and she surrendered such child to

⁵ Washaw v. Gimble, 50 Ark. 351; 7 S. W. 389; *In re* Gates, 95 Cal. 461; 30 Pac. 596; Miller v. Wallace, 76 Ga. 479; 2 Am. St. Rep. 48; Bentley v. Terry, 59 Ga. 555; 27 Am. Rep. 399; Hadley v. Forrest, 112 Ia. 125; 83 N. W. 822; *In re* Beckwith, 43 Kan. 159; 23 Pac. 164; Chapsky v. Wood, 26 Kan. 650; 40 Am. Rep. 321; Sturtevant v. State, 15 Neb. 459; 48 Am. Rep. 349; 19 N. W. 617; Richards v. Collins, 45 N. J. Eq. 283; 14 Am. St. Rep. 726; 17 Atl. 831; Hoxsie v. Potter, 16 R. I. 374; 17 Atl. 129; Baskette v. Streight, 106 Tenn. 549; 62 S. W. 142; Coffee v. Black, 82 Va. 567; Merritt v. Swimley, 82 Va. 433; 3 Am. St. Rep. 115; Green v. Campbell, 35 W. Va. 698; 29 Am. St. Rep. 843; 14 S. E. 212.

⁶ Verser v. Ford, 37 Ark. 27; Lally v. Fitz Henry, 85 Ia. 49; 16 L. R. A. 681; 51 N. W. 1155.

⁷ Hibbette v. Bains, 78 Miss. 695; 51 L. R. A. 839; 29 So. 80.

⁸ Enders v. Enders, 164 Pa. St. 266, 273; 44 Am. St. Rep. 598; 27 L. R. A. 56; 30 Atl. 129. For authorities tending to support this view see Townsend v. Warren, 99 Ga. 105; 24 S. E. 960; Miller v. Wallace, 76 Ga. 479; 2 Am. St. Rep. 48; Bentley v. Terry, 59 Ga. 555; 27 Am. Rep. 399; James v. Cleghorn, 54 Ga. 9; Van Dyne v. Vreeland, 11 N. J. Eq. 370; affirmed, 12 N. J. Eq. 142; Neal v. Gilmore, 79 Pa. St. 421; Anderson v. Young, 54 S. C. 388; 44 L. R. A. 277; 32 S. E. 448; Cunningham v. Barnes, 37 W. Va. 746; 38 Am. St. Rep. 57; 17 S. E. 308; Nugent v. Powell, 4 Wyom. 173; 62 Am. St. Rep. 17; 20 L. R. A. 199; 33 Pac. 23.

⁹ Fletcher v. Hickman, 50 W. Va. 244; 88 Am. St. Rep. 862; 55 L. R. A. 896; 40 S. E. 371.

A under such contract, the contract was held valid, and A's estate liable to the mother for the money to be paid to her.¹⁰ A contract between husband and wife who have separated, concerning the custody of the children, has been held valid, subject to the power of the divorce court to adjudge the custody of the child as it may deem best for the interests of the children.¹¹ So a contract by which the mother surrenders the custody of her illegitimate child is valid.¹² So the surrender of the custody of a child under contract is a good consideration for a promise to make a will,¹³ even if the promise not to leave it in the custody to which it is given for a certain time is void.¹⁴

A contract for the custody of an adult child is of course void, as the parents have no right to his custody and no power of restraint.¹⁵ Thus a contract whereby a divorced wife to whose custody the minor daughter has been awarded agrees with her former husband that he may have the custody of such daughter until she comes of age, and then he will return her to the wife, is void as to the latter provision.¹⁶ The divergence of authority in the decisions as distinguished from dicta is not as great as would at first appear. No case is found even in jurisdictions holding such contracts void where considerations of the welfare of the child may not cause the court to adjudge its custody to the same person as that indicated by the contract. So even in jurisdictions treating such contracts as valid, the person to whom the custody of the child has been given by contract is not allowed to

¹⁰ *Enders v. Enders*, 164 Pa. St. 266; 44 Am. St. Rep. 598; 27 L. R. A. 56; 30 Atl. 129.

¹¹ *Sargent v. Sargent*, 106 Cal. 541; 32 Pac. 931. (Hence pending the divorce suit the husband cannot without a *bona fide* attempt at reconciliation avoid such contract and regain the custody of the children.)

¹² *Marshall v. Reams*, 32 Fla. 499; 37 Am. St. Rep. 118; 14 So. 95.

¹³ *Benge v. Hiatt*, 82 Ky. 666; 56 Am. Rep. 912; *Nowack v. Berger*, 133 Mo. 24; 54 Am. St. Rep. 663;

31 L. R. A. 810; 34 S. W. 489; *Healey v. Simpson*, 113 Mo. 340; 20 S. W. 881; *Burns v. Smith*, 21 Mont. 251; 69 Am. St. Rep. 653; 53 Pac. 742; *Winne v. Winne*, 166 N. Y. 263; 82 Am. St. Rep. 647; 59 N. E. 832. *Contra*, *Wood v. Evans*, 113 Ill. 186; 55 Am. Rep. 409.

¹⁴ See § 295.

¹⁵ *Dittrich v. Gobey*, 119 Cal. 599; 51 Pac. 962.

¹⁶ *Dittrich v. Gobey*, 119 Cal. 599; 51 Pac. 962.

retain such custody if not for the best interests of the child. Furthermore, the cases in which the custody of the child is awarded according to the terms of the contract are those in which the custody of the child has actually been transferred and on account of the affection of the child for its custodians the best interests of the child demand that it be left where it is. On similar facts, therefore, the courts usually reach the same result, under either of the opposing theories. The chief divergence in actual decision must therefore exist where the parent and the person to whom the custody has been transferred are equally suitable persons to have the custody of the child. Such cases are naturally rather uncommon. It may, indeed, be questioned whether the contract, apart from change of custody, is ever looked upon as valid; that is, if the contract were entirely executory whether the custody of the child would be given to the party to whom it had been promised; or whether damages could be recovered for breach. A third person, who abducts a child, cannot attack the validity of the contract under which the custody of such child has been transferred.¹⁷

§428. Contracts concerning separation.

A contract between husband and wife which contemplates, and tends to promote, their future separation is invalid.¹ So a conveyance of the homestead by the husband to the wife, the wife to have the power to exclude the husband therefrom at her pleasure on paying him an annuity for life is void.² A contract which does not promote future separation is valid, although it provides therefor. Thus a contract whereby a married woman

¹⁷ Clark v. Bayer, 32 O. S. 299; 30 Am. Rep. 593.

¹ Bowers v. Hutchinson, 67 Ark. 15; 53 S. W. 399; Chapman v. Gray, 8 Ga. 341; Fox v. Davis, 113 Mass. 255; 18 Am. Rep. 476; Randall v. Randall, 37 Mich. 563; Stebbins v. Morris, 19 Mont. 115; 47 Pac. 642; Aspinwall v. Aspinwall, 49 N. J. Eq. 302; 24 Atl. 926; Galusha v. Ga-

lusha, 116 N. Y. 635; 15 Am. St. Rep. 453; 6 L. R. A. 487; 22 N. E. 1114; Henderson v. Henderson, 37 Or. 141; 82 Am. St. Rep. 741; 48 L. R. A. 766; 60 Pac. 597; 61 Pac. 136; Switzer v. Switzer, 26 Gratt. (Va.) 574.

² Brun v. Brun, 64 Neb. 782; 90 N. W. 860.

agreed that money due her should be paid on her death to her heirs unless her husband should die or she should separate from him and become dependent on herself for support was held valid.³ So a contract between A, B's father, and C, whom B had seduced, that if C married B, A would support C and her child and provide a home for them if B did not, was held valid.⁴

The attitude of the courts towards contracts for immediate separation has been characterized by much vacillation and confusion.⁵ The original English rule held by the ecclesiastical courts was that such contracts were void. Question concerning marriage came before the ecclesiastical courts up to their abolition in 1857.⁶ Subsequently by "one of the most marvelous judicial somersaults ever witnessed in any country" the English courts, observing that "public opinion has altered,"⁸ reversed their earlier rulings and upheld such contracts.⁹ For a short period, it seemed as if the later authorities would be overruled and the earlier ones followed.¹⁰ But the reactionary tendency soon passed away and such contracts were held valid,¹¹ and were specifically enforced in equity.¹² In the United States

³ *Buck v. Hughes*, 127 Ind. 46; 26 N. E. 558.

⁴ *Wright v. Wright*, 114 Ia. 748; 55 L. R. A. 261; 87 N. W. 709.

⁵ "There is disagreement not only as to what the law is, and what the policy on this subject should be, but also as to the history of the law, and how it was held in former times." *Foote v. Nickerson*, 70 N. H. 496, 497; 54 L. R. A. 554; 48 Atl. 1088.

⁶ *Nash v. Nash*, 1 Hagg. Consist. Rep. 140.

Chancery took the same view. *Wilkes v. Wilkes*, 2 Dick. 791. For a history of the change in judicial opinion see *Foote v. Nickerson*, 70 N. H. 496; 54 L. R. A. 554; 48 Atl. 1088.

⁷ *Baum v. Baum*, 109 Wis. 47; 83 Am. St. Rep. 854; 53 L. R. A. 650; 85 N. W. 122; quoting 1 Bishop,

Marriage, Divorce and Separation, § 1263.

⁸ *Wennhak v. Morgan*, 20 Q. B. D. 635, 639.

⁹ *Ringsted v. Butler*, 3 Dougl. 197; *Barwell v. Brooks*, 3 Dougl. 371; *Corbett v. Poelnitz*, 1 T. R. 5. The same view was soon taken by the courts of chancery. *Fletcher v. Fletcher*, 2 Cox Ch. Cas. 99.

¹⁰ *Marshall v. Rutton*, 8 T. R. 545 (decided while Lord Kenyon was on the bench; overruling, *Corbett v. Poelnitz*, 1 T. R. 5).

¹¹ *In re Weston* (1900), 2 Ch. 164; *Jones v. Waite*, 4 Mann. & G. 1104; affirming, 5 Bing. N. C. 341; *McGregor v. McGregor*, L. R. 20 Q. B. Div. 529.

¹² *Wilson v. Wilson*, 1 H. L. Cas. 538; *Besant v. Wood*, L. R. 12 Ch. Div. 605; *Marshall v. Marshall*, L. R. 5 Prob. Div. 19.

some courts have followed the rule of the English ecclesiastical courts in holding such contracts illegal.¹³ The covenant for separation is unenforceable,¹⁴ and a contract whereby the husband agrees to make no demand on his wife's property in view of their separation does not prevent him from taking a share of her estate after her death.¹⁵ So in a contract for immediate separation whereby the husband agreed to support his wife and children and to assign certain insurance policies to her, but such assignment was not made so as to prevent the husband from changing the beneficiary of the policy thereafter; and the wife learned of this form of the assignment after she had paid a loan for which the policy was pledged as collateral, and sued for reformation, relief was refused.¹⁶ The validity of any part of such contract depends on the question of the validity of separate covenants in an illegal contract not dependent on the illegal part.¹⁷ In other jurisdictions such contracts seem to be held to be valid,¹⁸ and covenants depending on the covenant to live separate seem to be upheld.¹⁹ Thus a covenant to renounce all

¹³ Boland v. O'Neil, 72 Conn. 217; 44 Atl. 15; McCrocklin v. McCrocklin, 2 B. Mon. (Ky.) 370; Simpson v. Simpson, 4 Dana (Ky.) 140; Foote v. Nickerson, 70 N. H. 496; 54 L. R. A. 554; 48 Atl. 1088; Collins v. Collins, Phill. Eq. (N. C.) 153; 93 Am. Dec. 606; McKennan v. Phillips, 6 Whart. (Pa.) 571; 37 Am. Dec. 438; Baum v. Baum, 109 Wis. 47; 83 Am. St. Rep. 854; 53 L. R. A. 650; 85 N. W. 122.

¹⁴ Allen v. Allen, 73 Conn. 54; 84 Am. St. Rep. 135; 49 L. R. A. 142; 46 Atl. 242; Boland v. O'Neil, 72 Conn. 217; 44 Atl. 15. Equity will not enforce the covenant for separation. Buttler v. Buttler, 57 N. J. Eq. 645; 73 Am. St. Rep. 648; 42 Atl. 755; reversing, 38 Atl. 300; Aspinwall v. Aspinwall, 49 N. J. Eq. 302; 24 Atl. 926; Miller v. Miller, 1 N. J. Eq. 386.

¹⁵ Foote v. Nickerson, 70 N. H.

496; 54 L. R. A. 554; 48 Atl. 1088.

¹⁶ Baum v. Baum, 109 Wis. 47; 83 Am. St. Rep. 854; 53 L. R. A. 650; 85 N. W. 122.

¹⁷ See § 509.

¹⁸ Sargent v. Sargent, 106 Cal. 541; 39 Pac. 931; Wickersham v. Comerford, 96 Cal. 433; 31 Pac. 358; Fox v. Davis, 113 Mass. 255; Burgess v. Burgess, — S. D. —; 95 N. W. 279; Bueter v. Bueter, 1 S. D. 94; 8 L. R. A. 562; 45 N. W. 208.

¹⁹ Sargent v. Sargent, 106 Cal. 541; 39 Pac. 931; Stebbins v. Morris, 19 Mont. 115; 47 Pac. 642; Duryea v. Bliven, 122 N. Y. 567; 25 N. E. 908; Clark v. Fosdick, 118 N. Y. 7; 16 Am. St. Rep. 733; 6 L. R. A. 132; 22 N. E. 1111; Galusha v. Galusha, 116 N. Y. 635; 15 Am. St. Rep. 453; 6 L. R. A. 487; 22 N. E. 1114; Pettit v. Pettit, 107 N. Y. 677; 14 N. E. 500; Carpenter v. Osborn, 102 N. Y. 552; 7 N. E. 823.

interest in the estate of the husband in consideration of separation and support is held valid.²⁰ But such a contract, while treated as valid, has been held not to prevent the wife from inheriting under the statute from the husband where he dies without lineal descendants, and intestate, as such contract merely gives the husband "the full dominion of his property" while he lived, and did not specifically refer to any rights of inheritance.²¹ A separation contract fixing the amount of maintenance does not contain an implied covenant not to ask for a larger amount of alimony if a divorce is thereafter sought for subsequent misconduct.²² A contract during separation whereby a husband agrees to relinquish all dower in his wife's lands and

A statute providing that a contract of separation is revocable by either party and if either offers in good faith to become reconciled and the other refuses, it is desertion applies only to the grounds for divorce and does not allow revocation of the contract so as to deprive one of the custody of a child, given by the contract. *Sargent v. Sargent*, 106 Cal. 541; 39 Pac. 931. But in *Hungerford v. Hungerford*, 161 N. Y. 550, 553; 56 N. E. 117, the court held that an inadequate contract provision for the wife would be set aside and a reasonable provision made, saying "a contract between husband and wife is void at law and upheld solely in equity, and then not in every case but only when the provision for the maintenance of the wife or children is suitable and equitable."

²⁰ *Daniels v. Benedict*, 97 Fed. 367; 38 C. C. A. 592; *Storey v. Storey*, 125 Ill. 608; 8 Am. St. Rep. 417; 1 L. R. A. 320; 18 N. E. 329; *King v. Mollohan*, 61 Kan. 683; 60 Pac. 731; *Randall v. Randall*, 37 Mich. 563; *Roll v. Roll*, 51 Minn.

353; 53 N. W. 716; *Stephenson v. Osborne*, 41 Miss. 119; 90 Am. Dec. 358; *Stebbins v. Morris*, 19 Mont. 115; 47 Pac. 642; *Garver v. Miller*, 16 O. S. 527; *Frank's Estate*, 195 Pa. St. 26; 45 Atl. 489; *Dillinger's Appeal*, 35 Pa. St. 357; *Aspey v. Barry*, 13 S. D. 220; 83 N. W. 91. Such a contract may bar her from claims on personal property, though it does not effect a bar of the wife's rights in the husband's realty. *Bowers v. Hutchinson*, 67 Ark. 15; 53 S. W. 399.

²¹ *Smith v. Smith*, 57 O. S. 27; 48 N. E. 28. The contract in this case provided for the "free and untrammelled use and enjoyment of the property owned by them respectively, with full power of encumbrance or sale without the other's consent." A similar question of construction is found in *Jones v. Lamont*, 118 Cal. 499; 62 Am. St. Rep. 251; 50 Pac. 766, where the release was "from all obligations and liability for the future acts and debts of each other."

²² *Bishop v. Bishop* (1897), P. 138.

the wife to relinquish all dower in the husband's lands, is valid.²³

Whether separation contracts are legal or illegal, a contract between husband and wife who have separated or are about to separate immediately, whereby the husband provides for the support of his wife and children²⁴ or for a division of their property,²⁵ is valid.

Where separation contracts are legal, a contract for support is of course legal, the husband's liability to support his wife and family forming ample consideration. If separation contracts are illegal, it is still possible in most cases to treat the covenant for maintenance as a separate covenant resting on a separate consideration and not affected by the illegality of the remaining

²³ *McBreen v. McBreen*, 154 Mo. 323; 77 Am. St. Rep. 758; 55 S. W. 463. (Such contract may include lands owned at the time of separation and also those afterwards acquired.) *Jenkins v. Hall*, 26 Or. 79; 37 Pac. 62.

²⁴ *Walker v. Walker*, 9 Wall. (U. S.) 743; *Bowers v. Hutchinson*, 67 Ark. 15; 53 S. W. 399; *McLaren v. Bradford*, 52 Ga. 648; *Chapman v. Gray*, 8 Ga. 341; *Luttrell v. Bogg*, 168 Ill. 361; 48 N. E. 171; *Phillips v. Meyers*, 82 Ill. 67; 25 Am. Rep. 295; *Dutton v. Dutton*, 30 Ind. 452; *Robertson v. Robertson*, 25 Ia. 350; *Gaines v. Poor*, 3 Met. (Ky.) 503; 79 Am. Dec. 559; *Carey v. Mackey*, 82 Me. 516; 17 Am. St. Rep. 500; 9 L. R. A. 113; 20 Atl. 84; *Dunbar v. Dunbar*, 180 Mass. 170; 94 Am. St. Rep. 623; 62 N. E. 249 (affirmed on another question (i. e., effect of discharge in bankruptcy), 190 U. S. 340). *Grime v. Borden*, 166 Mass. 198; 44 N. E. 216; *Fox v. Davis*, 113 Mass. 255; 18 Am. Rep. 476; *Randall v. Randall*, 37 Mich. 563; *Kraft v. Kraft*, 70 Minn. 144; 72 N. W. 804; *Roll*

v. Roll, 51 Minn. 353; 53 N. W. 716; *Buttlar v. Buttlar*, 57 N. J. Eq. 645; 73 Am. St. Rep. 648; 42 Atl. 755; reversing, 38 Atl. 300; *Hann v. Crickler* (N. J. Eq.); 43 Atl. 1063; *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302; 24 Atl. 926; *Calame v. Calame*, 25 N. J. Eq. 548; *Emery v. Neighbor*, 7 N. J. L. 142; 11 Am. Dec. 541; *Pettit v. Pettit*, 107 N. Y. 677; 14 N. E. 500; *Carpenter v. Osborn*, 102 N. Y. 552; 7 N. E. 823; *Garver v. Miller*, 16 O. S. 527; *Bettle v. Wilson*, 14 Ohio 257; *Henderson v. Henderson*, 37 Or. 141; 82 Am. St. Rep. 741; 48 L. R. A. 766; 60 Pac. 597; 61 Pac. 136; *Hutton v. Hutton*, 3 Pa. St. 100; *Buckner v. Ruth*, 13 Rich. L. (S. Car.) 157; *Goodrich v. Bryant*, 5 Sneed (Tenn.) 325; *Squires v. Squires*, 53 Vt. 208; 38 Am. Rep. 668. So where the husband agrees to pay the wife's father for her support. *Page v. Trufant*, 2 Mass. 159; 3 Am. Dec. 41.

²⁵ *Parsons v. Parsons* (Ky.); 62 S. W. 719; *Burgess v. Burgess*, — S. D. —; 95 N. W. 279.

provisions of the contract.²⁶ A contract for reconciliation and cohabitation is valid,²⁷ even if coupled with a condition of reformation on the part of the delinquent spouse, a breach whereof is to end the contract of reconciliation.²⁸ Any contract whether between husband and wife or between either and a third person which tends to prevent a reconciliation is invalid.²⁹ Thus a contract by a married woman to give her attorney in the divorce suit one-half of the alimony awarded her tends to give such attorney an interest in preventing a reconciliation and is invalid.³⁰

§429. Contracts concerning divorce.

While the law permits divorce in specified cases, it does not encourage it. Further, the state has an interest in every marriage contract, and is often said to be a third party thereto.¹ Hence, where husband and wife may make contracts with each other,² a contract based on their obtaining a divorce thereafter is void as *contra bonos mores*.³ The fact that the contract is intended to facilitate divorce is enough to make it illegal.⁴ Thus

²⁶ *Luttrell v. Boggs*, 168 Ill. 361; 48 N. E. 171; *Grime v. Borden*, 166 Mass. 198; 44 N. E. 216.

²⁷ *Duffy v. White*, 115 Mich. 264; 73 N. W. 363; *Barbour v. Barbour*, 49 N. J. Eq. 429; 24 Atl. 227; *Adams v. Adams*, 91 N. Y. 381; 43 Am. Rep. 675.

²⁸ *Duffy v. White*, 115 Mich. 264; 73 N. W. 363.

²⁹ *Jordan v. Westerman*, 62 Mich. 170; 4 Am. St. Rep. 836; 28 N. W. 826.

³⁰ *Jordan v. Waterman*, 62 Mich. 170; 4 Am. St. Rep. 836; 28 N. W. 826. (In this case the attorney interfered actively to prevent a reconciliation. He collected the whole amount of alimony, was sued by the divorced wife for the whole sum; remitted one-half to her and subsequently she recovered the other half.

See § 340.

¹ *Allen v. Allen*, 73 Conn. 54; 84 Am. St. Rep. 135; 49 L. R. A. 142; 46 Atl. 242; *Trammell v. Vaughan*, 158 Mo. 214; 81 Am. St. Rep. 302; 51 L. R. A. 854; 59 S. W. 79; *Blank v. Nohl*, 112 Mo. 159; 18 L. R. A. 350; 20 S. W. 477; *State v. Bittick*, 103 Mo. 183; 23 Am. St. Rep. 869; 11 L. R. A. 587; 15 S. W. 325.

² See § 928.

³ *Goodwin v. Goodwin*, 4 Day (Conn.) 343; *Birch v. Anthony*, 109 Ga. 349; 77 Am. St. Rep. 379; 34 S. E. 561; *Muckenbergh v. Holler*, 29 Ind. 139; 92 Am. Dec. 345; *Fredericks v. Sault*, 19 Ind. App. 604; 49 N. E. 909; *Adams v. Adams*, 25 Minn. 72; *Stebbins v. Morris*, 19 Mont. 115; 47 Pac. 642; *Wilde v. Wilde*, 37 Neb. 891; 56 N. W. 724.

⁴ *Palmer v. Palmer*, 26 Utah 31; 61 L. R. A. 641; 72 Pac. 3.

contracts whose consideration is that the defendant to the divorce suit will make no defense;⁵ or will suppress certain evidence and refrain from moving for a new trial after decree;⁶ or will conceal some specified ground for divorce,⁷ or a contract whereby the wife agrees to release all claims against her husband or his property if he will obtain a divorce by a specified time,⁸ are illegal. However, a contract of separation, otherwise valid, is not invalid because the parties thereto hope to obtain a divorce in a short time.⁹ Where A is married to B, a contract between A and C whereby A agrees to divorce B and marry C is illegal, and A's promise to marry C,¹⁰ or to pay money,¹¹ or to deed property to her¹² are all invalid. But where A had obtained a divorce from his wife B, and then promised C to

⁵ *Loveren v. Loveren*, 106 Cal. 509; 39 Pac. 801; *Senter v. Senter*, 70 Cal. 619; 11 Pac. 782; *Beard v. Beard*, 65 Cal. 354; 4 Pac. 229; *Smutzer v. Stimson*, 9 Colo. App. 326; 48 Pac. 314; *Stilson v. Stilson*, 46 Conn. 15; *Hamilton v. Hamilton*, 89 Ill. 349; *Everhart v. Puckett*, 73 Ind. 409; *Comstock v. Adams*, 23 Kan. 513; 33 Am. Rep. 191; *Belden v. Munger*, 5 Minn. 211; 80 Am. Dec. 407; *Shirk v. Shirk*, 75 Mo. App. 573; *Cross v. Cross*, 58 N. H. 373; *Weeks v. Hill*, 38 N. H. 199; *Sayles v. Sayles*, 21 N. H. 312; 53 Am. Dec. 208;; *Stoutenburg v. Lybrand*, 13 O. S. 228; *Phillips v. Thorp*, 10 Or. 494; *Kilborn v. Field*, 78 Pa. St. 194.

⁶ *Blank v. Nohl*, 112 Mo. 159; 18 L. R. A. 350; 20 S. W. 477.

⁷ *Goodwin v. Goodwin*, 4 Day (Conn.) 343. If part of the contract is that no resistance is to be made to the remaining grounds of divorce, the illegality of such contracts is clear; and perhaps this is a term, implied at least, in most contracts of this sort. But in the absence of such understanding it is

hard to see why withdrawing one ground of divorce is illegal, when it is legal to withdraw all. (See this section.) In *Irvin v. Irvin*, 169 Pa. St. 529; 29 L. R. A. 292; 32 Atl. 445, such a contract seems to have been held valid. An agreement to sue for divorce, "using the lightest cause possible," has been held not to be illegal, it being contemplated before such contract was made that a divorce suit would be brought. *Burgess v. Burgess*, — S. D. —; 95 N. W. 279.

⁸ *Birch v. Anthony*, 109 Ga. 349; 77 Am. St. Rep. 379; 34 S. E. 561.

⁹ *King v. Mollohan*, 61 Kan. 683; 60 Pac. 731.

¹⁰ *Noice v. Brown*, 38 N. J. L. 228; 20 Am. Rep. 388; s. c., 39 N. J. L. 133; 23 Am. Rep. 213. So in *Paddock v. Robinson*, 63 Ill. 99; 14 Am. Dec. 112; a promise to intermarry between two persons each of whom was already married was held invalid.

¹¹ *Leupert v. Shields*, 14 Colo. App. 404; 60 Pac. 193.

¹² *King v. Pillow*, 90 Tenn. 287; 16 S. W. 469. (In this case A had

marry her when B died, such contract is valid.¹³ A contract for a future divorce is still more clearly illegal when it involves extorting money from third persons by threatening to charge them publicly with adultery with defendant.¹⁴ If the contract is not intended to facilitate divorce, the fact that it provides for a settlement of property rights in contemplation of a divorce intended in any event does not make it illegal.¹⁵ Contracts between a husband or wife on the one hand, and an attorney on the other, providing for a contingent fee, and forbidding a compromise without the attorney's consent, tend to promote divorce and are invalid, even apart from considerations of champerty.¹⁶

A contract to refrain from bringing a divorce suit,¹⁷ or to dismiss one already brought,¹⁸ is valid. Whether such agreement to refrain from bringing a divorce suit or to dismiss one already brought is a consideration for a promise based thereon is a question discussed elsewhere.¹⁹

§430. Contracts concerning alimony.

Where it does not affect the divorce proceedings, the parties may agree upon the amount of alimony to be paid in case the divorce is thereafter granted.¹ While it is sometimes said, especially in text-books, that such contracts are necessarily in-

delivered the deed to C and then had destroyed it, and equity refused to compel him to make a new conveyance.)

¹³ *Brown v. Odill*, 104 Tenn. 250; 78 Am. St. Rep. 914; 52 L. R. A. 660; 56 S. W. 840.

¹⁴ *Byron v. Tremaine*, 31 N. S. 425.

¹⁵ *Burgess v. Burgess*, — S. D. —; 95 N. W. 279.

¹⁶ *Newman v. Freitas*, 129 Cal. 283; 50 L. R. A. 548; 61 Pac. 907. See § 340 and cases there cited on this point.

¹⁷ *Moayon v. Moayon*, — Ky. —; 60 L. R. A. 415; 72 S. W. 33; *Polson v. Stewart*, 167 Mass. 211; 57

Am. St. Rep. 452; 37 L. R. A. 771; 45 N. E. 737; (apparently refusing to follow *Merrill v. Peaslee*, 146 Mass. 460; 4 Am. St. Rep. 334; 16 N. E. 271, a case which seems contrary to principle and authority and which is criticised and not followed in *Duffy v. White*, 115 Mich. 264; 73 N. W. 363).

¹⁸ *Parsons v. Parsons* (Ky.), 62 S. W. 719; *Adams v. Adams*, 91 N. Y. 381; 43 Am. Rep. 675.

¹⁹ See §§ 289, 290.

¹ *Lowrey v. Lowrey*, 108 Ga. 766; 33 S. E. 421; *Storey v. Storey*, 125 Ill. 608; 8 Am. St. Rep. 417; 1 L. R. A. 320; 18 N. E. 329; *Stokes v. Anderson*, 118 Ind. 533; 4 L. R. A.

valid as tending to promote separation,² the cases in which such contracts have been held invalid are those in which there is some additional provision encouraging future separation or divorce.³ However a contract to pay to promisor's wife a certain sum of money if a divorce was granted without alimony has been held illegal as tending to facilitate divorce.⁴ Whether such contract can bind the action of the court if it is sought to obtain a judgment for alimony upon the basis of the contract is doubtful.⁵ The court is not bound by such contract as to community property and may ignore it even if no suit has been brought to set it aside.⁶ A contract for separation and maintenance does not, at least if broken, oust the court of chancery of its jurisdiction to allow alimony.⁷ The court usually enters judgment upon the basis of such agreement, if just and reasonable,⁸ and the adjudicated cases usually arise either on such a state of facts, or else where the parties to the

313; 21 N. E. 331; *Gibbons v. Gibbons* (Ky.), 54 S. W. 710; *Chapin v. Chapin*, 135 Mass. 393; *Roll v. Roll*, 51 Minn. 353; 53 N. W. 716; *Pettit v. Pettit*, 107 N. Y. 677; 14 N. E. 500; *Julier v. Julier*, 62 O. S. 90; 78 Am. St. Rep. 697; 56 N. E. 661; *Henderson v. Henderson*, 37 Or. 141; 82 Am. St. Rep. 741; 48 L. R. A. 766; 60 Pac. 597; 61 Pac. 136.

² In *Evans v. Evans*, 93 Ky. 510; 20 S. W. 605, a contract whereby in consideration of a money payment a wife agreed not to sue her husband for maintenance for a year was held invalid. But in *Gibbons v. Gibbons* (Ky.), 54 S. W. 710, where there was no question about the husband's right to a divorce, a contract to pay a sum each month in lieu of alimony was held valid.

³ Such as a provision that no defense to the divorce suit shall be made. *Everhart v. Puckett*, 73 Ind. 409; *Adams v. Adams*, 25 Minn. 72.

⁴ *Speck v. Dausman*, 7 Mo. App. 165.

⁵ A contract to dismiss a divorce suit and to divide personal property, the obtaining by either of a divorce thereafter was held to prevent alimony in a subsequent divorce suit. *Parsons v. Parsons* (Ky.), 62 S. W. 719.

⁶ *Loveren v. Loveren*, 106 Cal. 509; 39 Pac. 801.

⁷ *Meyerl v. Meyerl*, 125 Mich. 607; 84 N. W. 1109; *Cram v. Cram*, 116 N. Car. 288; 21 S. E. 197.

⁸ *Storey v. Storey*, 125 Ill. 608; 8 Am. St. Rep. 417; 1 L. R. A. 320; 18 N. E. 329; *Fletcher v. Holmes*, 25 Ind. 458; *Owen v. Yale*, 75 Mich. 256; 42 N. W. 817; *Crews v. Moon-ey*, 74 Mo. 26; *Julier v. Julier*, 62 O. S. 90; 78 Am. St. Rep. 697; 56 N. E. 661; *Henderson v. Henderson*, 37 Or. 141; 82 Am. St. Rep. 741; 48 L. R. A. 766; 66 Pac. 597; 61 Pac. 136. If there is no covenant not to sue for a larger amount, the court may give a larger amount if

contract have not sought to merge their contract for alimony in judgment but have relied solely on their contract.⁹ Whether the court has power to modify a decree for alimony based on a contract therefor is a question on which courts differ, some holding that such power exists wherever it would be proper to modify any other judgment for alimony,¹⁰ and others holding that the court has no such power,¹¹ at least where the contract is free from fraud.¹² After a decree awarding alimony in installments a contract whereby the husband is to convey land to his divorced wife in lieu of such alimony is valid.¹³

§431. Contracts concerning the contest of wills.

While not involving questions of status, contracts concerning the contest of wills may be considered in this connection. A contract whereby disinherited heirs agree not to contest the will of their ancestor is valid,¹ even if the court which tries the contest is not advised of such contract.² So a contract whereby an heir agrees to relinquish all his interest in his ancestor's estate and to refrain from contesting his ancestor's will;³ a contract to ignore the will and divide the property

circumstances subsequent to the date of the contract, such as the expense of educating a child have cast an increased burden on the wife. *Judkins v. Judkins* (1897), P. 138. It does not limit alimony in a divorce sought for subsequent aggression. *Bishop v. Bishop* (1897), P. 138.

⁹ *Parsons v. Parsons* (Ky.), 62 S. W. 719.

¹⁰ *Blake v. Blake*, 75 Wis. 339; 43 N. W. 144; *Blake v. Blake*, 68 Wis. 303; 32 N. W. 48.

¹¹ *Julier v. Julier*, 62 O. S. 90; 78 Am. St. Rep. 697; 56 N. E. 661; *Henderson v. Henderson*, 37 Or. 141; 82 Am. St. Rep. 741; 48 L. R. A. 766; 60 Pac. 597; 61 Pac. 136.

¹² These last questions belong rather under the law of divorce and alimony.

¹³ *Preston v. Williams*, 81 Ill. 176.

¹ *Waller v. Marks*, 100 Ky. 541; 38 S. W. 894; *Seaman v. Colley*, 178 Mass. 478; 59 N. E. 1017; *Moss v. Cohen*, 158 N. Y. 240; 53 N. E. 8; *Barrett v. Carden*, 65 Vt. 431; 36 Am. St. Rep. 876; 26 Atl. 530.

² *Seaman v. Colley*, 178 Mass. 478; 59 N. E. 1017.

³ *In re Garcelon*, 104 Cal. 570; 43 Am. St. Rep. 134; 32 L. R. A. 595; 38 Pac. 414; *Crum v. Sawyer*, 132 Ill. 443; 24 N. E. 956; *Eissler v. Hoppel*, 158 Ind. 82; 62 N. E. 692; *Nicholson v. Caress*, 59 Ind. 39; *Brown v. Brown*, 139 Ind. 653; 39 N. E. 152; *Jones v. Jones*, 46 Ia. 466; *Havens v. Thompson*, 26 N. J. Eq. 383; *Brands v. De Witt*, 44 N. J. Eq. 545; 6 Am. St. Rep. 909;

as if testator had died intestate,⁴ or a contract between prospective heirs by which one agrees to use his influence to cause the ancestor to refrain from altering his will, if such contract is known to such ancestor⁵ are each valid.

But in order to be valid, contracts with reference to the contest of a will or distribution of property of decedent must be free from other invalidity. Thus contracts between some of the heirs and devisees, intended to exclude others from their share of the estate, are invalid as working a fraud upon such others.⁶

10 Atl. 181; 14 Atl. 894; Power's Appeal, 63 Pa. 443.

⁴Phillips v. Phillips, 8 Watts (Pa.) 195; Stringfellow v. Early, 15 Tex. Civ. App. 597; 40 S. W. 871. *Contra*, where made in testator's lifetime. Mercier v. Mercier, 50 Ga. 546; 15 Am. Rep. 694.

⁵De Boer v. Harmsen, 131 Mich. 91; 90 N. W. 1036.

⁶Gray v. McReynolds, 65 Ia. 461; 54 Am. Rep. 16; 21 N. W. 777; Ridenbaugh v. Young, 145 Mo. 274; 46 S. W. 959.

CHAPTER XXV.

MONOPOLY CONTRACTS.

§432. Nature of monopoly contracts.

Monopolies have always been held to be "against the Common Law"¹ whether granted by the sovereign power or created by contract between private citizens; and modern Common Law, aided and supplemented by statutes, refuses to enforce contracts which tend to create monopolies on the ground that they are detrimental to the public interest.² This rule of law has proved partially ineffectual to prevent monopoly contracts. Since, from its nature, it can be applied only in an action between the parties

¹Case of Monopolies, 11 Coke 84*b*; Raymond v. Leavitt, 46 Mich. 447; 41 Am. Rep. 170; 9 N. W. 525; Texas Standard Oil Co. v. Adoue, 83 Tex. 650; 29 Am. St. Rep. 690; 15 L. R. A. 598; 19 S. W. 274.

²Pacific Factor Co. v. Adler, 90 Cal. 110; 25 Am. St. Rep. 102; 27 Pac. 36; Santa Clara, etc., Co. v. Hayes, 76 Cal. 387; 9 Am. St. Rep. 211; 18 Pac. 391; Fishburn v. Chicago, 171 Ill. 338; 63 Am. St. Rep. 236; 39 L. R. A. 482; 49 N. E. 532; People v. Stock Exchange, 170 Ill. 556; 62 Am. St. Rep. 404; 39 L. R. A. 373; 48 N. E. 1062; People v. Gas Trust Co., 130 Ill. 268; 17 Am. St. Rep. 319; 8 L. R. A. 497; 22 N. E. 798; Chicago Gas Light Co. v. Gas Light Co., 121 Ill. 530; 2 Am. St. Rep. 124; 13 N. E. 169; Craft v. McConoughy, 79 Ill. 346; 22 Am. Rep. 171; Anderson v. Jett, 89 Ky. 376; 6 L. R. A. 390; 12 S. W. 670; Alger v. Thacher, 19

Pick. (Mass.) 51; 31 Am. Dec. 119; People v. Milk Exchange, 145 N. Y. 267; 45 Am. St. Rep. 609; 27 L. R. A. 437; 39 N. E. 1062; People v. Sheldon, 139 N. Y. 251; 25 L. R. A. 221; 34 N. E. 785; Judd v. Harrington, 139 N. Y. 105; 36 Am. St. Rep. 690; 34 N. E. 790; Leonard v. Poole, 114 N. Y. 371; 11 Am. St. Rep. 667; 4 L. R. A. 728; 21 N. E. 707; Arnot v. Coal Co., 68 N. Y. 558; 23 Am. Rep. 190; Central Ohio Salt Co. v. Guthrie, 35 O. S. 666; Crawford v. Wick, 18 O. S. 190; 98 Am. Dec. 103; Nester v. Brewing Co., 161 Pa. St. 473; 41 Am. St. Rep. 894; 24 L. R. A. 247; 29 Atl. 102; Morris Run Coal Co. v. Coal Co., 68 Pa. St. 173; 8 Am. Rep. 159; Texas Standard Cotton-Oil Co. v. Adoue, 83 Tex. 650; 29 Am. St. Rep. 690; 15 L. R. A. 598; 19 S. W. 274; West Virginia Transportation Co. v. Pipe Line Co., 22 W. Va. 600; 46 Am. Rep. 527.

to a monopoly contract, it follows that if the monopoly is so complete and the profits arising therefrom are so large that the parties thereto are satisfied, the Common Law rule made it impossible for any other private person to complain. Statutes have been passed by the United States and by some of the states giving to the government,³ or to third persons injured by the operation of the monopoly,⁴ the right to complain of such monopoly and to invoke judicial action. Cases decided under these statutes are of value as far as they show what a monopoly is. As far as concerns the power of the state to punish offenders under such statutes, these cases have no connection with the law of contracts and questions of this sort will not be here discussed.

§433. What constitutes a monopoly contract.

Whether a contract tends to create a monopoly is a question not always easy to answer. It is said to be a mixed question of law and fact, proper for the jury.¹ Unless there is some tendency to a monopoly the contract should not be held invalid. An agreement between a number of stevedores cannot be held unlawful where it is not shown how many stevedores are members of the association as compared with the whole number in the city.² If there is no attempt or tendency to a monopoly it is always lawful to buy the plant, equipment and good-will of a competitor.³ On the other hand monopoly contracts are invalid, although they may not succeed in establishing an abso-

³ *Northern Securities Co. v. United States*, 193 U. S. 197; affirming 120 Fed. 720; *Addyston, etc., Co. v. United States*, 175 U. S. 211; modifying *United States v. Steel Co.*, 85 Fed. 271; 29 C. C. A. 141; 46 L. R. A. 122; *Gibbs v. McNeeley*, 118 Fed. 120; 60 L. R. A. 152; 55 C. C. A. 70; *State v. Packing Co.*, 173 Mo. 356; 96 Am. St. Rep. 515; 61 L. R. A. 464; 73 S. W. 645.

⁴ *Montague v. Lowry*, 193 U. S. 38.

¹ *South Florida R. R. v. Rhodes*,

25 Fla. 40; 23 Am. St. Rep. 506; 3 L. R. A. 733; 5 So. 633.

² *Herriman v. Menzies*, 115 Cal. 16; 56 Am. St. Rep. 82; 35 L. R. A. 318; 44 Pac. 660; 46 Pac. 730. But on the other hand, a contract between a few only of the stenographers of the city, fixing rates, was held invalid. *More v. Bennett*, 140 Ill. 69; 33 Am. St. Rep. 216; 15 L. R. A. 361; 29 N. E. 888.

³ *Coquard v. National, etc., Co.*, 171 Ill. 480; 49 N. E. 563.

lutely perfect monopoly, as it is their tendency rather than their ultimate effect that the law reproves.⁴ Further, by the weight of authority a contract which creates such a monopoly as to put it into the power of such combination to raise prices, is invalid,⁵ though the price may not in fact have been raised,⁶ or may even have been lowered.⁷ But some courts hold that a combination which does not increase prices beyond a reasonable price is valid.⁸

§434. Forms of monopoly contracts.—Buying off competition.

No exhaustive classification can be made of the forms of contracts which tend to monopoly. As given forms of such contracts are declared invalid, new ones are devised by the ingenuity of those who wish to make such contracts, and the only final limit to their form will be the limits to the writ of

⁴Montague v. Lowry, 193 U. S. 38; affirming 115 Fed. 27, which affirmed 106 Fed. 38; Addyston Pipe and Steel Co. v. U. S., 175 U. S. 211; modifying 85 Fed. 271; 29 C. C. A. 141; 46 L. R. A. 122, which reversed 78 Fed. 712; McMullen v. Hoffman, 174 U. S. 639; United States v. E. C. Knight Co., 156 U. S. 1; Wright v. Ryder, 36 Cal. 342; 95 Am. Dec. 186; Fishburn v. Chicago, 171 Ill. 338; 63 Am. St. Rep. 236; 39 L. R. A. 482; 49 N. E. 532; More v. Bennett, 140 Ill. 69; 33 Am. St. Rep. 216; 15 L. R. A. 361; 29 N. E. 888; State v. Armour Packing Co., 173 Mo. 356; 96 Am. St. Rep. 515; 61 L. R. A. 464; 73 S. W. 645; Cummings v. Stone Co., 164 N. Y. 401; 79 Am. St. Rep. 655; 52 L. R. A. 262; 58 N. E. 525; State v. Standard Oil Co., 49 O. S. 137; 34 Am. St. Rep. 541; 15 L. R. A. 145; 30 N. E. 279; Texas Standard Oil Co. v. Adoue, 83 Tex. 650; 29 Am. St. Rep. 690; 15 L. R. A. 598; 19 S. W. 274.

⁵Addyston, etc., Co. v. United States, 175 U. S. 211; modifying 85 Fed. 271; 29 C. C. A. 141; 46 L. R. A. 122; United States v. Freight Association, 166 U. S. 290; Pacific Factor Co. v. Adler, 90 Cal. 110; 25 Am. St. Rep. 102; 27 Pac. 36; Santa Clara, etc., Co. v. Hayes, 76 Cal. 387; 9 Am. St. Rep. 211; 18 Pac. 391; State v. Oil Co., 153 Ind. 483; 74 Am. St. Rep. 314; 53 L. R. A. 413; 53 N. E. 1089; State v. Standard Oil Co., 49 O. S. 137; 34 Am. St. Rep. 541; 15 L. R. A. 145; 30 N. E. 279.

⁶Addyston, etc., Co. v. United States, 175 U. S. 211; modifying 85 Fed. 271; 29 C. C. A. 141; 46 L. R. A. 122; Richardson v. Buhl, 77 Mich. 632; 6 L. R. A. 457; 43 N. W. 1102.

⁷State v. Standard Oil Co., 49 O. S. 137; 34 Am. St. Rep. 541; 15 L. R. A. 145; 30 N. E. 279.

⁸Manchester, etc., R. R. v. R. R., 66 N. H. 100; 49 Am. St. Rep. 582; 9 L. R. A. 689; 20 Atl. 383.

man. In these, as in gambling contracts, the parties thereto knowing that in their true form they are invalid, seek to make use of language to conceal their thought and to hide rather than to express their real intention. A few of the most important classes of such contracts are given by way of example.

(a) **Buying Off Competition.**—Where without a sale of good-will, or other legitimate dealing therewith, one party agrees with the other to abstain from business, such contract is invalid without regard to its reasonableness as to either space or time.¹ Such contracts are equally invalid whether the competition is suppressed directly or indirectly. Thus a contract is invalid whereby A is to sell lumber to B for eleven dollars a thousand, and to pay B twenty dollars a thousand for all lumber sold by him to other persons.²

§435. Limiting competition.

(b) In the absence of a sale of good-will, a contract limiting competition by dividing trade area or customers between the parties, and agreeing not to compete in such areas or to deal with such persons designated as customers of the other, is invalid.¹ Examples of such contracts are as follows: between

¹ *Cravens v. Carter-Crume Co.*, 92 Fed. 479; 34 C. C. A. 479; *Fox, etc., Steel Co. v. Schoen*, 77 Fed. 29; *Oliver v. Gilmore*, 52 Fed. 562; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110; 85 Am. St. Rep. 125; 50 L. R. A. 175; 28 So. 669; *Game-well, etc., Co. v. Crane*, 160 Mass. 50; 39 Am. St. Rep. 458; 22 L. R. A. 673; 35 N. E. 98; *Clark v. Needham*, 125 Mich. 84; 84 Am. St. Rep. 559; 51 L. R. A. 785; 83 N. W. 1027; *Bingham v. Brands*, 119 Mich. 255; 77 N. W. 940; *Western, etc., Association v. Starkey*, 84 Mich. 76; 22 Am. St. Rep. 686; 11 L. R. A. 503; 47 N. W. 604; *Culp v. Love*, 127 N. C. 457; 37 S. E. 476; *Field Cordage Co. v. Cordage Co.*, 6 Ohio C. C. 615.

² *Santa Clara Mill & Lumber Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; 18 Pac. 391.

¹ *Montague v. Lowry*, 193 U. S. 38; affirming 115 Fed. 27, which affirmed 106 Fed. 38; *Chapin v. Brown*, 83 Ia. 156; 32 Am. St. Rep. 297; 12 L. R. A. 428; 48 N. W. 1074; *Clark v. Needham*, 125 Mich. 84; 84 Am. St. Rep. 559; 51 L. R. A. 785; 83 N. W. 1027; *Cleland v. Anderson*, — Neb. —; 92 N. W. 306; *Cummings v. Stone Co.*, 164 N. Y. 401; 79 Am. St. Rep. 655; 52 L. R. A. 262; 58 N. E. 525; *Arnot v. Coal Co.*, 68 N. Y. 558; *Nester v. Brewing Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894; 24 L. R. A. 247; 29 Atl. 102; *Houck v. Anheuser-Busch Brewing Association*, 88

brokers in live-stock and butchers, whereby the brokers agree to sell only to the butchers and the butchers to buy only from the brokers;² or an agreement between dealers in beer not to sell at wholesale to others than the parties to the agreement except at certain fixed prices;³ or a contract between a brewing company and a wholesale firm to sell beer to no one else in said city except such wholesale firm;⁴ or a contract by A, a manufacturer of anchors, to sell them to B and to no other person,⁵ such contracts being part of a plan to control a given commodity in a given locality.

§436. Community of agency.

(c) In the absence of statute, however, two or more producers may join in appointing a single exclusive agent,¹ or a producer may appoint a sole agent,² or the agent may agree to handle the goods of one principal only;³ or a producer may appoint an exclusive agent who in turn agrees to sell only the goods of his principal;⁴ or A may agree to use B's articles exclusively.⁵ Anti-trust statutes do not apply to a genuine agency.⁶ If the

Tex. 184; 30 S. W. 869; affirming (Tex. Civ. App.), 27 S. W. 692; Texas Standard Oil Co. v. Adoue, 83 Tex. 650; 29 Am. St. Rep. 690; 15 L. R. A. 598; 19 S. W. 274.

² Judd v. Harrington, 139 N. Y. 105; 34 N. E. 790.

³ Nester v. Brewing Co., 161 Pa. St. 473; 41 Am. St. Rep. 894; 24 L. R. A. 247; 29 Atl. 102.

⁴ Houck v. Brewing Association, 88 Tex. 184; 30 S. W. 869; affirming (Tex. Civ. App.), 27 S. W. 692.

⁵ Clark v. Needham, 125 Mich. 84; 84 Am. St. Rep. 559; 51 L. R. A. 785; 83 N. W. 1027.

⁶ Sprainka v. Scharringhausen, 8 Mo. App. 522; New York Trap Rock Co. v. Brown, 61 N. J. L. 536; 43 Atl. 100. But if they go further and unite in maintaining one price their contract is invalid. Cummings

v. Stone Co., 164 N. Y. 401; 79 Am. St. Rep. 655; 52 L. R. A. 262; 58 N. E. 525.

² Fuller v. Hope, 163 Pa. St. 62; 29 Atl. 779.

³ Ferris v. Brewing Co., 155 Ind. 539; 52 L. R. A. 305; 58 N. E. 701.

⁴ Brown v. Rounsavell, 78 Ill. 589; Weiboldt v. Fashion Co., 80 Ill. App. 67; Newell v. Meyendorff, 9 Mont. 254; 18 Am. St. Rep. 738; 8 L. R. A. 440; 23 Pac. 333.

⁵ Chicago, etc., Ry. v. Car Co., 139 U. S. 79.

⁶ Welch v. Phelps, etc., Co., 89 Tex. 653; 36 S. W. 71. Under the Texas statutes, which prohibit combinations of capital, skill or acts by two or more persons, firms or corporations, to create or carry out restrictions in trade and to prevent competition in the sale and purchase

contract to create an exclusive agency or to sell to one vendee only is in pursuance of a plan to create a monopoly, it is unquestionably invalid.⁷ An agreement between two competing firms of grain dealers to buy grain at a given place on joint account is not necessarily a monopoly contract.⁸

§437. Fixing prices.

(*d*) A contract between persons in a given business whereby they aim to control the price of an article is invalid, at least if the article in question is one of necessity or general use.¹ Contracts between dealers whereby they form an "exchange,"

of commodities (Sayles's Ann. Civ. Stat. 1897, Art. 5313), a contract whereby a wholesale dealer or manufacturer agrees to sell to one person only in a given locality and such person agrees to buy only from such wholesaler, is void, though it may be called a contract of agency. *Texas Brewing Co. v. Templeman*, 90 Tex. 277; 38 S. W. 27; affirming 35 S. W. 935; *Fuqua v. Brewing Co.*, 90 Tex. 298; 35 L. R. A. 241; 38 S. W. 29; rehearing denied, 38 S. W. 750; reversing 36 S. W. 479; *S. S. White Dental Mfg. Co. v. Hertzberg* (Tex. Civ. App.), 51 S. W. 355; *Texas Brewing Co. v. Durrum* (Tex. Civ. App.), 44 S. W. 880; *Texas Brewing Co. v. Anderson* (Tex. Civ. App.), 40 S. W. 737; *Texas Brewing Co. v. Meyer* (Tex. Civ. App.), 38 S. W. 263.

⁷ *Pacific Factor Co. v. Adler*, 90 Cal. 110; 25 Am. St. Rep. 102; 27 Pac. 36; *Cummings v. Stone Co.*, 164 N. Y. 401; 79 Am. St. Rep. 655; 52 L. R. A. 262; 58 N. E. 525; *Houck v. Anheuser-Busch Brewing Association*, 88 Tex. 184; 30 S. W. 869.

⁸ *Wilson v. Morse*, 117 Ia. 581; 91 N. W. 823.

¹ *Vulcan Powder Co. v. Powder Co.*, 96 Cal. 510; 31 Am. St. Rep. 242; 31 Pac. 581; *Ford v. Milk-Shippers' Association*, 155 Ill. 166; 27 L. R. A. 298; 39 N. E. 651; *More v. Bennett*, 140 Ill. 69; 33 Am. St. Rep. 216; 15 L. R. A. 361; 29 N. E. 888; *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; *Cummings v. Foss*, 40 Ill. App. 523; *Beechley v. Mulville*, 102 Ia. 602; 63 Am. St. Rep. 479; 70 N. W. 107; 71 N. W. 428; *Straus v. Publishers' Association*, 177 N. Y. 473; 69 N. E. 1107; *Cohen v. Envelope Co.*, 166 N. Y. 292; 59 N. E. 906; *Cummings v. Stone Co.*, 164 N. Y. 401; 79 Am. St. Rep. 655; 52 L. R. A. 262; 58 N. E. 525; *Jackson v. Brick Association*, 53 O. S. 303; 53 Am. St. Rep. 638; 35 L. R. A. 287; 41 N. E. 257; *Nester v. Brewing Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894; 24 L. R. A. 247; 29 Atl. 102; *Houck v. Brewing Association*, 88 Tex. 184; 27 S. W. 692; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690; 15 L. R. A. 598; 19 S. W. 274; *Slaughter v. Coke Co.*, — W. Va., —; 47 S. E. 247.

discriminate in prices between members and non-members, control the production or distribution in that locality of the article in which they deal and provide for fines, expulsion and boycott for breach of such contract are invalid.² Such an association violates the United States anti-trust act of 1890.³ So under statutes which prohibit combinations to fix prices, a contract between insurance companies or their agents for maintaining rates,⁴ or fixing the compensation of their employees,⁵ is invalid, even though such organization masquerades as a social club of insurance agents.⁶ However a contract between a dealer and customer who is a retailer, fixing the price of certain articles has been held valid.⁷ However, a contract between two connecting and non-competing water companies, whereby they fix rates to be charged to the public residing in a given city has been held not to be monopolistic where by the state constitution the municipal corporation possesses the power to regulate water rates.⁸

§438. Pooling arrangements.

(e) Contracts whereby the parties thereto are bound to pay into a common fund or pool a certain amount, proportionate to

² Greer v. Payne, 4 Kan. App. 153; 46 Pac. 190; Ertz v. Exchange Co., 82 Minn. 173; 83 Am. St. Rep. 419; 51 L. R. A. 825; 84 N. W. 743; same case, 79 Minn. 140; 79 Am. St. Rep. 433; 48 L. R. A. 90; 81 N. W. 737; State v. Packing Co., 173 Mo. 356; 96 Am. St. Rep. 515; 73 S. W. 645.

³ United States v. Hopkins, 82 Fed. 529; Montague v. Lowry, 193 U. S. 38; affirming 115 Fed. 27, which affirmed 106 Fed. 38 (following Addyston, etc., Co. v. United States, 175 U. S. 211, and distinguishing Hopkins v. United States, 171 U. S. 578, and Anderson v. United States, 171 U. S. 604, as not involving articles of interstate commerce).

⁴ Beechley v. Mulville, 102 Ia.

602; 63 Am. St. Rep. 479; 70 N. W. 107; 71 N. W. 428; American Fire Ins. Co. v. State, 75 Miss. 24; 22 So. 99. Such combinations are possibly valid at Common Law. Queen Ins. Co. v. State, 86 Tex. 250; 22 L. R. A. 483; 24 S. W. 397.

⁵ Huston v. Reutlinger, 91 Ky. 333; 34 Am. St. Rep. 225; 15 S. W. 867.

⁶ State v. Ins. Co., 152 Mo. 1; 45 L. R. A. 363; 52 S. W. 595.

⁷ Ellman v. Carrington (1901), 2 Ch. 275; Commonwealth v. Grinstead, 111 Ky. 203; 56 L. R. A. 709; 63 S. W. 427; Long v. Towl, 42 Mo. 545; 97 Am. Dec. 355.

⁸ San Diego Water Co. v. Flume Co., 108 Cal. 549; 29 L. R. A. 839; 41 Pac. 495.

their actual output at some fixed time, which common fund is to be divided among them in some fixed proportion, restrain free competition, since when the market price is not far above the cost of production, it will be more profitable to refuse orders than it will be to fill them and pay the required amount into the pool.¹ Railroad pools are often on this objectionable plan.² A modification of this type of contract exists where the parties to the contract, formerly competitors in business, settle among themselves who shall sell goods to do work for parties outside the contract, as by bidding to see who will pay the highest bonus into the pool for doing the work,³ or bidding to see who would do the work for the least money and then adding a certain sum thereto, which is paid by the party for whom the work is done and goes into the pool.⁴ Such modifications are as illegal as the general type of monopoly contract. A contract between the only two newspapers in a county whereby they agree to fix the prices for public printing which by law must be published in a newspaper of the county, and to divide the compensation therefor is invalid.⁵

§439. Trusts.

(f) "An agreement providing for the welding together of all interests engaged in a certain business in one giant combination under the absolute dominion and control of a board of

¹ *Emery v. Candle Co.*, 47 O. S. 320; 21 Am. St. Rep. 819; 24 N. E. 660.

² *United States v. Freight Association*, 166 U. S. 290; *Chicago, etc., Ry. v. Ry.*, 61 Fed. 993; 9 C. C. A. 659; *Cleveland, etc., Ry. v. Closser*, 126 Ind. 348; 22 Am. St. Rep. 593; 9 L. R. A. 754; 26 N. E. 159; *Sayre v. Union*, 1 Duvall (Ky.) 143; 85 Am. Dec. 613; *Texas, etc., Ry. v. Ry.*, 41 La. Ann. 970; 17 Am. St. Rep. 445; 6 So. 888; *Stanton v. Allen*, 5 Denio (N. Y.) 434; 49 Am. Dec. 282; *Hooker v. Vanden-*

water, 4 Den. (N. Y.) 349; 47 Am. Dec. 258.

³ *Addyston Pipe and Steel Co. v. U. S.*, 175 U. S. 211; modifying 85 Fed. 271; 29 C. C. A. 141; 46 L. R. A. 122.

⁴ *Bailey v. Plumbers' Association*, 103 Tenn. 99; 46 L. R. A. 561; 52 S. W. 853; *Milwaukee, etc., Association v. Niezerowski*, 95 Wis. 129; 60 Am. St. Rep. 97; 37 L. R. A. 727; 70 N. W. 166.

⁵ *Pendleton v. Asbury*, — Mo. App. —; 78 S. W. 651.

trustees is void as contrary to public policy."¹ Such contracts are clearly invalid where the legal title to the property of the parties to the contract is transferred to the trustees to manage as one vast enterprise, the equitable interests being retained by the original owners.² If such agreements are made by a corporation or its stockholders, they are void not only as creating a monopoly but as violating the laws concerning the management of corporations.³ Where a new corporation is formed for the purpose of acquiring outright all the property of all the interests engaged in a given line of business or manufacturing the authorities differ as to the validity of contracts for carrying such plan into execution. In some jurisdictions they are held contrary to public policy and unlawful,⁴ while in other jurisdictions the general plan is held lawful, and contracts in aid thereof, if themselves valid, are upheld.⁵ Under the United States' statute of

¹ *Bishop v. Preservers' Co.*, 157 Ill. 284; 48 Am. St. Rep. 317; 41 N. E. 765; quoted with approval in *Harding v. Glucose Co.*, 182 Ill. 551, 617; 74 Am. St. Rep. 189; 55 N. E. 577. To the same effect see *National Harrow Co. v. Quick*, 67 Fed. 130; *Merz Capsule Co. v. Capsule Co.*, 67 Fed. 414; *American Preservers' Trust v. Mfg. Co.*, 46 Fed. 152; *American, etc., Co. v. Klotz*, 44 Fed. 721; *Distilling, etc., Co. v. People*, 156 Ill. 448; 47 Am. St. Rep. 200; 41 N. E. 188; *Ford v. Shippers' Association*, 155 Ill. 166; 27 L. R. A. 298; 39 N. E. 651; *People v. Gas Trust Co.*, 130 Ill. 268; 8 L. R. A. 497; 22 N. E. 798; *National Lead Co. v. Store Co.*, 80 Mo. App. 247.

² *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; *Schubart v. Coke Co.*, 41 Ill. App. 181; *People v. Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843; 2 L. R. A. 33; 24 N. E. 834; *State v. Standard Oil Co.*, 49 O. S. 137; 34 Am. St. Rep. 541; 15 L. R. A. 145; 30

N. E. 279; *Central Ohio Salt Co. v. Guthrie*, 35 O. S. 668; *Morris Run Coal Co. v. Coal Co.*, 68 Pa. St. 173.

³ See § 408.

⁴ *Merz Capsule Co. v. Capsule Co.*, 67 Fed. 414; *Cravens v. Carter-Crume Co.*, 92 Fed. 479; 34 C. C. A. 479; *Harding v. Glucose Co.*, 182 Ill. 551; 74 Am. St. Rep. 189; 55 N. E. 577; *Distilling, etc., Co. v. People*, 156 Ill. 448; 47 Am. St. Rep. 200; 41 N. E. 188; *Richardson v. Buhl*, 77 Mich. 632; 6 L. R. A. 457; 43 N. W. 1102. The question "whether a trust is created where a majority of stockholders consolidate their interests by conveying all their property to a corporation organized for the purpose of taking their property" is answered in the affirmative in *Harding v. Glucose Co.*, 182 Ill. 551, 615; 74 Am. St. Rep. 189; 55 N. E. 577.

⁵ *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; partly affirming and partly re-

July 2, 1903, it has been held unlawful to form a holding corporation under the laws of a state which permits such corporations for the purpose of acquiring as custodian a majority of the stock of two competing railways in other states, and thus to control such railways.⁶

§440. Contracts for union labor exclusively.

(g) Contracts requiring employers to hire union labor only, are invalid.¹ This is especially true where the employer is a public corporation and should let contracts on competitive bidding.² Even if the statute on the subject of public contracts does not require the letting of the contract to the lowest bidder, the union label cannot be specified on bids for public printing.³ An association formed to exclude from employment all except its own members has been held to be illegal, and the courts will not give affirmative relief to compel the continuation of such association or of membership therein.⁴

§441. Contracts held not tending to monopoly.

Contracts made in adjustment of the mutual rights of the parties thereto and not designed to create a monopoly are often

versing 56 N. J. Eq. 680; 39 Atl. 923. See *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784; 23 L. R. A. 639; 28 Atl. 973.

⁶ *Northern Securities Co. v. United States*, 193 U. S. 197; affirming 120 Fed. 721.

¹ *Fabacher v. Bryant*, 46 La. Ann. 820; 15 So. 181; *Curran v. Galen*, 152 N. Y. 33; 57 Am. St. Rep. 496; 37 L. R. A. 802; 46 N. E. 297. So a provision in a by-law of an association to deal only with those who patronize them exclusively is unreasonable and invalid. *Gatzow v. Buening*, 106 Wis. 1; 80 Am. St. Rep. 17; 49 L. R. A. 475; 81 N. W. 1003. (The action arose out of a withdrawal of horses and carriages

from a funeral by order of a union.)

² *Holden v. Alton*, 179 Ill. 318; 53 N. E. 556; *Adams v. Brennan*, 177 Ill. 194; *sub nomine*, *Adams v. Brennan*, 69 Am. St. Rep. 222; 42 L. R. A. 718; 52 N. E. 314.

³ *Atlanta v. Stein*, 111 Ga. 789; 51 L. R. A. 335; 36 S. E. 932; *Adams v. Brennan*, 177 Ill. 194; *sub nomine*, *Adams v. Brennan*, 69 Am. St. Rep. 222; 42 L. R. A. 718; 52 N. E. 314; *Paterson Chronicle Co. v. Paterson*, 66 N. J. L. 129; 48 Atl. 589; *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495; 71 S. W. 815.

⁴ *O'Brien v. Musical, etc., Union*, 64 N. J. Eq. 525; 54 Atl. 150.

held valid though they may limit competition. A consolidation of competitors, if made as part of a *bona fide* compromise of litigation over disputed rights, is not invalid.¹ An agreement between the merchants of a town to close at a fixed time,² or for protection against dishonest customers³ is valid. A contract to pay the owner of a grist-mill a certain sum per day for each day that the water is obstructed is valid where intended to adjust damages and not to stifle competition.⁴ A contract whereby a wholesale dealer, to increase his trade, promises to pay a rebate to such customers as would buy of him exclusively for a certain time, is held valid.⁵ Such a contract is valid where the price at which vendee is to retail goods is fixed, vendee being free to change his scale of prices or to buy elsewhere if willing to lose the rebate.⁶ At any rate the vendee cannot recover the rebate after buying goods elsewhere.⁷ So if in the competition of business, as merely incidental thereto, certain business is placed at a relative disadvantage, no monopoly can be said to exist.⁸ So a contract whereby A agrees to sell to B at a lower price than C has sold, to enable B to compete successfully is valid even if C is a monopoly.⁹

§442. Exclusive privileges in private property.

Furthermore the owner of private property of which others have no right to make use without his consent, may give exclusive rights in such property, and his agreement to that effect will not be invalid as creating a monopoly.¹ Thus the owner

¹ Meredith v. Iron Co., 56 N. J. Eq. 454; 41 Atl. 1116; affirming without opinion 55 N. J. Eq. 211; 37 Atl. 539.

² Stovall v. McCutchen, 107 Ky. 577; 47 L. R. A. 287; 54 S. W. 969.

³ Delz v. Winfree, 6 Tex. Civ. App. 11; 25 S. W. 50.

⁴ McIntosh v. Rankin, 134 Mo. 340; 35 S. W. 995. (It did not appear that the mill was a public one.)

⁵ In re Greene, 52 Fed. 104; In re Terrell, 51 Fed. 213; National Distilling Co. v. Importing Co., 86 Wis. 352; 39 Am. St. Rep. 902; 56 N. W. 864.

⁶ In re Corning, 51 Fed. 205.

⁷ Olmstead v. Distilling, etc., Co., 77 Fed. 265.

⁸ State v. Warehouse Co., 109 La. 64; 33 So. 81.

⁹ Matthews Glass Co. v. Burk, — Ind. —; 70 N. E. 371.

¹ Sommers v. Myers, 69 N. J. L.

of a pleasure resort may contract for exclusive privileges thereat.² A cemetery association may give the exclusive privilege of opening graves in such cemetery to its superintendent.³

§443. Nature of article affected by monopoly.

Some courts have endeavored to distinguish between articles of prime necessity and those not of prime necessity, holding that monopoly contracts are invalid if the article affected is one of prime necessity; otherwise not. Such a rule "only furnishes another opportunity for a court to give effect to the varying economical opinions of its different members,"¹ and it is often impossible to determine whether the court, in holding a monopoly contract invalid, does so because the article in question is one of prime necessity or because they hold such contracts invalid without reference to the nature of the article. Among the articles which have been treated as articles of prime necessity under this rule are live-stock,² flour,³ grain,⁴ bags for transporting grain,⁵ butter,⁶ milk,⁷ preserves,⁸ ice,⁹ oil,¹⁰ gas,¹¹ can-

24; 54 Atl. 812; Roanoke Cemetery Co. v. Goodwin, 101 Va. 605; 44 S. E. 769.

² *Sommers v. Myers*, 69 N. J. L. 24; 54 Atl. 812.

³ *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605; 44 S. E. 769.

¹ *United States v. Steel Co.*, 85 Fed. 271; 29 C. C. A. 141; 46 L. R. A. 122.

² *People v. Live Stock Exchange*, 170 Ill. 556; 62 Am. St. Rep. 404; 39 L. R. A. 373; 48 N. E. 1062; *Judd v. Harrington*, 139 N. Y. 105; 34 N. E. 790.

³ *Culp v. Love*, 127 N. Car. 457; 37 S. E. 476.

⁴ *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; *Cummings v. Foss*, 40 Ill. App. 523.

⁵ *Pacific Factor Co. v. Adler*, 90 Cal. 110; 25 Am. St. Rep. 102; 27 Pac. 36.

⁶ *Chapin v. Brown*, 83 Ia. 156;

32 Am. St. Rep. 297; 12 L. R. A. 428; 48 N. W. 1074.

⁷ *Ford v. Milk-Shippers' Association*, 155 Ill. 166; 27 L. R. A. 298; 39 N. E. 651; *People v. Milk Exchange*, 145 N. Y. 267; 45 Am. St. Rep. 609; 27 L. R. A. 437; 39 N. E. 1062.

⁸ *American Preservers' Trust v. Mfg. Co.*, 46 Fed. 152; *Bishop v. Preservers' Co.*, 157 Ill. 284; 48 Am. St. Rep. 317; 41 N. E. 765.

⁹ *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110; 85 Am. St. Rep. 125; 50 L. R. A. 175; 28 So. 669.

¹⁰ *Consumers' Oil Co. v. Nunne-maker*, 142 Ind. 560; 51 Am. St. Rep. 193; 41 N. E. 1048; *State v. Oil Co.*, 49 O. S. 137; 34 Am. St. Rep. 541; 15 L. R. A. 145; 30 N. E. 279; *Texas, etc., Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690; 15 L. R. A. 598; 19 S. W. 274.

¹¹ *People v. Trust Co.*, 130 Ill.

dles,¹² coal,¹³ matches,¹⁴ lumber,¹⁵ brick,¹⁶ sewer and gas pipe,¹⁷ gelatine capsules,¹⁸ rulers,¹⁹ bed-quilts²⁰ and a fire alarm and police telegraph.²¹ So the services of plumbers,²² masons²³ and stenographers²⁴ are treated as of prime necessity. A contract between a newspaper and a syndicate formed to collect and forward news, whereby the newspaper is to use only news forwarded by that syndicate, has been held valid in New York²⁵ and invalid in Illinois.²⁶ In the absence of a contract to furnish news, the syndicate cannot be compelled so to do.²⁷ Missouri anti-trust laws apply to property, not to labor, and hence have no application to a news syndicate.²⁸ On the other hand, where

268; 17 Am. St. Rep. 319; 8 L. R. A. 497; 22 N. E. 798; Chicago, etc., Co. v. Gas Lighting Co., 121 Ill. 530; 2 Am. St. Rep. 124; 13 N. E. 169; Schubart v. Coke Co., 41 Ill. App. 181.

¹² Emery v. Candle Co., 47 O. S. 320; 21 Am. St. Rep. 819; 24 N. E. 660.

¹³ Arnot v. Coal Co., 68 N. Y. 558; 23 Am. Rep. 190; Morris Run Coal Co. v. Coal Co., 68 Pa. St. 173; 8 Am. Rep. 159.

¹⁴ Richardson v. Buhl, 77 Mich. 632; 6 L. R. A. 457; 43 N. W. 1102.

¹⁵ Santa Clara, etc., Co. v. Hayes, 76 Cal. 387; 9 Am. St. Rep. 211; 18 Pac. 391.

¹⁶ Jackson v. Brick Association, 53 O. S. 303; 53 Am. St. Rep. 637; 35 L. R. A. 287; 41 N. E. 257.

¹⁷ Addyston Pipe and Steel Co. v. United States, 175 U. S. 211; modifying 85 Fed. 271; 46 L. R. A. 122; 29 C. C. A. 141.

¹⁸ Merz Capsule Co. v. Capsule Co., 67 Fed. 414.

¹⁹ Luffkin Rule Co. v. Fringeli, 57 O. S. 596; 63 Am. St. Rep. 736; 41 L. R. A. 185; 49 N. E. 1030.

²⁰ Bishop v. Palmer, 146 Mass.

469; 4 Am. St. Rep. 339; 16 N. E. 299.

²¹ Gamewell, etc., Co. v. Crane, 160 Mass. 50; 39 Am. St. Rep. 458; 22 L. R. A. 673; 35 N. E. 98.

²² Bailey v. Plumbers' Association, 103 Tenn. 99; 46 L. R. A. 561; 52 S. W. 853.

²³ Milwaukee, etc., Association v. Niezerowski, 95 Wis. 129; 60 Am. St. Rep. 97; 37 L. R. A. 127; 70 N. W. 166.

²⁴ More v. Bennett, 140 Ill. 69; 33 Am. St. Rep. 216; 15 L. R. A. 361; 29 N. E. 888.

²⁵ Matthews v. Associated Press, 136 N. Y. 333; 32 Am. St. Rep. 741; 32 N. E. 981.

²⁶ Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438; 75 Am. St. Rep. 184; 48 L. R. A. 568; 56 N. E. 822.

²⁷ Iron Age Publishing Co. v. Telegraph Co., 83 Ala. 498; 3 Am. St. Rep. 758; 3 So. 449; State v. Associated Press, 159 Mo. 410; 81 Am. St. Rep. 368; 51 L. R. A. 151; 60 S. W. 91.

²⁸ State v. Associated Press. 159 Mo. 410; 81 Am. St. Rep. 338; 51 L. R. A. 151; 60 S. W. 91

this doctrine obtains, cigarettes,²⁹ window-shade rollers,³⁰ glue³¹ and sanitary pottery³² are held not to be articles of prime necessity, and hence liable to be the subjects of valid monopoly contracts. The better rule seems to be that no monopoly contract is valid in any article of merchandise, at least if in general use, whether of prime necessity or not. Under this rule, blue-stone for curbing,³³ envelopes,³⁴ dynamite,³⁵ glucose,³⁶ beer,³⁷ and distillery products³⁸ are articles of such general use that monopoly contracts therein are not permitted. Where an anti-trust law forbids combinations in general, it makes no difference whether the article in question is one of prime necessity or not.³⁹ But if the statute forbids monopolies of property, it has no application to monopolies of services and labor.⁴⁰

§444. Trade secrets.

There are certain classes of contracts which stand on a different footing from others with reference to monopolies and restraint of trade. These are contracts concerning trade secrets,

²⁹ *Bonsack Machine Co. v. Smith*, 70 Fed. 383.

³⁰ *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; 9 N. E. 629.

³¹ *Gloucester, etc., Co. v. Cement Co.*, 154 Mass. 92; 26 Am. St. Rep. 214; 12 L. R. A. 563; 27 N. E. 1005.

³² *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; affirming in part and reversing in part 56 N. J. Eq. 680; 39 Atl. 923.

³³ *Cummings v. Stone Co.*, 164 N. Y. 401; 79 Am. St. Rep. 655; 52 L. R. A. 262; 58 N. E. 525.

³⁴ *Cohen v. Envelope Co.*, 166 N. Y. 292; 59 N. E. 906.

³⁵ *Vulcan Powder Co. v. Powder Co.*, 96 Cal. 510; 31 Am. St. Rep. 242; 31 Pac. 581.

³⁶ *Harding v. Glucose Co.*, 182 Ill. 551; 74 Am. St. Rep. 189; 55 N. E. 577.

³⁷ *Nester v. Brewing Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894; 24 L. R. A. 247; 29 Atl. 102; *Houck v. Anheuser-Busch Brewing Association*, 88 Tex. 184; 30 S. W. 869; affirming (Tex. Civ. App.), 27 S. W. 692.

³⁸ *Distilling, etc., Co. v. People*, 156 Ill. 448; 47 Am. St. Rep. 200; 41 N. E. 188.

³⁹ *More v. Bennett*, 140 Ill. 69; 33 Am. St. Rep. 216; 15 L. R. A. 361; 29 N. E. 888; *Beechley v. Mulville*, 102 Ia. 602; 63 Am. St. Rep. 479; 70 N. W. 107; 71 N. W. 428; *American Fire Ins. Co. v. State*, 75 Miss. 24; 22 So. 99; *Pasteur Vaccine Co. v. Burkey*, 22 Tex. Civ. App. 232; 54 S. W. 804; *Texas Brewing Co. v. Templeman*, 90 Tex. 277; 38 S. W. 27; affirming 35 S. W. 935.

⁴⁰ *State v. Associated Press*, 159 Mo. 410; 81 Am. St. Rep. 368; 51 L. R. A. 151; 60 S. W. 91.

public monopolies, patents and contracts in violation of a public duty.

A trade secret is recognized by the law as property,¹ and a promise by one to whom such secrets are imparted restraining him from divulging or using them is valid though unlimited as to time and space;² or a contract fixing the area within which the secret can be used, and the price at which the article produced thereby can be sold is valid.³ So a contract with one to be employed to improve the machinery of another, providing that the employer shall have the benefit of all patents for inventions made by such employee during his term of employment and that if any inventions are not patented, the employee will keep such information a secret forever, has been held to be valid.⁴ Such contract is neither unconscionable nor contrary to public policy.

§445. Monopoly contracts concerning patents.

A patent is a monopoly in the use, manufacture, and sale, of the patented article.¹ Its value consists solely in its character as a monopoly, and as it is created by Act of Congress under authority of an express provision of the Constitution of the

¹ *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149; 68 Am. St. Rep. 469; 38 L. R. A. 200; 72 N. W. 140; *Tode v. Gross*, 127 N. Y. 480; 24 Am. St. Rep. 475; 13 L. R. A. 652; 28 N. E. 469.

² *Leather Cloth Co. v. Lorisont*, L. R. 9 Eq. 345; *Hagg v. Darley*, 47 L. J. Ch. n. s. 567; *C. F. Simmons Medicine Co. v. Simmons*, 81 Fed. 163; *Peabody v. Norfolk*, 98 Mass. 452; 96 Am. Dec. 664; *Vickery v. Welch*, 19 Pick. (Mass.) 523; *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149; 68 Am. St. Rep. 469; 38 L. R. A. 200; 72 N. W. 140; *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6; *Tode v. Gross*, 127 N. Y. 480; 24 Am. St.

Rep. 475; 13 L. R. A. 652; 28 N. E. 469; *Hard v. Seeley*, 47 Barb. 428.

³ *Fowle v. Park*, 131 U. S. 88; *Garst v. Harris*, 177 Mass. 72; 58 N. E. 174.

⁴ *Thibodeau v. Hildreth*, 124 Fed. 892; 63 L. R. A. 480; affirming 117 Fed. 146.

¹ "A patent right is essentially monopolistic. To contracts granting the exclusive right to use or vend patented articles the general rule (forbidding contracts in restraint of trade) does not apply, however extensive as to territory in their scope, and however unlimited as to time." *Bonsack Machine Co. v. Smith*, 70 Fed. 383, 386.

United States, its validity when in compliance with Federal Statutes cannot be questioned. The owner of a patent may, therefore, restrict its use as he pleases, both as to territory and time, as long as the patent remains in force, and such contracts are valid.² He may sell his patent and agree not to compete with his vendee or to infringe such patent,³ even under an anti-trust statute.⁴ He may restrict the area of sale of the patented article, forbidding its sale entirely in the United States.⁵ But if the owners of distinct patents combine to prevent competition in business, and to control the price of the patented articles, such combinations and all contracts for such purposes are as invalid as if the articles were not patented.⁶ A voluntary association of manufacturers of proprietary medicines to sell at certain fixed prices, and to make rebates only to such customers as they could depend upon to maintain the selling price, has been held valid.⁷ The owner of a trade-mark may

² Printing, etc., Co. v. Sampson, L. R. 19 Eq. 462; Bement v. Harrow Co., 186 U. S. 70; Adams v. Burke, 17 Wall. (U. S.) 453; Mitchell v. Hawley, 16 Wall. (U. S.) 544; Kinsman v. Parkhurst, 18 How. (U. S.) 289; Gamewell, etc., Co. v. Brooklyn, 14 Fed. 255; Hulse v. Machine Co., 65 Fed. 864; 13 C. C. A. 180; Bowling v. Taylor, 40 Fed. 404; Whitson v. Phonograph Co., 18 App. D. C. 565; Squires v. Mfg. Co., 182 Mass. 137; 65 N. E. 32; Standard Fireproofing Co. v. Fireproofing Co., 177 Mo. 559; 76 S. W. 1008; Good v. Doland, 121 N. Y. 1; 24 N. E. 15.

³ Morse, etc., Co. v. Morse, 103 Mass. 73; 4 Am. Rep. 513.

⁴ Clark v. Fence Co., 22 Tex. Civ. App. 41; 54 S. W. 392.

⁵ Dickerson v. Mathewson, 57 Fed. 524.

⁶ National Harrow Co. v. Hench, 83 Fed. 36; 27 C. C. A. 349; 55 U. S. App. 53; 39 L. R. A. 299;

same case, 76 Fed. 667; National Harrow Co. v. Quick, 67 Fed. 130; Vulcan Powder Co. v. Powder Co., 96 Cal. 510; 31 Am. St. Rep. 242; 31 Pac. 581; Gamewell, etc., Co. v. Crane, 160 Mass. 50; 39 Am. St. Rep. 458; 22 L. R. A. 673; 35 N. E. 98. This, of course, involves the question elsewhere discussed of whether the contract in question would be valid if the article were not patented. See § 432 *et seq.* There seems to be some authority holding that monopoly contracts concerning patented articles are always valid. Columbia Wire Co. v. Wire Co., 71 Fed. 302; American Soda-Fountain Co. v. Green, 69 Fed. 333; Edison, etc., Co. v. Electric Co., 53 Fed. 592; 3 C. C. A. 605; Strait v. Harrow Co., 51 Fed. 819.

⁷ John D. Park & Sons Co. v. Druggists' Association, 175 N. Y. 1; 96 Am. St. Rep. 578; 62 L. R. A. 632; 67 N. E. 136.

sell the same and agree not to make use thereof without restriction as to time or area.⁸ A contract which tends to create a monopoly in the sale of books, some copyrighted and some not copyrighted, is illegal, even if it would have been valid had it been limited to copyrighted books.⁹

§446. Monopolies of a public nature.

Public corporations may be and often are authorized to grant monopolies in services of a public nature. Thus under the Police Power monopolies may be granted, as for the collection of garbage,¹ for conducting the business of slaughtering within city limits,² for the sale of school-books throughout the state, to be let to the lowest bidder³ or for the sale of intoxicating liquor.⁴ So monopolies may be created in matters not of public right, since only the government can permit such business at all, and it can therefore give such permission to such persons and on such terms and restrictions as it pleases. Thus turnpikes,⁵ toll-bridges,⁶ water-works⁷ and the like may be made monopolies.

⁸ *Brewer v. Lamar*, 69 Ga. 656; 47 Am. Rep. 766.

⁹ *Straus v. Publishers' Association*, 177 N. Y. 473; 69 N. E. 1107.

¹ *National Fertilizing Co. v. Lambert*, 48 Fed. 458; *Iler v. Ross*, 64 Neb. 710; 57 L. R. A. 896; 90 N. W. 869; *Coombs v. MacDonald*, 43 Neb. 632; 62 N. W. 41. But a municipal corporation cannot give a monopoly to one person to go up the property of private owners and haul therefrom at their expense ashes, manure and the like, not *per se* nuisances. *Iler v. Ross*, 64 Neb. 710; 57 L. R. A. 896; 90 N. W. 869.

² *Slaughter House Cases*, 16 Wall. (U. S.) 36; *Butchers', etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746.

³ *Leeper v. State*, 103 Tenn. 500; 48 L. R. A. 167; 53 S. W. 962.

⁴ *Lowenstein v. Evans*, 69 Fed. 908; *Deal v. Singletary*, 105 Ga. 466; 30 S. E. 765; *Plumb v. Christie*, 103 Ga. 686; 30 S. E. 759; *Guy v. Cumberland County*, 122 N. Car. 471; 29 S. E. 771.

⁵ *Ratcliffe v. Turnpike Co.*, 69 Ark. 264; 63 S. W. 70.

⁶ *Binghamton Bridge*, 3 Wall. (U. S.) 51; *Catawba Toll Bridge Co. v. Flowers*, 110 N. Car. 381; 14 S. E. 918.

⁷ *St. Tammany Waterworks Co. v. Waterworks Co.*, 120 U. S. 64; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674. Under the Texas constitution, which forbids monopolies, the state courts hold that no exclusive franchise can be granted to a waterworks company. *Edwards County v. Jennings*, 89 Tex. 618; 35 S. W. 1053; *Brenham v. Water Co.*, 67 Tex. 542; 4 S. W.

The power which assumes to create the monopoly must be authorized so to do in order to create a valid monopoly. A municipality cannot create a monopoly without authority from the legislature,⁸ and the legislature may be prevented from authorizing a monopoly by constitutional provisions.⁹

§447. Contracts in violation of public duty.

While not strictly a form of monopoly contract, a contract by which a corporation which owes duties to the public agrees not to perform such duties, is generally a part of a monopoly scheme, and may be considered in connection with monopoly contracts.

If a corporation owes certain duties to the public, a contract whereby it agrees not to perform them is not only *ultra vires*,¹ but is also illegal, without reference to whether the restraint is reasonable as to time or space.² Thus contracts which tend to disable a common carrier from performing its duties to the public at reasonable rates are invalid; as contracts to maintain certain rates;³ even if the rates actually established are reasonable and the combination is made to prevent ruinous competition.⁴ If the carrier discharges its duty to the public it may

143. The Federal courts take the opposite view. *Bartholomew v. Austin*, 85 Fed. 359; 29 C. C. A. 568; and so do the Tennessee courts, with reference to a similar clause in the constitution of Tennessee. *Memphis v. Water Co.*, 5 Heisk. (Tenn.) 495.

⁸ *Capital City, etc., Co. v. Tallahassee*, 42 Fla. 462; 28 So. 810.

⁹ *Pereria v. Wallace*, 129 Cal. 397; 62 Pac. 61.

¹ See § 1082, *et seq.*

² *Pearsall v. Ry.*, 161 U. S. 646; reversing 73 Fed. 933; *Chicago, etc., Ry. Co. v. Ry. Co.*, 61 Fed. 993; 9 C. C. A. 659; *People v. Gas Trust Co.*, 130 Ill. 268; 8 L. R. A. 497; 22 N. E. 798; *Chicago, etc., Co. v. Coke Co.*, 121 Ill. 530; 2 Am. St.

Rep. 124; 13 N. E. 169; *Cumberland, etc., Co. v. R. R.*, 51 La. Ann. 29; 72 Am. St. Rep. 442; 24 So. 803.

³ *United States v. Traffic Association*, 171 U. S. 505; *United States v. Freight Association*, 166 U. S. 290; *Pearsall v. Ry.*, 161 U. S. 646; reversing 73 Fed. 933; *Chicago, etc., Ry. Co. v. Ry. Co.*, 61 Fed. 993; 9 C. C. A. 659; *Texas, etc., Ry. v. Ry.*, 41 La. Ann. 970; 17 Am. St. Rep. 445; 6 So. 888; *Stanton v. Allen*, 5 Denio 434; 49 Am. Dec. 282; *Hooker v. Vandewater*, 4 Denio 349; 47 Am. Dec. 258.

⁴ *United States v. Freight Association*, 166 U. S. 290. The question of the effect of the combination's actually fixing reasonable

employ such means as it pleases. Thus it may agree to use one make of sleeping-cars and no other for fifteen years,⁵ or it may agree with a ferry company, connecting and not competing with it, to give all its ferrying business to such ferry company.⁶

So contracts whereby the parties limit the services which they will render to third parties, are especially invalid where the promisor is a corporation charged with duties to the public which it agrees not to perform within certain areas or as to certain customers.⁷ Thus a railroad company cannot give a monopoly of the express business,⁸ nor acquire a controlling interest in a competing railroad.⁹ Contracts between competing street railway companies by which they apportion between them the territory of the municipality from which they have their franchise, agreeing not to compete therein, as by agreeing not to cross each other's tracks except in a specified way which is not allowed by law,¹⁰ or by agreeing not to compete in obtaining a franchise, but to divide the profits thereof,¹¹ are invalid. A contract by which a railroad agrees with a telegraph company not to haul material for any other telegraph company except on

rates was left open in *Cleveland, etc., Ry. v. Closser*, 126 Ind. 348; 22 Am. St. Rep. 593; 9 L. R. A. 754; 26 N. E. 159; as it was there held that at any rate such a combination was *prima facie* illegal and that it was not shown affirmatively that the rate fixed was reasonable. As steamboats are common carriers a contract between the owners of competing steamboat lines to maintain rates is invalid. *Anderson v. Jett*, 89 Ky. 375; 6 L. R. A. 390; 12 S. W. 670.

⁵ *Chicago, etc., Ry. v. Car Co.*, 139 U. S. 79. While the point was not expressly decided such a contract was assumed to be invalid in *Erie Ry. Co. v. Express Co.*, 35 N. J. L. 240.

⁶ *Wiggins Ferry Co. v. R. R.*, 73 Mo. 389; 39 Am. Rep. 519.

⁷ *Gibbs v. Gas Co.*, 130 U. S. 396;

Chicago, etc., Co. v. Coke Co., 121 Ill. 530; 2 Am. St. Rep. 124; 13 N. E. 169; *State v. Oil Co.*, 153 Ind. 483; 74 Am. St. Rep. 314; 53 L. R. A. 413; 53 N. E. 1089; *Commercial Union Telegraph Co. v. Telephone Co.*, 61 Vt. 241; 15 Am. St. Rep. 893; 5 L. R. A. 161; 17 Atl. 1071 (see cases there cited).

⁸ *New England Express Co. v. R. R.*, 57 Me. 188; 2 Am. Rep. 31.

⁹ *Central R. R. v. Collins*, 40 Ga. 582.

¹⁰ *South Chicago City Ry. v. Ry.*, 171 Ill. 391; 49 N. E. 576; affirming 70 Ill. App. 254.

¹¹ *Hyer v. Traction Co.*, 80 Fed. 839. (Citing *Pingry v. Washburn*, 1 Aiken 264; *Hunter v. Nolf*, 71 Pa. 282; *Smith v. Applegate*, 23 N. J. L. 352; *Gibbs v. Smith*, 115 Mass. 592; *Atcheson v. Mallon*, 43 N. Y. 147; 3 Am. Rep. 678.)

terms so burdensome as to be practically prohibitive,¹² or to allow no other telegraph company to use the right of way of the railroad,¹³ is invalid. A company which has a franchise for furnishing gas to the public, with the right to lay pipes in the streets, cannot agree to renounce its obligation to furnish gas.¹⁴ This includes a purchase by one corporation of the stock in all the competing gas companies in a city,¹⁵ as well as a contract between two competing gas companies, fixing prices and agreeing not to furnish gas to the other's customers.¹⁶ Telegraph and telephone companies are also quasi-public corporations, which may be and often are endowed with the power of eminent domain. Contracts whereby they agree not to perform their duties toward the public or some part thereof are invalid.¹⁷

¹² *Cumberland, etc., Co. v. R. R.*, 51 La. Ann. 29; 72 Am. St. Rep. 442; 24 So. 803.

¹³ *Baltimore, etc., Co. v. Telegraph Co.*, 24 Fed. 319; *Western Union Telegraph Co. v. Ry. Co.*, 11 Fed. 1; *Western Union Telegraph Co. v. Telegraph Co.*, 65 Ga. 160; 38 Am. Rep. 781; *Union Trust Co. v. R. R.*, 8 N. Mex. 327; 43 Pac. 701. But a contract whereby a railroad company in effect agrees not to allow another telegraph company to use the poles used by the first telegraph company has been held valid. "So long as any other company is left free to erect another line of poles, we see no just ground of complaint on the score of monopoly or the repression of competition." *Western*

Union Telegraph Co. v. R. R., 86 Ill. 246, 252; 29 Am. Rep. 28.

¹⁴ *Gibbs v. Gas Co.*, 130 U. S. 396; *People v. Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; 8 L. R. R. 497; 22 N. E. 798; *Chicago, etc., Co. v. Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; 13 N. E. 169.

¹⁵ *People v. Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; 8 L. R. A. 497; 22 N. E. 798.

¹⁶ *State v. Oil Co.*, 153 Ind. 483; 74 Am. St. Rep. 314; 53 L. R. A. 413; 53 N. E. 1089.

¹⁷ *State v. Telephone Co.*, 47 Fed. 633; *Commercial Union Telegraph Co. v. Telephone Co.*, 61 Vt. 241; 15 Am. St. Rep. 893; 5 L. R. A. 161; 17 Atl. 1071.

CHAPTER XXVI.

WAGER CONTRACTS.

§448. General nature of wager contracts.

A wager contract is one in which the parties arbitrarily select some event, and create a financial interest in its outcome or ascertainment by agreeing that in case of the one result thereof, A will give to B a thing of value, while in the other event B will give A something of value.¹ As the element of risk is present in all executory transactions and many executed ones, risk alone does not make the contract a wager.² A sale of an article in excess of its real value payable on the happening or

¹ "Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from the other is gambling." *Brua's Appeal*, 55 Pa. St. 294, 298, quoted in *Creston First National Bank v. Carroll*, 80 Ia. 11, 14; 8 L. R. A. 275; 45 N. W. 304. "A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing in contributing to which all agreeing take part shall become the property of one or some of them on the happening in the future of an event at the present uncertain; and the stake is the money or thing thus put upon the chance." *Harris v. White*, 81 N. Y. 532, 539; quoted in *Hankins v. Ottinger*, 115 Cal. 454, 458; 40 L. R. A. 76; 47 Pac. 254. See also *Fareira v. Gabell*, 89 Pa. St. 89.

² Examples of contracts which are not wagers. *Hanna v. Ingram*, 93 Ala. 482; 9 So. 621. (A sale of an interest in an option on land, the assignee to receive his share of the profits on a resale.) *Vigel v. Gattton*, 61 Ill. App. 98. (A resale at a loss of a lot of hogs already shipped.) *Connell v. Hudson*, 53 Mo. App. 418. (A resale to vendor of a steer accidentally left in his possession, on consideration that he pay the vendees whatever loss they may suffer on their venture.) *Clyde v. Mohn*, 4 Onio C. C. 537. (A sold land to B for \$700 in cash and \$2,000 payable in fourteen years, with annual interest; but if A should die before the end of fourteen years B to be released from paying the \$2,000.) *Tontine insurance is not gambling*. *Rothschild v. Ins. Co.*, 97 Ill. App. 547.

determination of a certain event arbitrarily selected by the parties is a wager.³ A guaranty of the market price of cattle by A, under an agreement that A shall pay to B any deficiency under the price fixed and shall receive from B any excess over such price is a wager.⁴ So where A allows B and C to use A's billiard table to be paid for by the winner, the transaction is a wager.⁵ However, if the event is one which affects the value of the thing sold, as that the horse sold should trot a mile in a specified time,⁶ or should win a race,⁷ it is not a wager. A guaranty by the vendor of stock that it will bring a certain price in two years, with a promise to buy it back then at that price if vendee then "holds such stock and so requests," is not a wager.⁸ So a contract for the sale of the produce of certain orange trees for two years in advance possesses many elements of uncertainty but is not a wager.⁹ The essential feature of wager contracts is that the party who loses receives nothing in possession and has not even the promise of anything in return for his loss. Wager contracts, then, really lack the element of consideration,¹⁰ though few courts have ever treated them on that theory. This last proposition in turn needs some explanation. It is possible for the parties to a wager to stake not the entire value of a certain thing but a fraction of its value.¹¹ With a bet of this sort it is often hard to see that there is no consideration, but there is none for whatever the parties have

³ *Gordon v. Casey*, 23 Ill. 70; *Bevil v. Hix*, 12 B. Mon. (Ky.) 140; *Harper v. Crain*, 36 O. S. 338; 38 Am. Rep. 589; *Lucas v. Harper*, 24 O. S. 328. As a sale of hogs at double the market price, payable if Greeley was elected President; *Lucas v. Harper*, 24 O. S. 328.

⁴ *First National Bank v. Carroll*, 80 Ia. 11; 8 L. R. A. 275; 45 N. W. 304.

⁵ *Murphy v. Rogers*, 151 Mass. 118; 24 N. E. 35. *Contra*, *Steuer v. Cigar Co.*, 17 Ohio C. C. 82; 9 Ohio C. D. 456.

⁶ *Whitehead v. Burgess*, 61 N. J. L. 75; 38 Atl. 802.

⁷ *Treacy v. Chinn*, 79 Mo. App. 648.

⁸ *Maurer v. King*, 127 Cal. 114; 59 Pac. 290. Similar cases are: *Wolf v. Bank*, 178 Ill. 85; 52 N. E. 896; reversing 77 Ill. App. 325; *Plumb v. Campbell*, 129 Ill. 101; 18 N. E. 790; *Loeb v. Stern*, 198 Ill. 371; 64 N. E. 1043.

⁹ *Losecco v. Gregory*, 108 La. 648; 32 So. 985.

¹⁰ *Bishop on Contracts* (enlarged edition), § 532.

¹¹ See § 452.

agreed to stake on the event. If any part of the value is to be won or lost on the extrinsic event the contract is a wager.

§449. History of the law of wager contracts.

If the courts had taken the position at the outset that gambling or wager contracts lacked consideration, much trouble might have been spared. Ordinary wagers could have been treated as merely void. As it was, the English courts committed themselves to the doctrine that such contracts were valid, if they did not tend to breach of the peace, or to injure third persons or the government.¹ Their desire to escape from this doctrine without overruling it, led to the counter doctrine that certain classes of wagers were not actionable on special grounds of public policy, such as wagers which might cause annoyance to third persons,² or might injure the government,³ or that vague and elastic class known as wagers contrary to public policy.⁴ In the United States, while some courts at first upheld the validity of wager contracts in adherence to English precedent,⁵ others refused to do so; and with the spread of the latter doctrine and the enactment of statutes making gambling and wager contracts void or illegal it may be said as a general proposition that gambling contracts are either void or illegal everywhere, in the United States and in England.⁶ The legislature has power to declare wagers and gambling illegal, and may make it unlawful and criminal to bet on a race in another state.⁷

¹ *Jones v. Randall*, 1 Cowp. 37; *Good v. Elliott*, 3 T. R. 693.

² *Da Costa v. Jones*, 2 Cowp. 729 (a wager on the sex of a third person).

³ *Atherfold v. Beard*, 2 T. R. 610.

⁴ *Hartley v. Rice*, 10 East. 22.

⁵ *Gridley v. Dorn*, 57 Cal. 78; 40 Am. Rep. 110 (obiter); *Beadles v. Bless*, 27 Ill. 320; 81 Am. Dec. 231; *Bunn v. Riker*, 4 Johns. (N. Y.) 426; 4 Am. Dec. 292 (obiter). *Eldred v. Malloy*, 2 Colo. 320; *Love v. Harvey*, 114 Mass. 80; *Ap-*

pleton v. Maxwell, 10 N. M. 748; 55 L. R. A. 93; 65 Pac. 158; *Bernard v. Taylor*, 23 Or. 416; 37 Am. St. Rep. 693; 18 L. R. A. 859; 31 Pac. 968.

⁶ *Monroe v. Smelly*, 25 Tex. 586; 78 Am. Dec. 541. Bets on horse-races were once treated in Texas with especial favor. *Dunman v. Strother*, 1 Tex. 89; 46 Am. Dec. 97. *Contra*, in California, *Gridley v. Dorn*, 57 Cal. 78; 40 Am. Rep. 110.

⁷ *State v. Stripling*, 113 Ala. 120; 36 L. R. A. 81; 21 So. 409; *Lacey*

§450. Wager contracts under modern statutes.

Modern statutes have practically made all gambling and wager contracts invalid. Simple undisguised bets, wagers and gaming are so clearly made invalid by these statutes that few questions now ever arise concerning their validity. Betting on a game, as betting on a billiard-match,¹ on throwing dice,² on a game of poker,³ or an election,⁴ or on a horse-race,⁵ and a contract that one action shall be decided as another one,⁶ are all invalid. A bet is none the less invalid because it is not made a crime.⁷ The only exceptions to the rule that wagers are invalid exist in those states which hold that such contracts are valid at Common Law and in which the legislature has made such contracts invalid not by a general statute, but by enumerating the special kinds of gambling contracts which it made void. If any classes were omitted from this enumeration, deliberately or accidentally, such contracts are there held valid.⁸ Since these statutes, the law of wager contracts chiefly assumes the form of constant attempts by parties to disguise the fact that they are gambling, and constant failures to accomplish such result.

v. Palmer, 93 Va. 159; 57 Am. St. Rep. 795; 31 L. R. A. 822; *sub nomine*, *Ex parte* Lacey, 24 S. E. 930.

¹ Shoolbred v. Roberts (1899), 2 Q. B. 560.

² Shain v. Goodwin, 46 Fed. 564 (dice-throwing for money was a crime in California where this case arose).

³ White v. Wilson, 100 Ky. 367; 37 L. R. A. 197; 38 S. W. 495; reversing on rehearing 37 S. W. 677; Schoenberg v. Adler, 105 Wis. 645; 51 N. W. 1055; Olson v. Sawyer Goodman Co., 110 Wis. 149; 53 L. R. A. 648; 85 N. W. 640.

⁴ Gregory v. King, 58 Ill. 169; 11 Am. Rep. 56; Davis v. Leonard, 69 Ind. 213; Specht v. Beindorff, 56 Neb. 553; 42 L. R. A. 429; 76 N. W. 1059; Harper v. Crain, 36 O. S. 338; 38 Am. Rep. 589.

⁵ Gridley v. Dorn, 57 Cal. 78; 40 Am. Rep. 110; Shaffner v. Pinchback, 133 Ill. 410; 23 Am. St. Rep. 624; 24 N. W. 867; Moore v. Trippe, 20 N. J. L. 263.

⁶ Gittings v. Baker, 2 O. S. 21 (no connection was shown between the two). In Percheron-Norman Horse Co. v. Downen, 18 Colo. 71; 31 Pac. 501, such a contract was held valid.

⁷ Tuckett v. Herdic, 5 Tex. Civ. App. 690; 24 S. W. 992.

⁸ In Kinney v. Hynds, 7 Wyom. 22; 49 Pac. 403; 52 Pac. 1081, it was held that money lost at a licensed faro game could not be recovered. (Distinguishing Bryant v. Mead, 1 Cal. 441; Carrier v. Brannan, 3 Cal. 328; Scott v. Courtney, 7 Nev. 419.)

§451. Gambling.

Gambling is a form of wagering, in which the stake is on the result of some game.¹ In many cases, as in actions between the parties, where the contract is equally invalid whether gambling, or merely a wager, the terms may be used interchangeably without thereby causing reversible error.² But statutes often separate gambling contracts from other wagers. Thus a note for a wager may be valid in the hands of a *bona fide* holder, while one for gambling is not.³ Thus under the English gaming act of 1845 no recovery could be had for securities deposited to abide the result of a gaming contract, while recovery can be had if it is a wager on future differences.⁴ Where the statute makes a difference in legal effect between a wager and gambling, contracts of wager on future differences,⁵ and election bets,⁶ are wagers, not gambling.

§452. Lotteries.

A lottery is a scheme for "procuring, through lot or chance, by the investment of money or something of value some greater amount of money, or thing of value."¹ It follows from this

¹ Crawford v. Spencer, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713; Oliphant v. Markham, 79 Tex. 543; 23 Am. St. Rep. 363; 15 S. W. 569.

² As cases of wagers on future sales. Oliphant v. Markham, 79 Tex. 543; 23 Am. St. Rep. 363; 15 S. W. 569.

³ As for future differences: Sondheim v. Gilbert, 117 Ind. 71; 10 Am. St. Rep. 23; 5 L. R. A. 432; 18 N. E. 687; Crawford v. Spencer, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713.

⁴ Universal Stock Exchange v. Strachan (1896), A. C. 166.

⁵ White v. Barber, 123 U. S. 392; Boyce v. Commission Co., 109 Fed. 758; Sondheim v. Gilbert, 117 Ind.

71; 10 Am. St. Rep. 23; 5 L. R. A. 432; 18 N. E. 687; Shaw v. Clark, 49 Mich. 384; 43 Am. Rep. 474; 13 N. W. 786; Crawford v. Spencer, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713; Dows v. Glaspel, 4 N. D. 251; 60 N. W. 60.

⁶ Lassen v. Karrer, 117 Mich. 512; 76 N. W. 73; Hickerson v. Benson, 8 Mo. 8; 40 Am. Dec. 115.

¹ United States v. Wallis, 58 Fed. 942, 943; quoted in State v. Dalton, 22 R. I. 77, 83; 84 Am. St. Rep. 818, 824; 48 L. R. A. 775; 46 Atl. 234; on this point, see Thomas v. People, 59 Ill. 160; People v. Elliott, 74 Mich. 264; 16 Am. St. Rep. 640; 3 L. R. A. 403; 41 N. W. 916; Governors v. Art Union, 7 N. Y. 228.

definition that a distribution by lot of things of unequal value among persons who invest the same amount is a lottery, even though under the scheme every person who purchases a chance is to receive something.² Thus a scheme to distribute by lot tracts of land of unequal value among a number of persons, each of whom is to pay the same price for the land, is a lottery.³ Thus, where the right to select a certain number passes with each sale of a lead-pencil and prizes are to be distributed by lot among the holders of such numbers a lottery exists.⁴ So the operation of a slot machine has been held to be a lottery though something of value was drawn every time, because the things drawn were of different values and chance determined what each player would receive.⁵ A scheme for issuing bonds and redeeming them in an order determined by lot, thereby paying some holder the face value thereof in a short time and for a small payment while others are postponed for a much longer time and are bound to pay much more, is a lottery.⁶ But a contract whereby A is to pay one dollar and twenty-five cents

² *Horner v. United States*, 147 U. S. 449; *Dunn v. People*, 40 Ill. 465; see to the same effect *Lynch v. Rosenthal*, 144 Ind. 86; 55 Am. St. Rep. 168; 31 L. R. A. 835; 42 N. E. 1103; *Davenport v. Ottawa*, 54 Kan. 711; 45 Am. St. Rep. 303; 39 Pac. 708; *Hull v. Ruggles*, 56 N. Y. 424; *State v. Lumsden*, 89 N. Car. 572; *Jackson Steel Nail Co. v. Marks*, 4 Ohio C. C. 343.

³ *Paulk v. Land Co.*, 116 Ala. 178; 22 So. 495; *Branham v. Stallings*, 21 Colo. 211; 52 Am. St. Rep. 213; 40 Pac. 396; *Lynch v. Rosenthal*, 144 Ind. 86; 55 Am. St. Rep. 168; 31 L. R. A. 835; 42 N. E. 1103; *Emshiviler v. Tyner*, 21 Ind. App. 347; 69 Am. St. Rep. 360; 52 N. E. 459; *Clarke v. Havens*, 1 A. K. Mar. (Ky.) 198; *Jackson Steel Nail Co. v. Marks*, 4 Ohio C. C. 343.

⁴ *State v. Mercantile Association*, 45 Kan. 351; 23 Am. St. Rep. 727;

11 L. R. A. 430; 25 Pac. 984. For a similar scheme see *Hull v. Ruggles*, 56 N. Y. 424.

⁵ *Loiseau v. State*, 114 Ala. 34; 62 Am. St. Rep. 84; 22 So. 138.

⁶ *State v. Investment Co.*, 64 O. S. 283; 83 Am. St. Rep. 754; 52 L. R. A. 530; 60 N. E. 220. (The "numeral apart" scheme was used here.) See for a similar scheme to assist members "in paying for a home" held a lottery as by the system of retiring certificates some members would get their homes paid for in forty months and others in some seventy-three years. *State v. Nebraska Home Co.*, — Neb. —; 60 L. R. A. 448; 92 N. W. 763. A scheme similar to that in *State v. Investment Co.*, *supra*, was held not to be a lottery in *Equitable, etc., Co. v. Waring*, 117 Ga. 599; 97 Am. St. Rep. 177; 62 L. R. A. 93; 44 S. E. 320.

a week to B for sixty-three weeks, and B is then to deliver to A a diamond and if A wishes, B is to buy it for one hundred and twenty dollars, A forfeiting all interest in payments made if he does not keep them up has been held not a gambling contract.⁷ A plan of distribution, originally lawful, may by the adoption of a scheme of chance become a lottery.⁸ A distribution by lot among co-owners of things substantially equal in value is not a lottery, as where a number of lots were bought together, the lots to be sold to the shareholders at auction as long as there was any choice between them, and when there was none to be divided among the owners by lot.⁹ Offering gifts with each sale, where such gifts are substantially of equal value, is not a lottery,¹⁰ nor is it a lottery where tickets to a drawing are distributed gratuitously.¹¹ A lottery cannot exist where there is no element of chance or luck. Thus where A sold all the tickets in a so-called lottery for A's house to B, it was held that no lottery existed.¹² So giving "trading stamps" with each sale is not a lottery and a statute forbidding such a gift is unconstitutional.¹³

§453. Wager contracts disguised as future sales.

A form of wager often difficult to detect exists where an apparent contract of sale is made for future delivery, in which the parties do not intend delivery of the thing contracted for, but mean to settle the contract by paying and receiving the difference between the market price and the price agreed upon.

⁷ *Barney v. Surety Co.*, 131 Mich. 192; 91 N. W. 140.

⁸ *Emshwiler v. Tyner*, 21 Ind. App. 347; 69 Am. St. Rep. 360; 52 N. E. 459.

⁹ *Elder v. Chapman*, 176 Ill. 143; 52 N. E. 10; reversing 70 Ill. App. 288; *Chancy Park Land Co. v. Hart*, 104 Ia. 592; 73 N. W. 1059.

¹⁰ *Long v. State*, 74 Md. 565; 28 Am. St. Rep. 268; 12 L. R. A. 425; 22 Atl. 4; *State v. Dalton*, 22 R. I. 77; 84 Am. St. Rep. 818;

48 L. R. A. 775; 46 Atl. 234.

¹¹ *Yellowstone Kit v. State*, 88 Ala. 196; 16 Am. St. Rep. 38; 7 L. R. A. 599; 7 So. 338. (Even though an admission fee is charged to witness the drawing, but the winners are not confined to those present.) *Cross v. People*, 18 Colo. 321; 36 Am. St. Rep. 292; 32 Pac. 821.

¹² *Thornhill v. O'Rear*, 108 Ala. 299; 31 L. R. A. 792; 19 So. 382.

¹³ *State v. Dodge*, — Vt. —; 56 Atl. 983.

Such a contract is really a bet or wager on the market price at the time fixed.¹ Such contracts are said by some authorities

- ¹ *Universal Stock Exchange v. Strachan* (H. L. E.) (1896), A. C. 166; *In re Gieve* (1899), 1 Q. B. 794; *Pearce v. Rice*, 142 U. S. 28; *Metropolitan National Bank v. Jansen*, 108 Fed. 572; 47 C. C. A. 497; *Waldron v. Johnston*, 86 Fed. 757; *Morris v. Norton*, 75 Fed. 912; 21 C. C. A. 553; Board of Trade, etc., v. Kinsey Co., 125 Fed. 72; *Peet v. Hatcher*, 112 Ala. 514; 57 Am. St. Rep. 45; 21 So. 711; *Benton v. Singleton*, 114 Ga. 548; 58 L. R. A. 181; 40 S. E. 811; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199; 81 Am. St. Rep. 28; 37 S. E. 485; *Central Stock & Grain v. Board of Trade*, 196 Ill. 396; 63 N. E. 740; affirming 98 Ill. App. 212; *Jamieson v. Wallace*, 167 Ill. 388; 59 Am. St. Rep. 302; 47 N. E. 762; affirming 60 Ill. App. 618; *Miles v. Andrews*, 153 Ill. 262; 38 N. E. 644; affirming 40 Ill. App. 155; Illinois, etc., Bank v. La Touche, 101 Ill. App. 341; *Watte v. Costello*, 40 Ill. App. 307; *Wheeler v. McDermid*, 36 Ill. App. 179; *Pearce v. Dill*, 149 Ind. 136; 48 N. E. 788; *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23; 5 L. R. A. 432; 18 N. E. 687; *Boyd Commission Co. v. Coates* (Ky.), 69 S. W. 1090; *E. O. Standard Mill Co. v. Flower*, 46 La. Am. 315; 15 So. 16; *Morris v. Telegraph Co.*, 94 Me. 423; 47 Atl. 926; *Billingslea v. Smith*, 77 Md. 504; 26 Atl. 1077; *Wilson v. Head*, 184 Mass. 515; 69 N. E. 317; *Harvey v. Merrill*, 150 Mass., 1; 15 Am. St. Rep. 159; 5 L. R. A. 200; 22 N. E. 49; *Donavan v. Daiber*, 124 Mich. 49; 82 N. W. 848; *McCarthy v. Commission Co.*, 87 Minn. 11; 91 N. W. 33; *Moehr v. Miesen*, 47 Minn. 228; 49 N. W. 862; *Campbell v. Bank*, 74 Miss. 526; 21 So. 400; *Connor v. Black*, 119 Mo. 126; 24 S. W. 184; *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713; *Scott v. Brown*, 54 Mo. App. 606; *Merrill v. Garver* (Neb.), 96 N. W. 619; *Mendel v. Boyd* (Neb.), 91 N. W. 860; *Rogers v. Marriott*, 59 Neb. 759; 82 N. W. 21; *Sprague v. Warren*, 26 Neb. 326; 3 L. R. A. 679; 41 N. W. 1113; *Wheeler v. Stock Exchange*, — N. H. —; 56 Atl. 754; *Sharp v. Stalker*, 63 N. J. Eq. 596; 52 Atl. 1120; *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394; 45 Atl. 611; *Pratt v. Boody*, 55 N. J. Eq. 175; 35 Atl. 1113; *Cantwell v. Boykin*, 127 N. Car. 64; 37 S. E. 72; *Dows v. Glaspel*, 4 N. D. 251; 60 N. W. 60; *Lester v. Buel*, 49 O. S. 240; 34 Am. St. Rep. 556; 30 N. E. 821; *Kahn v. Walton*, 46 O. S. 195; 20 N. E. 203; *Taylor's Estate*, 192 Pa. St. 304; 73 Am. St. Rep. 812; 43 Atl. 973; *Wagner v. Hildebrand*, 187 Pa. St. 136; 41 Atl. 34; *Dauler v. Hartley*, 178 Pa. St. 23; 35 Atl. 857; *Hopkins v. O'Kane*, 169 Pa. St. 478; 32 Atl. 421; *Gist v. Telegraph Co.*, 45 S. Car. 344; 55 Am. St. Rep. 763; 23 S. E. 143; *Waite v. Frank*, 14 S. D. 626; 86 N. W. 645; *Allen v. Dunham*, 92 Tenn. 257; 21 S. W. 898; *McGrew v. City Produce Exchange*, 85 Tenn. 572; 4 Am. St. Rep. 771; 4 S. W. 38; *Mechanics', etc., Co. v. Duncan* (Tenn. Ch. App.), 36 S. W. 887; *Bartlett v. Collins*, 109 Wis. 477; 83 Am. St. Rep. 928; 85 N. W. 703; *Atwater v. Manville*, 106 Wis. 64; 81 N. W. 985.

to be void at Common Law² on grounds of public policy.³ Where wager contracts are invalid no specific statute is necessary to make this class of contracts invalid.⁴ The absence of the intention of the parties at the inception of the contract to deliver and pay for the goods sold respectively, determines the contract to be a wager. It is not necessary that there should be a positive intention not to deliver the goods sold, to make the contract a wager, as distinguished from the absence of an intention to deliver. If the contract does not require delivery, though it allows delivery as an alternative provision at the election of either party, it is a wager.⁵ To make a future sale a wager the intention to settle differences must be entertained by both parties to the transaction, and such intention of one party alone will not invalidate the contract.⁶ Accordingly a contract whereby the vendee represents that he intends performance and,

² *Gist v. Telegraph Co.*, 45 S. Car. 344; 55 Am. St. Rep. 763; 23 S. E. 143.

³ *Morris v. Norton*, 75 Fed. 912; 21 C. C. A. 553; *Pearce v. Dill*, 149 Ind. 136; 48 N. E. 788.

⁴ *Metropolitan National Bank v. Jansen*, 108 Fed. 572; 47 C. C. A. 497.

⁵ *Universal Stock Exchange v. Strachan* (1896), A. C. 166; *In re Gieve* (1899), 1 Q. B. 794; *Miles v. Andrews*, 153 Ill. 262; 38 N. E. 644; affirming 40 Ill. App. 155; *Watte v. Costello*, 40 Ill. App. 307; *E. O. Stannard Milling Co. v. Flower*, 46 La. Ann. 315; 15 So. 16; *Cantwell v. Boykin*, 127 N. Car. 64; 37 S. E. 72; *Riordan v. Doty*, 50 S. Car. 537; 27 S. E. 939; so under the Massachusetts statute. *Davy v. Bangs*, 174 Mass. 238; 54 N. E. 536.

⁶ *Bibb v. Allen*, 149 U. S. 481; *Irwin v. Williar*, 110 U. S. 499; *Ponder v. Cotton Co.*, 100 Fed. 373; 40 C. C. A. 416; *Hill v. Levy*, 98 Fed. 94; *Edwards v. Hoeffinghoff*, 38 Fed.

635; *Johnston v. Miller*, 67 Ark. 172; 53 S. W. 1052; *Scanlon v. Warren*, 169 Ill. 142; 48 N. E. 410; affirming 68 Ill. App. 213; *Jamieson v. Wallace*, 167 Ill. 388; 59 Am. St. Rep. 302; 47 N. E. 762; affirming 60 Ill. App. 618; *Warren v. Scanlon*, 59 Ill. App. 138; *Counselman v. Reichart*, 103 Ia. 430; 72 N. W. 490; *Barnes v. Smith*, 159 Mass. 344; 34 N. E. 403; *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159; 5 L. R. A. 200; 22 N. E. 49; *Donovan v. Dailier*, 124 Mich. 49; 82 N. W. 848; *A. G. Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516; 61 S. W. 617; *Mulford v. Caesar*, 53 Mo. App. 263; *Rogers v. Marriott*, 59 Neb. 759; 82 N. W. 21. Under some special statutes such intention of one party if known to the other invalidates the contract. *Walker v. Johnson*, 59 Ill. App. 448; *Marks v. Stock Exchange*, 181 Mass. 251; 63 N. E. 410; *Davy v. Bangs*, 174 Mass. 238; 54 N. E. 536; *Schreiner v. Orr*, 55 Mo. App. 406.

to relieve vendor from the trouble of proving such intent, agrees to indemnify him from such damage as vendor may sustain by reason of non-existence of such intent, is void as a mere attempt to evade the statute.⁷ Such intent of one party is, however, admissible in evidence as a link in the chain showing the real contract.⁸ The intention to assign one's rights under a future contract of sale, before delivery,⁹ or an actual re-sale,¹⁰ or hope that the adversary party will settle differences,¹¹ do not make the contract a wager. A contract for future delivery may be valid, if real delivery is intended when the contract is made,¹² even if the vendor has not the property sold on hand and must buy it to perform the contract;¹³ or if the property is bought as a mere speculation,¹⁴ or is not in existence when the con-

⁷ Corey v. Griffin, 181 Mass. 229; 63 N. E. 420.

⁸ Waite v. Frank, 14 S. D. 626; 86 N. W. 645.

⁹ Ponder v. Cotton Co., 100 Fed. 373; 40 C. C. A. 416.

¹⁰ Wolf v. Bank, 178 Ill. 85; 52 N. E. 896; reversing 77 Ill. App. 325; Young v. Glendinning, 194 Pa. St. 550; 45 Atl. 364.

¹¹ Barnes v. Smith, 159 Mass. 344; 34 N. E. 403.

¹² Clews v. Jamieson, 182 U. S. 461; reversing 96 Fed. 648; 38 C. C. A. 473; Bibb v. Allen, 149 U. S. 481; James H. Parker, etc., Co. v. Moore, 125 Fed. 807; Thompson v. Maddux, 117 Ala. 468; 23 So. 157; Forsyth Mfg. Co. v. Castlen; 112 Ga. 199; 81 Am. St. Rep. 28; 37 S. E. 485; Perin v. Parker, 126 Ill. 201; 9 Am. St. Rep. 571; 2 L. R. A. 336; 18 N. E. 747; Post v. Leland, 184 Mass. 601; 69 N. E. 361; Rogers v. Marriott, 59 Neb. 759; 82 N. W. 21; Morrissey v. Broomal, 37 Neb. 766; 56 N. W. 383; MacDonald v. Gessler, 208 Pa. St. 177; 57 Atl. 361. Contracts for future delivery are held by some courts to be *prima facie* wagers.

Cobb v. Prell, 15 Fed. 774; Sprague v. Warren, 26 Neb. 326; 3 L. R. A. 679; 41 N. W. 1113; Bartlett v. Collins, 109 Wis. 477; 83 Am. St. Rep. 928; 85 N. W. 703; *Contra*, Ponder v. Cotton Co., 100 Fed. 373; 40 C. C. A. 416; Hill v. Levy, 98 Fed. 94; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199; 81 Am. St. Rep. 28; 37 S. E. 485.

¹³ Clews v. Jamieson, 182 U. S. 461; reversing 96 Fed. 648; 38 C. C. A. 473; Bibb v. Allen, 149 U. S. 481; Hill v. Levy, 98 Fed. 94; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199; 81 Am. St. Rep. 28; 37 S. E. 485; Gardner v. Meeker, 169 Ill. 40; 48 N. E. 307; affirming 69 Ill. App. 422; Rogers v. Marriott, 59 Neb. 759; 82 N. W. 21; Kahn v. Walton, 46 O. S. 195; 20 N. E. 203; Potts v. Dunlap, 110 Pa. St. 177; 20 Atl. 413.

¹⁴ Laughton v. Griffin, (P. C.) (1895) A. C. 104; Forget v. Ostigny, (P. C.) (1895), A. C. 318; Goodhart v. Rastert, 7 Ohio N. P. 534; Stewart v. Parnell, 147 Pa. St. 523; 23 Atl. 838; Burr v. Davis (Tex. Civ. App.), 27 S. W. 589.

tract is made.¹⁵ Some statutes forbid "future" sales.¹⁶ Under such statute a rapid succession of purchases and sales for present delivery is not invalid.¹⁷ So a sale on margins, the vendee depositing only so much of the purchase price as will secure the vendor or broker against loss in case of a fall in prices, is not necessarily a wager contract;¹⁸ and if the parties intend delivery when the contract is formed, the fact that they subsequently agree to discharge the contract by settling differences does not make it a wager.¹⁹ The converse of this proposition is not always held true. A transaction originally merely a wager contract may be made valid by treating the last transaction as a purchase.²⁰ That the sales were on margin,²¹ may be evidence from which it may be inferred that the parties intended at the outset merely to settle differences,

¹⁵ Forsyth Mfg. Co. v. Castlen, 112 Ga. 199; 81 Am. St. Rep. 28; 37 S. E. 485.

¹⁶ Cashman v. Root, 89 Cal. 373; 23 Am. St. Rep. 482; 12 L. R. A. 511; 26 Pac. 883; Wall v. Stock Exchange, 168 Mass. 282; 46 N. E. 1062.

¹⁷ Western Union Telegraph Co. v. Littlejohn, 72 Miss. 1025; 18 So. 418.

¹⁸ Hocker v. Telegraph Co., — Fla. —; 34 So. 901; Perin v. Parker, 126 Ill. 201; 9 Am. St. Rep. 571; 2 L. R. A. 336; 18 N. E. 747; Curtis v. Wright, 40 Ill. App. 491; Fisher v. Fisher, 8 Ind. App. 665; 36 N. E. 296; Taylor's Estate, 192 Pa. St. 304; 73 Am. St. Rep. 812; 43 Atl. 973; Wagner v. Hildebrand, 187 Pa. St. 136; 41 Atl. 34; Hopkins v. O'Kane, 169 Pa. St. 478; 32 Atl. 421; Drouilhet v. Pinckard, (Tex. Civ. App.) 42 S. W. 135; *Contra*, by Art. IV, § 26, of the California Constitution; Parker v. Otis, 130 Cal. 322; 92 Am. St. Rep. 56; 62 Pac. 571; 62 Pac. 927; Kullman v. Simmens, 104 Cal. 595; 38 Pac. 362.

This provision cannot be evaded by the broker's buying from a third person where he keeps the title to the stock, though it is agreed that it is collateral for his customers' debt. Sheehy v. Shinn, 103 Cal. 325; 37 Pac. 393.

¹⁹ Miles v. Andrews, 153 Ill. 262; 38 N. E. 644; affirming 40 Ill. App. 155; Reibe v. Hellman, 69 Ill. App. 19; Dillon v. McCrea, 59 Ill. App. 505; Dillaway v. Alden, 88 Me. 230; 33 Atl. 981.

²⁰ Young v. Glendinning, 194 Pa. St. 550; 45 Atl. 364; Taylor's Estate, 192 Pa. St. 304; 73 Am. St. Rep. 812; 43 Atl. 973; Taylor's Estate (No. 2), 192 Pa. St. 313; 43 Atl. 975. (In this case a wager contract was made valid, after an assignment for the benefit of creditors.) Anthony v. Unangst, 174 Pa. St. 10; 34 Atl. 284; *Contra*, under the South Carolina statute: Rioridan v. Doty, 50 S. Car. 537; 27 S. E. 939.

²¹ Allen v. Dunham, 92 Tenn. 257; 21 S. W. 898.

especially where the vendor knows that the vendee is not able financially to pay the entire purchase price.²² That the sales were actually settled by paying differences²³ is not of itself conclusive that the contracts were wagers at their inception. Contracts which give either vendor²⁴ or vendee an option as to the time of delivery within certain limits are *prima facie* valid.²⁵ Some statutes forbid "option" contracts. This statute as construed by the lower courts of Illinois forbade practically all executory contracts in which any election was given to either party.²⁶ But the courts of last resort held that "option" as used in the statute meant a "put"—the privilege of delivering or not delivering the thing sold—or a "call"—the privilege of calling or not calling for the thing bought; that is, it meant future wager sales.²⁷ Other options are valid,²⁸ as a contract

²² Rogers v. Marriott, 59 Neb. 759; 82 N. W. 21; Waite v. Frank, 14 S. D. 626; 86 N. W. 645.

²³ Jamieson v. Wallace, 167 Ill. 388; 59 Am. St. Rep. 302; 47 N. E. 762; Scott v. Brown, 54 Mo. App. 606; Rogers v. Marriott, 59 Neb. 759; 82 N. W. 21; Flagg v. Baldwin, 38 N. J. Eq. 219; 48 Am. Rep. 308; Waite v. Frank, 14 S. D. 626; 86 N. W. 645; Atwater v. Manville, 106 Wis. 64; 81 N. W. 985; Lowry v. Dillman, 59 Wis. 197; 18 N. W. 4; Wall v. Schneider, 59 Wis. 352; 48 Am. Rep. 520; 18 N. W. 443.

²⁴ Perryman v. Wolffe, 93 Ala. 290; 9 So. 148.

²⁵ Lester v. Buel, 49 O. S. 240; 34 Am. St. Rep. 556; 30 N. E. 821.

²⁶ Clews v. Jamieson, 96 Fed. 648; 38 C. C. A. 473; Peterson v. Currier, 62 Ill. App. 163; Locke v. Towler, 41 Ill. App. 66. Thus a contract by A to pay B for threshing A's crop by giving B the excess thereof over a certain number of bushels. Jacobus v. Hazlett, 78 Ill. App. 239. A contract to repurchase stock sold, within a given time at the

option of vendee. Ubben v. Bin-
n, 78 Ill. App. 330; McKeon
v. Wolf, 77 Ill. App. 325; Wolsey v.
Neeley, 62 Ill. App. 141. An option
on a business. Kerling v. Hilton,
51 Ill. App. 437. A similar view of
the Illinois statute was taken by the
Iowa courts, where a sale of a cer-
tain number of carloads of coal at a
given price was held valid; but the
rest of the contract, an option to
vendee to take an additional specified
number of carloads on the same
terms was held void. Osgood v.
Bauder, 82 Ia. 171; 1 L. R. A. 655;
47 N. W. 1001.

²⁷ Tenney v. Foote, 95 Ill. 99; af-
firming 4 Ill. App. 594; Schneider
v. Turner, 130 Ill. 28; 6 L. R. A.
164; 22 N. E. 497; Preston v. Smith,
156 Ill. 359; 40 N. E. 949; affirm-
ing 57 Ill. App. 132; Minnesota
Lumber Co. v. Coal Co., 160 Ill. 85;
31 L. R. A. 529; 43 N. E. 774; re-
versing 56 Ill. App. 248.

²⁸ Clews v. Jamieson, 182 U. S.
461; reversing 96 Fed. 648; 38 C.
C. A. 473. As where the option is
as to the time of delivery alone.

to re-purchase stock at vendee's option,²⁹ or an offer to sell goods at a certain price if ordered by vendee by a certain time,³⁰ or a contract to sell all the coal needed by vendee during that season,³¹ or a contract for the use of a patent right, reserving to the patentee the right to cancel the contract if the royalties do not amount to a certain sum³² and a contract of sale at a certain price, giving the vendee the right, within limits, to indicate the amount.³³ If A and B contract to purchase from other persons so much of a given commodity that delivery will be impossible, their intention to settle differences clearly exists and the contract between them is illegal.³⁴

As in case of other illegal contracts, the validity of a contract for future sales does not depend on the outward form of the contract but on the real transaction which is almost always carefully disguised.³⁵

Skinner v. Osgood, 83 Ill. App. 454; Barnett v. Baxter, 64 Ill. App. 544; Dillon v. McCrea, 59 Ill. App. 506.

²⁹ Loeb v. Stern, 198 Ill. 371; 64 N. E. 1043; affirming 99 Ill. App. 637; Ubben v. Binnian, 182 Ill. 508; 55 N. E. 552; reversing 78 Ill. App. 330; Wolf v. National Bank of Illinois, 178 Ill. 85; 52 N. E. 896; reversing 77 Ill. App. 325.

³⁰ Schlee v. Guckenheimer, 179 Ill. 593; 54 N. E. 302; reversing 76 Ill. App. 681; Minnesota Lumber Co. v. Coal Co., 160 Ill. 85; 31 L. R. A. 529; 43 N. E. 774; reversing 56 Ill. App. 248.

³¹ Minnesota Lumber Co. v. Coal Co., 160 Ill. 85; 31 L. R. A. 529; 43 N. E. 774; reversing 56 Ill. App. 248.

³² Preston v. Smith, 156 Ill. 359; 40 N. E. 949; affirming 57 Ill. App. 132.

³³ Minnesota Lumber Co. v. Coal Co., 56 Ill. App. 248; Corcoran v. Coal Co., 37 Ill. App. 577.

³⁴ Wright v. Cudahy, 168 Ill. 86; 48 N. E. 39; affirming 64 Ill. App.

455; Foss v. Cummings, 149 Ill. 353; affirming 47 Ill. App. 665. (Decided under a statute which makes it a crime to attempt to "corner" the market.)

³⁵ Metropolitan National Bank v. Jansen, 108 Fed. 572; 47 C. C. A. 497; Waldron v. Johnston, 86 Fed. 757; Melchert v. Telegraph Co., 11 Fed. 193; Tenney v. Foote, 95 Ill. 99; affirming 4 Ill. App. 594; Whitesides v. Hunt, 97 Ind. 191; 49 Am. Rep. 441; Gregory v. Wendell, 39 Mich. 337; 33 Am. Rep. 390; Mohr v. Miesen, 47 Minn. 228; 49 N. W. 862; Morrissey v. Broomal, 37 Neb. 766; 56 N. W. 383; Sprague v. Warren, 26 Neb. 326; 3 L. R. A. 679; 41 N. W. 1113; Minzesheimer v. Doolittle, 60 N. J. Eq. 394; 45 Atl. 611; Pratt v. Boody, 55 N. J. Eq. 175; 35 Atl. 1113; Lester v. Buel, 49 O. S. 240; 34 Am. St. Rep. 556; 30 N. E. 821; Taylor's Estate, 192 Pa. St. 309; 43 Atl. 975; Gaw v. Bennett, 153 Pa. St. 247; 34 Am. St. Rep. 699; 25 Atl. 1114; Waite v. Frank, 14 S. D. 626; 86 N. W.

§454. Prizes.

Whether offering prizes for success in competitions is gambling or not is often a question of some difficulty as the real transaction is often so disguised as to be difficult to understand. If the amount of the prize depends in whole or in part¹ upon the amount of the entrance fees, it is a wager contract, closely resembling a lottery, except that skill or strength, not chance, is supposed to determine the winner of the prize. If the prize does not depend on entrance fees,² as where it consists of the voluntary subscriptions of persons who take no part in the contest³ it is not gambling. In some states statutes have forbidden offering prizes for certain kinds of contests.⁴ Such statute does not apply to a promise to pay a certain sum to the owner of a stallion if a foal out of the mare of the promisor by the stallion of the promisee is the first foal by such stallion to trot a mile in a specified time.⁵

645. "It will not do to attach too much weight or importance to the mere form of the instrument, for it is quite certain that parties will be astute in concealing their intention, and the real nature of the transaction if it be illegal." *Barnard v. Backhaus*, 52 Wis. 593, 600; 6 N. W. 252; 9 N. W. 595.

¹*Stone v. Clay*, 61 Fed. 889; 10 C. C. A. 147; *West v. Carter*, 129 Ill. 249; 21 N. E. 782; reversing 25 Ill. App. 245; *Bronson, etc., Association v. Ramsdell*, 24 Mich. 441; *Contra*, *Hankins v. Ottinger*, 115 Cal. 454; 40 L. R. A. 76; 47 Pac. 254.

²*Hankins v. Ottinger*, 115 Cal. 454; 40 L. R. A. 76; 47 Pac. 254; *Delier v. Agricultural Society*, 57 Ia. 481; 10 N. W. 872; *Farrier v.*

Agricultural Society, 36 Minn. 478; 32 N. W. 554; *People v. Fallon*, 152 N. Y. 12; 57 Am. St. Rep. 492; 37 L. R. A. 227; 46 N. E. 296. "A premium is a reward or recompense for some act done, a wager is a stake upon some uncertain event. In a premium it is known who is to give before the event; in a wager it is not known until after the event." *Alvord v. Smith*, 63 Ind. 58, 63; quoted in *Hankins v. Ottinger*, 115 Cal. 454, 457; 40 L. R. A. 76; 47 Pac. 254.

³*Wilkinson v. Stitt*, 175 Mass. 581; 56 N. E. 830.

⁴As for trials of speed, *Ferguson v. Yunt*, 13 S. Dak. 120; 82 N. W. 509.

⁵*Whitehead v. Burgess*, 61 N. J. L. 75; 38 Atl. 802.

CHAPTER XXVII.

SUNDAY CONTRACTS.

§455. Sunday contracts at common law.

At Common Law an act might be done as lawfully on Sunday as on any other day,¹ except judicial acts² or such acts as by reason of the manner in which they were done amounted to nuisances. Contracts made on Sunday were therefore valid at Common Law,³ as were contracts to be performed on Sunday.⁴

§456. Sunday contracts at modern law.—Contracts made on Sunday.

Modern statutes differing in different jurisdictions have forbidden certain acts to be done on Sunday, and have made a violation of such statutes a crime. In considering the effect of such statutes on contracts a distinction must be made between (a) contracts made on Sunday and (b) contracts which by

¹ Ward v. Ward, 75 Minn. 269; 77 N. W. 965.

² III. Black. Comm. 277; City of Parsons v. Lindsay, 41 Kan. 336; 13 Am. St. Rep. 290; 3 L. R. A. 658; 21 Pac. 227; *Ex parte* Tice, 32 Or. 179; 49 Pac. 1038; Styles v. Harrison, 99 Tenn. 128; 63 Am. St. Rep. 824; 41 S. W. 333.

³ Bishop on Contracts (enlarged edition), § 536; Drury v. Defontaine, 1 Taunt. 131; Comyns v. Boyer, Cro. Eliz. 485; Bloxsome v. Williams, 3 B. & C. 232; Hayden v. Mitchell, 103 Ga. 431; 30 S. E. 287; Steere v. Trebilcock, 108 Mich. 464; 66 N. W. 342; Roberts v.

Barnes, 127 Mo. 405; 48 Am. St. Rep. 640; 30 S. W. 113; Bloom v. Richards, 2 O. S. 387. (See the historical discussion by Judge Thurman.) Kepner v. Keefer, 6 Watts (Pa.) 231; 31 Am. Dec. 460; Adams v. Gay, 19 Vt. 358; *Contra*, Morgan v. Richards, 1 P. A. Browne, 171; overruled by Kepner v. Keefer, 6 Watts (Pa.) 231; 31 Am. Dec. 460. A note delivered to indorsee on Sunday was valid. Steere v. Trebilcock, 108 Mich. 464; 66 N. W. 342.

⁴ Ward v. Ward, 75 Minn. 269; 77 N. W. 965.

their terms must be performed on Sunday. Under some of these statutes, contracts made on Sunday are void.¹ Thus, delivery on Sunday of a note,² or a note and mortgage,³ making a loan,⁴ a lease,⁵ a contract of employment,⁶ a contract of sale,⁷ or a release of damages,⁸ are all void.

§457. Forms of statute making Sunday contracts void.

What form of prohibition in such statutes is necessary to include contracts is a question on which there is some diversity of judicial opinion. Statutes which forbid "secular business,"¹ "secular labor, business or employment,"² "work, labor or busi-

¹ *Hill v. Hite*, 85 Fed. 268; 29 C. C. A. 549; affirming 79 Fed. 826; *Spahn v. Willman*, 1 Penn. (Del.) 125; 39 Atl. 787; *Terry v. Platt*, 1 Penn. (Del.) 185; 40 Atl. 243; *Calhoun v. Phillips*, 87 Ga. 482; 13 S. E. 593; *Pillen v. Erickson*, 125 Mich. 68; 83 N. W. 1023; *Aspell v. Hosbein*, 98 Mich. 117; 57 N. W. 27; *Winfield v. Dodge*, 45 Mich. 355; 40 Am. St. Rep. 476; 7 N. W. 906; *Tucker v. Mowrey*, 12 Mich. 378; *Gennert v. Wuestner*, 53 N. J. Eq. 302; 31 Atl. 609; *Ainsworth v. Williams*, 111 Wis. 17; 86 N. W. 551; *Smith v. Ry. Co.*, 83 Wis. 271; 50 N. W. 497; affirmed on rehearing 83 Wis. 278; 53 N. W. 550; *Cohn v. Heimbauch*, 86 Wis. 176; 56 N. W. 638; *Vinz v. Beatty*, 61 Wis. 645; 21 N. W. 787.

² *Cameron v. Peck*, 37 Conn. 555; *Terry v. Platt*, 1 Penn. (Del.) 185; 40 Atl. 243; *Harrison v. Powers*, 76 Ga. 218; *Russell v. Murdock*, 79 Ia. 101; 18 Am. St. Rep. 348; 44 N. W. 237; *Allen v. Deming*, 14 N. H. 133; 40 Am. Dec. 179.

³ *Hill v. Hite*, 85 Fed. 268; 29 C. C. A. 549; affirming 79 Fed. 826.

⁴ *Terry v. Platt*, 1 Penn. (Del.)

185; 40 Atl. 243; *Meador v. White*, 66 Me. 90; 22 Am. Rep. 551; *Troewert v. Decker*, 51 Wis. 46; 37 Am. Rep. 808; 8 N. W. 26.

⁵ *Ainsworth v. Williams*, 111 Wis. 17; 86 N. W. 551.

⁶ *Spahn v. Willman*, 1 Penn. (Del.) 125; 39 Atl. 787; *Pillen v. Erickson*, 125 Mich. 68; 83 N. W. 1023.

⁷ *Calhoun v. Phillips*, 87 Ga. 482; 13 S. E. 593; *Myers v. Meinrath*, 101 Mass. 366; 3 Am. Rep. 368; *Brazee v. Bryant*, 50 Mich. 136; 15 N. W. 49; *Thompson v. Williams*, 58 N. H. 248.

⁸ *Smith v. Ry.*, 83 Wis. 271; 50 N. W. 497; affirmed on rehearing, 83 Wis. 278; 53 N. W. 550.

¹ *Greathead v. Walton*, 40 Conn. 226; *Cameron v. Peck*, 37 Conn. 555; *Finn v. Donahue*, 35 Conn. 216; *Bar Harbor, etc., Bank v. Kingsley*, 84 Me. 111; 24 Atl. 794; *Pope v. Linn*, 50 Me. 83; *Bank v. Mayberry*, 48 Me. 198. Such as the indorsement of a note. *Bar Harbor, etc., Bank v. Kingsley*, 84 Me. 111; 24 Atl. 794.

² *Lovejoy v. Whipple*, 18 Vt. 379; 46 Am. Dec. 157.

ness of his secular calling,"³ "worldly labor or business,"⁴ "worldly employment or business."⁵ "labor, business or work."⁶ "business" and "labor,"⁷ or "business,"⁸ or which specifically make void a contract entered into on Sunday,⁹ are held to avoid contracts made on Sunday. A statute prohibiting business of one's "ordinary calling" does not avoid a marriage contract made on Sunday,¹⁰ nor a release,¹¹ nor the purchase of a house for use as a residence,¹² nor a deed of gift.¹³ Statutes forbidding "common labor,"¹⁴ or "laboring or performing other services,"¹⁵ are held in some jurisdictions to make Sunday contracts void, but by the weight of authority a prohibition merely on

³ *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 310; *Allen v. Deming*, 14 N. H. 133; 40 Am. Dec. 179.

⁴ *Gennert v. Wuestner*, 53 N. J. Eq. 302; 31 Atl. 609; *Nibert v. Baghurst*, 47 N. J. Eq. 201; 20 Atl. 252; *Steffens v. Earl*, 40 N. J. L. 128; 29 Am. Rep. 214.

⁵ *Foreman v. Ahl*, 55 Pa. St. 325.

⁶ *Cardoze v. Swift*, 113 Mass. 250; *Cranson v. Goss*, 107 Mass. 439; 9 Am. Rep. 45; *Day v. McAllister*, 15 Gray (Mass.) 433; *Pillen v. Erickson*, 125 Mich. 68; 83 N. W. 1023; *Aspell v. Hosbein*, 98 Mich. 117; 57 N. W. 27; *Costello v. Ten Eyck*, 86 Mich. 348; 24 Am. Rep. 128; 49 N. W. 152; *Searles v. Reed*, 63 Mich. 485; 29 N. W. 884; *Winfield v. Dodge*, 45 Mich. 355; 40 Am. Rep. 476; 7 N. W. 906; *Hanchett v. Jordan*, 43 Minn. 149; 45 N. W. 617; *Durant v. Rhener*, 26 Minn. 362; 4 N. W. 610; *Finley v. Quirk*, 9 Minn. 179; 86 Am. Dec. 93; *Ainsworth v. Williams*, 111 Wis. 17; 86 N. W. 551; *Vinz v. Beatty*, 61 Wis. 645; 21 N. W. 787; *Troewert v. Decker*, 51 Wis. 46; 37 Am. Rep. 808; 8 N. W. 26; as loaning money, *Troewert v. Decker*, 51 Wis. 46; 37 Am. Rep. 808; 8 N. W. 26.

⁷ *Russell v. Murdock*, 79 Ia. 101;

18 Am. St. Rep. 348; 44 N. W. 237; *Gunderson v. Richardson*, 56 Ia. 56; 41 Am. Rep. 81; 8 N. W. 683; *Clough v. Goggins*, 40 Ia. 325; *Pope v. Linn*, 50 Me. 83; *Bank v. Mayberry*, 48 Me. 198; *Towle v. Larabee*, 26 Me. 464.

⁸ *Miller v. Lynch*, 38 Miss. 344.

⁹ *Anderson v. Bellenger*, 87 Ala. 334; 4 L. R. A. 680; 6 S. O. 82.

¹⁰ *Lampkin v. Hayden*, 103 Ga. 575; 30 S. E. 294; *Hayden v. Mitchell*, 103 Ga. 431; 30 S. E. 287. In *Gangwere's Estate*, 14 Pa. St. 417, the court divided equally on the validity of a Sunday contract of marriage settlement made under the provisions of a similar statute.

¹¹ *Allen v. Gardiner*, 7 R. I. 22.

¹² *Hazard v. Day*, 14 All. (Mass.) 487; 92 Am. Dec. 790. (A contract controlled by Rhode Island law.)

¹³ *Dorough v. Mortgage Co.*, 118 Ga. 178; 45 S. E. 22.

¹⁴ *Evansville v. Morris*, 87 Ind. 269; 44 Am. Rep. 763; *Bosley v. McAllister*, 13 Ind. 565; *Reynolds v. Stevenson*, 4 Ind. 619; such as notes. *Reynolds v. Stevenson*, 4 Ind. 619.

¹⁵ *Hill v. Hite*, 85 Fed. 268; 29 C. A. 549; affirming 79 Fed. 826; *Stewart v. Davis*, 31 Ark. 518; 25 Am. Rep. 576.

"labor" or "common labor" does not include making ordinary contracts.¹⁶ Other statutes forbidding work and labor of certain specified kinds are held not to avoid contracts made on Sunday which do not grow out of acts of a prohibited class.¹⁷ A statute which prohibits "public selling and offering for sale" does not avoid private sales.¹⁸

§458. What constitutes a Sunday contract.

A contract,¹ as a note,² bond,³ or deed,⁴ written and signed on Sunday but not delivered till a week day is not a Sunday contract. So a contract is not a Sunday contract where oral negotiations are completed on Sunday and the contract is written, executed or delivered on a week day,⁵ or where an offer is made on Sunday and accepted on a week day,⁶ as where repre-

¹⁶ *Richmond v. Moore*, 107 Ill. 429; 47 Am. Rep. 445; *Birks v. French*, 21 Kan. 238; *Roberts v. Barnes*, 127 Mo. 405; 48 Am. St. Rep. 640; 30 S. W. 113; *Kaufman v. Hamm*, 30 Mo. 387; *Eberle v. Mehrback*, 55 N. Y. 682; *Merritt v. Earle*, 29 N. Y. 115; 86 Am. Dec. 292; *Bloom v. Richards*, 2 O. S. 387.

¹⁷ *Moore v. Murdock*, 26 Cal. 514; *Steere v. Trebilcock*, 108 Mich. 464; 66 N. W. 342; *Roberts v. Barnes*, 127 Mo. 405; 48 Am. St. Rep. 640; 30 S. W. 113; *Merritt v. Earle*, 29 N. Y. 115; 86 Am. Dec. 292.

¹⁸ *Moore v. Murdock*, 26 Cal. 514; *Ward v. Ward*, 75 Minn. 269; 77 N. W. 965; *Eberle v. Mehrback*, 55 N. Y. 683.

¹ *Gibbs, etc., Mfg. Co. v. Brucker*, 111 U. S. 597; *Ins. Co. v. Boulden*, 96 Ala. 609; 11 So. 774; *Bell v. Mahin*, 69 Ia. 408; 29 N. W. 331; *Harris v. Morse*, 49 Me. 432; 77 Am. Dec. 269; *Stacy v. Kemp*, 97 Mass. 166.

² *Hofer v. Cowan (Ky.)*, 68 S.

W. 438; *Hilton v. Houghton*, 35 Me. 143; *Hill v. Dunham*, 7 Gray (Mass.) 543; *Barger v. Farnham*, 130 Mich. 487; 90 N. W. 281. *Contra*, a guaranty made on Sunday and delivered on a week day is held to be a Sunday contract. *Carrick v. Morrison*, 2 Marv. (Del.) 157; 42 Atl. 447.

³ *Babcock v. Carter*, 117 Ala. 575; 67 Am. St. Rep. 193; 23 So. 487; *Lovejoy v. Whipple*, 18 Vt. 379; 46 Am. Dec. 157.

⁴ *Flanagan v. Meyer*, 41 Ala. 132; *Love v. Wells*, 25 Ind. 503; 87 Am. Dec. 375; *Beitenman's Appeal*, 55 Pa. St. 183.

⁵ *Tyler v. Waddingham*, 58 Conn. 375; 8 L. R. A. 657; 20 Atl. 335; *McKinnis v. Estes*, 81 Ia. 749; 46 N. W. 987; *Wooliver v. Ins. Co.*, 104 Mich. 132; 62 N. W. 149; *Merrill v. Downs*, 41 N. H. 72; *Stackpole v. Symonds*, 23 N. H. 229; *Goss v. Whitney*, 24 Vt. 187; *Adams v. Gay*, 19 Vt. 358.

⁶ *McDonald v. Fernald*, 68 N. H. 171; 38 Atl. 729.

sentations as to the soundness of a horse are made on Sunday, and the price is paid and the horse delivered on a week day.⁷ If possession of property does not pass on Sunday, a sale is valid even though negotiations therefor were entered into on Sunday.⁸ The vendee is liable at least for the reasonable value of the goods delivered on a secular day.⁹ If a note¹⁰ is executed and delivered on Sunday but dated on a week day, it is invalid wherever Sunday contracts are held void; unless it is in the hands of a *bona fide* purchaser for value without notice.¹¹ A contract by a vendee of mortgaged property to pay the mortgagee the amount due if he would release his mortgage is not made invalid by the fact that such vendee bought such property on Sunday.¹²

§459. Contracts to be performed on Sunday.

A contract which by its terms must be performed on Sunday is void if the thing to be done on Sunday is forbidden by law or made criminal if then done.¹ Thus no action can be maintained for failure to send a telegram on Sunday,² or on a contract with a band to play each day of the week, including Sunday,³

⁷ Evert v. Kleimenhagen, 6 S. D. 221; 60 N. W. 851.

⁸ Foster v. Wooten, 67 Miss. 540;

⁹ Foreman v. Ahl, 55 Pa. St. 325.

¹⁰ Hill v. Hite, 85 Fed. 268; 29 C. C. A. 549; Cameron v. Peck, 37 Conn. 555; Leightman v. Kadetskya, 58 Ia. 676; 43 Am. Rep. 129; 12 N. W. 736; Cranson v. Goss, 107 Mass. 439; 9 Am. Rep. 45; Gilman v. Berry, 59 N. H. 62. So with a note and mortgage. Hill v. Hite, 85 Fed. 268; 29 C. C. A. 549.

¹¹ Johns v. Bailey, 45 Ia. 241; Bank v. Mayberry, 48 Me. 198.

¹² Provenchee v. Piper, 68 N. H. 31; 36 Atl. 552.

¹ Willingham v. Telegraph Co., 91 Ga. 449; 18 S. E. 298; Pate v. Wright, 30 Ind. 476; 95 Am. Dec. 705; Johnson v. Brown, 13 Kan. 529; Slade v. Arnold, 14 B. Mon.

(Ky.) 287; Stewart v. Thayer, 168 Mass. 519; 60 Am. St. Rep. 407; 47 N. E. 420; Handy v. Publishing Co., 41 Minn. 188; 16 Am. St. Rep. 695; 4 L. R. A. 466; 42 N. W. 872; Fountain Square Theatre Co. v. Evans, 3 N. P. (Ohio) 245; Warren v. Theatre Co., 7 N. P. (Ohio) 538. "In no case has any court failed to declare such a contract void." Handy v. Publishing Co., 41 Minn. 188, 192; 16 Am. St. Rep. 695; 4 L. R. A. 466; 42 N. W. 872.

² Willingham v. Telegraph Co., 91 Ga. 449; 18 S. E. 298; Western Union Telegraph Co. v. Yopst, 118 Ind. 248; 3 L. R. A. 224; 20 N. E. 222; Western Union Telegraph Co. v. Henley, 23 Ind. App. 14; 54 N. E. 775.

³ Stewart v. Thayer, 168 Mass. 519; 60 Am. St. Rep. 407; 47 N. E.

or to perform in a theatre on Sunday,⁴ or under a statute imposing a fine on "labor, business or work" on Sunday, on a contract to publish a paper on week days and Sundays, and to print advertisements therein.⁵ But under a statute providing that convicts shall not be required to work on Sundays and holidays, recovery can be had on a contract by a convict to work on such days, such statute being for the protection of the convict.⁶ If the contract does not by its terms require forbidden acts to be done on Sunday it is not illegal, though one party may intend to do one or more of such acts on Sunday.⁷ Thus a contract to furnish a car for cattle is valid, though the shipper means to sell on Sunday,⁸ and a contract of employment which does not require working or traveling on Sunday is valid, though it recites that the train leaves at a certain hour on Sunday,⁹ or though the compensation is to be at a fixed rate per day for the time spent on a trip, "Sundays and all."¹⁰ A contract of sale made on a week day is not made invalid because delivery is made on Sunday at the request of the vendee.¹¹ A statute making common labor or sporting on Sunday a crime does not make illegal a contract for a theatrical performance on Sunday.¹²

420. (Even if such contract is performed by the band.)

⁴ *Fountain Square Theatre Co. v. Evans*, 3 N. P. (Ohio) 245. Hence there can be no recovery under the Civil Rights law for refusing to admit the holder of a ticket to a Sunday theatre. *Warren v. Theatre Co.*, 7 N. P. (Ohio) 538.

⁵ *Handy v. Publishing Co.*, 41 Minn. 188; 16 Am. St. Rep. 695; 4 L. R. A. 466; 42 N. W. 872. *Contra*, on the ground that to perform such contract it was not necessary to work on Sunday. *Sheffield v. Balmer*, 52 Mo. 474; 14 Am. Rep. 430.

⁶ *Sloss, etc., Co. v. Harvey*, 116 Ala. 656; 22 So. 994.

⁷ *Goddard v. Morrissey*, 172 Mass. 594; 53 N. E. 207; *Waters v. R. R. Co.*, 110 N. Car. 338; 16 L. R. A. 834; 14 S. E. 802. (Question raised but not decided in same case, 108 N. Car. 349; 12 S. E. 950.)

⁸ *Waters v. R. R.*, 110 N. Car. 338; 16 L. R. A. 834; 14 S. E. 802. (Question raised but not decided, same case, 108 N. Car. 349; 12 S. E. 950.)

⁹ *Goddard v. Morrissey*, 172 Mass. 594; 53 N. E. 207.

¹⁰ *Alfree v. Gates*, 82 Ia. 19; 47 N. W. 993.

¹¹ *People v. Sheehan*, 118 Mich. 539; 77 N. W. 88.

¹² *Wirth v. Calhoun*, 64 Neb. 316; 89 N. W. 785.

§460. Works of necessity and mercy.

Statutes which forbid certain acts on Sunday usually except works of necessity or charity.¹ Thus a contract of subscription to a church debt on Sunday,² a vote of a church employing a pastor,³ attendance at divine service,⁴ employing a physician,⁵ traveling to visit a sick friend,⁶ or to get medicine for a sick child,⁷ or to visit one's children,⁸ making a contract to relieve a sick pauper,⁹ transacting business of a beneficial charitable organization,¹⁰ loading property for transportation when it is likely that navigation will close,¹¹ storing goods received on Sunday,¹² bringing in a vessel as pilot,¹³ and a dairyman's delivering milk on Sunday¹⁴ are all held to be works of necessity, or mercy, or both; and an assignment may be made a reasonable necessity by the circumstances of the case.¹⁵

¹ Western Union Telegraph Co. v. Yopst, 118 Ind. 248; 3 L. R. A. 224; 20 N. E. 222; Flagg v. Milbury, 4 Cush. (Mass.) 243; Doyle v. R. R., 118 Mass. 195; 19 Am. Rep. 431; McClary v. Lowell, 44 Vt. 116; 8 Am. Rep. 366. This exception includes "Everything which is morally fit and proper to be done on Sunday under the particular circumstances of the case." First M. E. Church v. Donnell, 110 Ia. 5, 6; 46 L. R. A. 858; 81 N. W. 171.

² Bryan v. Watson, 127 Ind. 42; 11 L. R. A. 63; 26 N. E. 666; (overruling Catlett v. M. E. Church, 62 Ind. 365; 30 Am. Rep. 197; First M. E. Church v. Donnell, 110 Ia. 5; 46 L. R. A. 858; 81 N. W. 171; Allen v. Duffie, 43 Mich. 1; 38 Am. Rep. 159; 4 N. W. 427; Dale v. Knepp, 98 Pa. St. 389; 42 Am. Rep. 624; Hodges v. Nalty, 113 Wis. 567; 89 N. W. 535.

³ Arthur v. Church Society, 73 Conn. 718; 49 Atl. 241.

⁴ Feital v. Ry., 109 Mass. 398; 12 Am. Rep. 720.

⁵ Smith v. Watson, 14 Vt. 332.

⁶ Doyle v. R. R. Co., 118 Mass. 195; 19 Am. Rep. 431.

⁷ Gorman v. Lowell, 117 Mass. 65.

⁸ McClary v. Lowell, 44 Vt. 116; 8 Am. Rep. 366.

⁹ Aldrich v. Blackstone, 128 Mass. 148.

¹⁰ Pepin v. Société St. Jean Baptiste, 24 R. I. 550; 54 Atl. 47.

¹¹ McGatrick v. Wason, 4 O. S. 566. *Contra*, Pate v. Wright, 30 Ind. 476; 95 Am. Dec. 705.

¹² Powhatan Steamboat Co. v. R. R., 24 How. (U. S.) 247.

¹³ Perkins v. O'Mahoney, 131 Mass. 546.

¹⁴ Topeka v. Hempstead, 58 Kan. 328; 49 Pac. 87.

¹⁵ Donovan v. McCarty, 155 Mass. 543; 30 N. E. 221. So a sale of all the partnership property. Schneider v. Samson, 62 Tex. 201; 50 Am. Rep. 521.

CHAPTER XXVIII.

USURY.

I. HISTORY AND NATURE OF USURY.

§441. History of usury in English Law.

At the early Common Law, usury is constantly spoken of as a thing forbidden to Christians, and as a sin.¹ An investigation, however, of the use of the term shows us that usury included all taking of interest for a loan of money, no matter what the rate. Usury, meaning loaning money at interest, was permitted to the Jews until shortly before their expulsion from England.² The rules against usury had the actual effect, therefore, of making the right to take interest a matter of royal license, and ultimately in part, a right to be exercised for the benefit of the king, since the right to take interest was given to the Jew alone; and "the Jew can have nothing that is his own, for whatever he acquires, he acquires not for himself but for the king."³ It was in fact, a royal monopoly, made possible by religious prejudice and intolerance, and productive of results very different from those apparent to the mass of the community. In Glanville's time the offense reprobated by the courts seems to have been not the taking of usury, but "dying in usury," that is, dying while usurious transactions were entered upon but were still executory. Dying in usury caused a forfeiture of chattels to the king, while the land reverted to the lord of whom it was held.⁴ However, "if any one has, during

¹ Pollock and Maitland, *History of English Law*, Vol. II., pp. 118, 119 (original paging).

² Pollock and Maitland, *History of English Law*, Vol. I., pp. 451, 454 (original paging).

³ Bracton, f. 386b, quoted in Pollock and Maitland, *History of English Law*, Vol. I., p. 451 (original paging).

⁴ Glanville (Beames' Edition), Bk. VII., ch. XVI.

a certain period of his life, been guilty of this crime and be publicly accused of it in the community where he lived, if he desisted from his error before his death and was penitent, neither he nor his property shall after his death be liable to the penalties of usury. It ought, therefore, to be evident that a man has died a usurer, in order that he may be so adjudged after his death and his effects disposed of as those of a usurer.”⁵ Even loans at interest by Christians, in the form of pledges of land, advantageous leases and bonds under seal, seem to have been enforced by the Common Law courts, whatever the effect of making such contracts may have been upon the usurer’s sale, or as a ground for forfeiting his property at his death. Glanville tells us that a pledge, the proceeds and rents whereof are not to reduce the debt, is “unjust and dishonest, and is that called a mortgage, but this is not prohibited by the King’s Court, although it considers such a pledge as a species of usury. Hence if any one die having such a pledge, and this be proved after his death, his property shall be disposed of no otherwise than as the effects of a usurer.”⁶ The necessities of commerce made loans of money imperative, and few were willing to loan without interest.⁷ Accordingly, we find that Parliament, by statute fixed the rate of interest at ten pounds per cent per annum, and made it a penal offense to exact more. A subsequent statute,⁸ forbade interest at any rate, and provided for a forfeiture of the debt if interest were exacted. A subsequent statute⁹ repealed the statute of Edward VI., and re-enacted the statute of Henry VIII. Subsequent statutes reduced the rate to eight pounds per cent,¹⁰ six pounds per cent,¹¹ and five pounds per cent.¹² In England, after experimenting for nearly three hundred years, it was finally decided that usury statutes were unsound in principle, and they were accordingly repealed, the parties being free to fix by contract such rate of interest as they

⁵ Glanville (Beames’ Edition), Bk. VII., ch. XVI.

⁶ Glanville (Beames’ Edition), Bk. X., ch. VIII.

⁷ 37 Hen. VIII., Ch. 9.

⁸ 5 and 6 Edw. VI., Ch. 20.

⁹ 13 Eliz., Ch. 8.

¹⁰ 21 Jac. I., C. 17.

¹¹ 12 Car. II., C. 13.

¹² 12 Anne Stat. 2, C. 16.

might agree upon.¹³ In the United States some of the states have not fixed any rate of interest, the parties being free to make such contract as they please. Most of the states, however, fix by statute some rate of interest, varying in different localities, as the maximum rate which the parties may agree upon.

§462. Nature of usury.

Usury, as the term is applied at Modern Law, consists in contracting for a higher rate of interest than that fixed by statute for the use of money.¹ Unless a rate higher than that fixed by law is contracted for the contract is not usurious.² Accordingly a contract for a rate not higher than that fixed by statute is not usurious, even if the rate after maturity is higher than that before maturity.³ Hence a contract, some provisions of which would by themselves be usurious, is valid if it provides on an accounting for a repayment only of the sum actually loaned with lawful interest.⁴ So if the intent of a contract taken as a whole, is to exact only lawful interest, it is not usurious though certain provisions may seem to exact a higher rate.⁵ If the contract itself is valid, the wrongful misapplication of payments cannot amount to usury.⁶ No contract authorized by law can be usurious.⁷ Hence certain classes of contracts such as small loans or loans by building and loan associations,⁸ if excepted from the general operation of the usury laws by statute are not usurious. If exemption from the general usury laws is claimed, however, by virtue of a special statute, the

¹³ 17 and 18 Viet., C. 90.

¹ Woolsey v. Jones, 84 Ala. 88; 4 So. 190; Omaha, etc., Co. v. Hanson, 46 Neb. 870; 65 N. W. 1058; Miller v. Ins. Co., 118 N. C. 612; 54 Am. St. Rep. 741; 24 S. E. 484.

² Lloyd v. Scott, 4 Pet. (U. S.) 205; Johnson v. Loan Association, 125 Ala. 465; 82 Am. St. Rep. 257; 28 So. 2; McKinley-Lanning, etc., Co. v. Aldrich, 50 Neb. 785; 70 N. W. 399.

³ Omaha, etc., Co. v. Hanson, 46 Neb. 870; 65 N. W. 1058.

⁴ Turner v. Loan Association, 47 S. C. 397; 25 S. E. 278.

⁵ Jarvis Conklin, etc., Co. v. Willhoit, 84 Fed. 514.

⁶ Burns v. Loan Association, 108 Ga. 181; 36 S. E. 856.

⁷ Johnson v. Loan Association, 125 Ala. 465; 82 Am. St. Rep. 257; 28 So. 2.

⁸ See § 478.

case must be brought strictly within such statute.⁹ If the statute fixes six per cent as the legal rate, unless the parties in writing fix a higher rate, in which case they cannot fix a rate higher than eight per cent, a charge of seven per cent as interest upon interest, and of twelve per cent as interest on overdrafts is usurious, there being no written contract for either.¹⁰ A question as to the nature of usury has caused a conflict of judicial decisions as to particular forms of contracts which are claimed to be usurious. The question is whether it is the amount to be paid by the debtor or the amount which is received by the creditor directly or indirectly, that is to be considered as the payment for the use of money in determining whether usury exists. On the one hand it seems to be held that payment of interest made partly by the debtor and partly by a third person is usurious if such payments, when added together, exceed the maximum legal rate, even if the amount paid by the debtor alone did not exceed such rate.¹¹ On the other hand it has been held that a loan by A to B on consideration that B will convey to C property other than that mortgaged to secure such debt is not usurious.¹² The solution of this question determines cases where in addition to the highest rate of interest the debtor agrees to pay commissions,¹³ or expenses of making the loan.¹⁴ As will be observed from the discussion of these subjects in subsequent sections, the courts are neither harmonious nor consistent in their answer to this question. "Usury" is also used as a concrete noun to denote the illegal interest exacted or contracted for.¹⁵

⁹ *Atlanta Savings Bank v. Spencer*, 107 Ga. 629; 33 S. E. 878; *Crabtree v. Loan Association*, 95 Va. 670; 64 Am. St. Rep. 818; 29 S. E. 741.

¹⁰ *Citizens National Bank v. Donnell*, 172 Mo. 384; 72 S. W. 925.

¹¹ *Alexander v. National Bank*, — Ky. —; 71 S. W. 883.

¹² *Cockrill v. Cockrill*, 79 Fed. 143. (A was B's father-in-law; C was B's wife; and B was an habitual drunkard not under guardianship.)

¹³ See § 481 *et seq.*

¹⁴ See § 486.

¹⁵ *Sanford v. Kunz*, — Ida. —; 71 Pac. 612.

§463. Intent as element of usury.

A wrongful or corrupt intent to exact a higher rate of interest than that fixed by law is said to be an essential element of usury.¹ "Usury is a matter of intention, and to avoid a contract on that ground it must appear that the lender knew the facts and acted with a view of evading the law."² "To constitute usury within the prohibitions of the law there must be an intention knowingly to contract for or to take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for legal presumption; for the intent is apparent, *res ipsa loquitur*. But where the contract, on its face, is for legal interest only, there it must be proved that there was some corrupt agreement or device or shift to cover usury, and that it was in the full contemplation of the parties."³ Within certain limits this principle is sound. Its application to mistakes of fact or expression insofar that it prevents the penalties and forfeitures fixed by the usury laws from applying, is clear. Thus if the provision for an excessive rate is due to a mistake in expression,⁴ as where the provision is inserted either by that borrower,⁵ or by the agent of the lender,⁶ without the knowledge of the lender in either case; or if it is due to a failure of the scrivener to strike out a printed clause in the form on which

¹ Brown v. Grundy, 111 Fed. 15; Bellerby v. Goodwyn, 112 Ga. 306; 37 S. E. 376; Anderson v. Mfg. Co., — Ida. —; 56 L. R. A. 554; 67 Pac. 493; Cooper v. Nock, 27 Ill. 301; Gale v. Grannis, 9 Ind. 140; Brainard v. Prouty, 66 Minn. 343; 69 N. W. 3; Folsom v. Kilbourne, 5 N. D. 402; 67 N. W. 291; Washington Investment Association v. Stanley, 38 Or. 319; 84 Am. St. Rep. 793; 58 L. R. A. 816; 63 Pac. 489; Hancock v. Clark, 68 Vt. 302; 35 Atl. 317.

² Fay v. Lovejoy, 20 Wis. 407; quoted in Anderson v. Mfg. Co., — Ida. —; 56 L. R. A. 554, 557; 67 Pac. 493.

³ Bank v. Waggener, 9 Pet. (U. S.) 378, 399.

⁴ Ward v. Anderberg, 31 Minn. 304; 17 N. W. 630. (Mistake in mortgage; note bearing lawful rate.) Smythe v. Allen, 67 Miss. 146; 6 So. 627. (Mistake in date of note.)

⁵ Anderson v. Mfg. Co., — Ida. —; 56 L. R. A. 554; 67 Pac. 493.

⁶ Kase v. Bennett, 54 N. J. Eq.

the mortgage was written,⁷ such mistake does not make the contract usurious. So an error in computation in which the lender is in good faith seeking to avoid usury,⁸ as where, by mistake in dates, interest is computed for a greater time than that agreed upon⁹ does not make the contract usurious, especially where the excess over the legal rate is very slight.¹⁰ So if in an honest attempt to purge a contract of usury by eliminating usurious items the parties by mistake omit to eliminate certain items the new contract is not usurious.¹¹ So where interest coupons bore date before the money was delivered, and interest for such intervening time was credited on the lender's books, but by mistake was not credited upon the first coupon due, the contract is not usurious.¹² If, however, the real agreement was usurious, the fact that by mistake a greater rate of interest than even that agreed upon was inserted in the contract does not prevent the contract from being usurious.¹³ The courts have in some cases gone further, and held that a *bona fide* belief in the legality of the interest charged will prevent the contract from being so usurious as to charge the lender with penalties.¹⁴ Some courts have held that the intent to contract for usury must be entertained by both borrower and lender to constitute usury. Under this theory fraud in inducing the

97; 33 Atl. 248. (Provision in mortgage only; bond legal.)

⁷ Fifth National Bank v. Pierce, 117 Mich. 376; 75 N. W. 1058.

⁸ Johnson v. Shattuck, 67 Ark. 159; 53 S. W. 888; Rushing v. Willingham, 105 Ga. 166; 31 S. E. 154; Agricultural Bank v. Bissell, 12 Pick. (Mass.) 586; Dodds v. Machine Co., 62 Neb. 759; 87 N. W. 911; Marvine v. Hymers, 12 N. Y. 223.

⁹ Johnson v. Shattuck, 67 Ark. 159; 53 S. W. 888; Swanson v. Realization, etc., Corporation, 70 Minn. 380; 73 N. W. 165.

¹⁰ Slaughter v. Bank, 109 Ala. 157; 19 So. 430. (Interest for less

than one day in excess.) Johnson v. Shattuck, 67 Ark. 159; 53 S. W. 888. (Interest note two dollars in excess.) Rushing v. Willingham, 105 Ga. 166; 31 S. E. 154. (Interest a few cents in excess.) Swanson v. Realization, etc., Corporation, 70 Minn. 380; 73 N. W. 165.

¹¹ Jarvis v. Grocery Co., 63 Ark. 225; 38 S. W. 148.

¹² Bellerby v. Goodwyn, 112 Ga. 306; 37 S. E. 376.

¹³ Carter v. Holloway (Miss.), 28 So. 941.

¹⁴ Washington Investment Co. v. Stanley, 38 Or. 319; 84 Am. St. Rep. 793; 58 L. R. A. 816; 63 Pac. 489.

borrower to execute a note and mortgage for an amount larger than he intended is not usury, even if the difference between the amount loaned and the amount provided for in the contract exceeds the highest legal rate of interest.¹⁵ So it has been held that where the lender fraudulently induces the borrower to pay him money by alleging that it is for expenses of making a loan, fraud exists but no usury.¹⁶ The view taken by other courts makes the contract for unlawful interest usury without reference to the intention of the parties.¹⁷ Apart from mistakes in expression and in computation, this is undoubtedly the correct view. Hence a *bona fide* mistake of law does not prevent the contract from being usurious.¹⁸

§464. Contingent payment.

Since usury is an agreement for an excessive rate of interest for the use of money, it follows that if the contract is for paying such excessive rate for something other than the use of money, or for the use of money and something else in addition thereto, such contract is not usury. Thus if the contract provides for the repayment of the debt not absolutely but only upon a certain contingency which may or may not happen, a contract for a rate of interest higher than that fixed by statute is not usury.¹ If the provision for non-payment in a given contingency is not *bona fide*, but is "a mere shift and device to cover usury,"² the contract may be usurious. Thus if a loan is made secured by mortgage on realty, to be paid when due, unless the debtor died under certain circumstances specified in detail, in which case the notes were to be surrendered and the mortgage cancelled, the contract was held usurious where the amount to be repaid

¹⁵ Chambers v. Gilbert, 68 Minn. 183; 70 N. W. 1077.

¹⁶ Morton v. Thurber, 85 N. Y. 550.

¹⁷ Garvin v. Linton, 62 Ark. 370; 35 S. W. 430; 37 S. W. 569; Mitchell v. Bailey, 57 S. C. 341; 35 S. E. 581.

¹⁸ Atlanta Savings Bank v. Spencer, 107 Ga. 629; 33 S. E. 878; Crab-

tree v. Loan Association, 95 Va. 670; 64 Am. St. Rep. 818; 29 S. E. 741.

¹ Spain v. Hamilton's Administrator, 1 Wall. (U. S.) 604; Craig v. McMullin, 9 Dana (Ky.) 311; Heist v. Blaisdell, 198 Pa. St. 377; 48 Atl. 259.

² Missouri, etc., Co. v. McLachlan, 59 Minn. 468, 475; 61 N. W. 560.

was greatly in excess of the legal rate, and as part of the contract the insured was to pass a medical examination for life insurance and the creditor insured the debtor's life to protect itself against loss.³ In the cases here cited interest for the entire principal was computed and added to the principal. The sum thus obtained was divided into equal amounts payable at equal intervals during the life of the loan.⁴ If, however, the contract is for the absolute repayment of the principal, and the contingency affects the rate of interest only, the contract is usurious.⁵ In other cases such a contract has been held to be valid.⁶ So a provision for paying a share of profits as remuneration for the use of money is held not to be usurious.⁷

§465. Excessive rate of interest after maturity.

Since usury contemplates the use of money, the contract for the legal rate of interest up to maturity, and providing for an increase after maturity over the legal rate, is, in the absence of special statute, held not to be usury, since the contract is not for the use of money but to compel its payment at maturity. So it has been said that if the statute does not specifically provide for the rate of interest after maturity the parties may contract for any rate they please.¹ This principle was recognized in the earlier cases² and has since been applied in many cases.³ This doctrine seems to have been applied originally to cases where the promise was to pay a lump sum in case of default in payment,⁴ as that if the debt was not dis-

³ Missouri, etc., Co. v. Krumsieg, 172 U. S. 351; affirming 77 Fed. 32; 40 U. S. App. 620; which affirmed 71 Fed. 350; Mathews v. Trust Co., 69 Minn. 318; 72 N. W. 121; Missouri, etc., Co. v. McLachlan, 59 Minn. 468; 61 N. W. 560.

⁴ See § 473.

⁵ Browne v. Vredenburg, 43 N. Y. 195; Cooper v. Tappan, 9 Wis. 361.

⁶ Spain v. Hamilton's Administrator, 1 Wall. (U. S.) 604.

⁷ See § 490.

¹ Chaffee v. Landers, 46 Ark. 364; Downey v. Beach, 78 Ill. 53; Fisher v. Anderson, 25 Ia. 28; 95 Am. Dec. 761; Capen v. Crowell, 66 Me. 282.

² Lloyd v. Scott, 4 Pet. (U. S.) 205; Cutler v. How, 8 Mass. 257.

³ Chaffee v. Landers, 46 Ark. 364; Downey v. Beach, 78 Ill. 53; Withers v. Briggs, 67 Ill. 96; Gould v. Hill Colony, 35 Ill. 324; Upton v. O'Donahue, 32 Neb. 565; 49 N. W. 267.

⁴ Garrett v. Foot, Comb. 133; Oli-

charged during the debtor's lifetime, her executor should pay it with twenty per cent added;⁵ or to contract to pay a certain sum at a certain time, but giving to the debtor the option to discharge the contract by paying a smaller sum before such time,⁶ or to pay a commission for collection if the debt is not paid at maturity.⁷ So a provision for an additional payment if the mortgagor of mortgaged property sells it before paying the mortgage debt, has been held not to be usurious.⁸ It has been extended also to cases in which the debtor is to pay an increased rate of interest after maturity in excess of the legal rate.⁹ The reason for this rule suggested in these cases is that since the debtor may pay the debt at the time indicated and relieve himself from further liability, the contract is not usurious, as it is without the statute fixing the rate to be contracted for for forbearance.¹⁰ Whether the agreement to pay the additional rate of interest is valid, or whether it is to be treated merely as a penalty and invalid, is another question which is discussed elsewhere.¹¹ It is not, however, usury, and does not invalidate the valid provisions of the contract. The application of this principle, however, presupposes that the contract is a *bona fide* one and not intended as an evasion of the usury

ver v. Oliver, 2 Rolle 469; Gambrill v. Rose, 8 Blackf. (Ind.) 140; 44 Am. Dec. 760.

⁵ Watson v. McClanahan, 13 Ala. 57.

⁶ Jordan v. Lewis, 2 Stew. (Ala.) 426; Chaffee v. Landers, 46 Ark. 364; Moore v. Hylton, 1 Dev. Eq. (N. C.) 429; Groves v. Graves, 1 Wash. (Va.) 1.

⁷ Campbell v. Shields, 6 Leigh (Va.) 517.

⁸ State v. Elliott, 61 Kan. 518; 59 Pac. 1047.

⁹ Hubbard v. Callahan, 42 Conn. 524; 19 Am. Rep. 564. (15 per cent interest after maturity.) Wernwag v. Mothershead, 3 Blackf. (Ind.) 401. (Interest \$5 per week on principal of \$432 after maturity.) Con-

rad v. Gibbon, 29 Ia. 120. (Interest 20 per cent per annum after maturity.) Wight v. Shuck, 1 Morris (Ia.) 425; s. c., Shuck v. Wight, 1 Greene (Ia.) 128. (Interest 50 per cent per annum after maturity.) Law, etc., Society v. Hogue, 37 Or. 544; 62 Pac. 380; rehearing denied, 37 Or. 560; 63 Pac. 690. (Interest $\frac{1}{2}$ per cent per annum in excess of legal rate after maturity.) Ward's Administrators v. Cornett, 91 Va. 676; 49 L. R. A. 550; 22 S. E. 494; Fisher v. Otis, 3 Pinn. (Wis.) 78; 3 Chand. (Wis.) 83.

¹⁰ State v. Elliott, 61 Kan. 518; 59 Pac. 1047; Campbell v. Shields, 6 Leigh (Va.) 517.

¹¹ See § 1181.

laws.¹² If it appears that the contract is really for forbearance at an illegal rate of interest, and not as a means of enforcing prompt payment, it is usurious.¹³ Hence if the real understanding of the parties is that the note is not to be paid until a year after maturity, the contract for illegal interest renders the transaction usurious.¹⁴ So it has been held that as a contract for illegal interest if made at maturity can be only for forbearance and not to enforce prompt payment, it is usurious.¹⁵ Where the contract for excessive interest after maturity is made when the note is executed the mere fact of forbearance to sue does not show an evasion of the usury laws.¹⁶ Under some statutes a contract for a rate of interest after maturity, exceeding the legal rate, is usury.¹⁷ This result is reached in Texas under the statutory definition of interest as a sum allowed for the detention of money.¹⁸ In some states which, under former statutes, allowed interest after maturity in excess of the legal rate, statutes have since been passed specifically forbidding such contracts and making them usurious.¹⁹

II. DISGUISED FORMS OF USURY.

§466. Interest included in principal.

In view of the general prevalence of usury statutes, and their rigid enforcement by the courts, open and undisguised contracts

¹² Stein v. Swensen, 44 Minn. 218; 46 N. W. 360.

¹³ Union, etc., Co. v. Hagood, 97 Fed. 360; Sanner v. Smith, 89 Ill. 123; 31 Am. Rep. 70; Osborn v. McCowan, 25 Ill. 218.

¹⁴ Pike v. Crist, 62 Ill. 461.

¹⁵ Shirley v. Welty, 19 Ill. 623; 71 Am. Dec. 244.

¹⁶ Funk v. Buck, 91 Ill. 575.

¹⁷ Union, etc., Co. v. Hagood, 97 Fed. 360. (Under South Carolina law.) May v. Shephard, 1 Mackey (D. C.) 430; *In re Leeds*, 49 La. Ann. 501; 21 So. 617; Griffin v. His Creditors, 6 Rob. (La.) 216; Ehrhardt v. Varn, 51 S. C. 550; 29 S. E.

225; Carroll County Savings Bank v. Strother, 28 S. C. 504; 6 S. E. 313; Bang v. Windmill Co., 96 Tenn. 361; 34 S. W. 516; Richardson v. Brown, 9 Baxt. (Tenn.) 242; Parks v. Lubbock, 92 Tex. 635; 51 S. W. 322; reversing (Tex. Civ. App.), 50 S. W. 466. In construing the Tennessee Statute, the Mississippi Court reached the opposite conclusion. Vacarro v. Asher (Miss.), 11 So. 531.

¹⁸ Parks v. Lubbock, 92 Tex. 635; 51 S. W. 322; reversing (Tex. Civ. App.), 50 S. W. 466.

¹⁹ Barton v. Bank, 122 Ill. 352; 13 N. E. 503; Peavler v. McLaughlin,

for usury are quite rare. One of the most important problems under the law of usury is to detect the disguises under which the parties seek to mask the real nature of the transaction. Since these disguises assume the form of legitimate contracts outside the usury statutes it is constantly necessary to distinguish the real intent of the parties from the form in which the contract is expressed. Any device whereby a greater amount than the maximum rate fixed by statute is charged for forbearance of the use of money is usury.¹ If the maximum legal rate of interest is charged, and the lender as a part of the contract of loan requires the borrower to pay another debt upon which he is not himself liable, such payment constitutes usury.² A simple disguise which is always held to be usury, consists in adding the usury to the principal, making the note or promise to pay, for a larger sum than that advanced, the face of the note exceeding the sum advanced and the highest legal rate of interest thereon, and the transaction being merely to secure compensation for the forbearance of money.³ If the amount added to the sum advanced is not compensation for forbearance, but is for some other outstanding liability, the transaction is not usurious.⁴ Hence the mere fact that the amount advanced is less than the face of the note does not of itself establish usury.⁵ If the intention of the parties is not to charge compensation for the use of money, the transaction is

20 Ill. App. 536; *Chase v. Whitten*, 51 Minn. 485; 53 N. W. 767.

¹ *Missouri, etc., Co. v. Krumsieg*, 172 U. S. 351.

² *Bishop v. Bank*, 114 Ga. 962; 41 S. E. 43.

³ *Rozier v. Evans*, 113 Ga. 1162; 39 S. E. 481; *Harrell v. Blount*, 112 Ga. 711; 38 S. E. 56; *Lavette v. Brinsfield*, 111 Ga. 821; 35 S. E. 637; *Borrowers', etc., Association v. Eklund*, 190 Ill. 257; 52 L. R. A. 637; 60 N. E. 521; *Sorensen v. Lumbar Co.*, 98 Ill. App. 581; *Pardoe v. Bank*, 106 Ia. 345; 76 N. W. 800; *McNeely v. Ford*, 103 Ia. 508; 64

Am. St. Rep. 195; 72 N. W. 672; *Richards v. Purdy*, 90 Ia. 502; 48 *Am. St. Rep.* 458; 58 N. W. 886; *Greenfield v. Monaghan*, 85 Ia. 211; 52 N. W. 193; *Kreibohm v. Yancey*, 154 Mo. 67; 55 S. W. 260; *Farm Land Security Co. v. Nelson*, 52 Neb. 624; 72 N. W. 1048; *Sumter, etc., Association v. Winn*, 45 S. C. 381; 23 S. E. 29; *Rosetti v. Lozano*, 96 Tex. 57; 70 S. W. 204.

⁴ *Neuhauser v. Banish*, 84 Minn. 286; 87 N. W. 774; *Pettyjohn v. Wilkin*, 11 Okla. 135; 66 Pac. 281.

⁵ *Wilkins v. Gibson*, 113 Ga. 31; 84 *Am. St. Rep.* 204; 38 S. E. 374.

not usurious even if the note given exceeds the amount advanced. Thus notes for future advances of money and supplies were given. The person who agreed to furnish the supplies (a person other than the payee) did not furnish all that he agreed to furnish. This was a breach of contract, causing partial failure of consideration, but was not usury.⁶ If the face of the note is less than the amount furnished, with the maximum legal rate of interest, the contract is not usurious, though the face of the note is larger than the amount advanced.⁷

§467. Additional note for interest.

Another disguise of usury consists in executing a note bearing a legal rate of interest, and an additional note for the usurious excess over the legal rate.¹ The entire contract is tainted with usury in such case, and not merely the note given specifically for the interest.²

§468. Loan of depreciated currency.

A question, happily long since obsolete, once arose where a loan of depreciated currency was made and a note given therefor at par. Whether this was usury or not depended entirely on the intention of the parties. If they intended it to disguise a usurious loan its form did not make it valid.¹ An agreement to repay in specie tended very strongly to establish the fact that the entire contract was usurious.² On the other hand such loans were not treated as usurious if such was not the intention of the parties.³ So if a loan of coin was made, an

⁶ Lanier v. Trust Co., 64 Ark. 39; 40 S. W. 466.

⁷ Green v. Mortgage Co., 107 Ga. 536; 33 S. E. 869. (Even under a statute requiring such rate to be specified in writing.)

¹ Brown v. Bank, 169 U. S. 416; Howell v. Pennington, 118 Ga. 494; 45 S. E. 272; Shepherd v. Wacaser, 86 Ill. App. 444.

² Brown v. Bank, 169 U. S. 416.

¹ Bank v. Owens, 2 Pet. (U. S.) 527; Collins v. Secreth, 7 T. B. Mon. (Ky.) 335; Weatherhead v. Boyers, 7 Yerg. (Tenn.) 545.

² Weatherhead v. Boyers, 7 Yerg. (Tenn.) 545.

³ Bank v. Waggener, 9 Pet. (U. S.) 378; Talbot v. Warfield, 3 J. J. Mar. (Ky.) 83; Hamilton v. Moore, 7 Humph. (Tenn.) 35.

agreement to pay a greater sum if in depreciated currency,⁴ or an agreement to repay the same sum in coin or a larger sum in depreciated currency⁵ was not of itself usurious.

§469. Exchange.

If the contract contemplates the payment of money in another place, adding exchange is not usury.¹ If, however, the note is to be paid where made, and the addition of exchange is for the purpose of collecting a rate of interest greater than the legal rate the contract is usurious.²

§470. Rate of interest of other state.

If the debt is really payable in another state the parties may exact the maximum rate of interest provided for by the law either of the state where the contract is made or the state where it is payable.¹ If, however, the contract is really payable where made, and the provision as to payment in another state is inserted in order to permit a charge of a greater rate than the maximum permitted in the place where the contract is really payable, it is usurious.² If a bill is drawn and discounted the fact that the drawer did not himself expect to pay it in

⁴ *Wilson v. Kilburn*, 1 J. J. Mar. (Ky.) 494.

⁵ *Finley v. McCormick*, 6 Heisk. (Tenn.) 392.

¹ *Wheeler v. National Bank*, 96 U. S. 268; *Buckingham v. McLean*, 13 How. (U. S.) 151; *Smith v. Champion*, 102 Ga. 92; 29 S. E. 160; *Griffin v. Marine Co.*, 52 Ill. 130; *Beals v. Benjamin*, 33 N. Y. 61; *Creed v. Bank*, 11 Ohio 489.

² *Union Bank v. Bell*, 14 O. S. 200; *Miami Exporting Co. v. Clark*,

13 Ohio 1; *Townsend v. Durkee*, 12 Wis. 480.

¹ See Ch. LXXX.

² *Junction Ry. v. Bank*, 12 Wall. (U. S.) 226; *Miller v. Tiffany*, 1 Wall. (U. S.) 298; *Shannon v. Loan Association*, 78 Miss. 955; 57 L. R. A. 800; 30 So. 51; *Chapman v. Robertson*, 6 Paige (N. Y.) 627; 31 Am. Dec. 264; *Pacific States, etc., Co. v. Hill*, 40 Or. 280; 91 Am. St. Rep. 477; 56 L. R. A. 163; 67 Pac. 103; *Parham v. Pulliam*, 5 Coldw. (Tenn.) 497.

another place, but expected the drawee to pay it for him in such other place does not make it usurious.³

§471. Interest paid in advance.

If the highest legal rate of interest is charged, and is collected in advance, there is a technical infraction of the usury laws. The courts, however, have deferred to methods of business insofar that if such loans are for short times, the transaction is treated as not usurious.¹ If, however, the loan is for a long time, and the interest for a long period is deducted in advance, the transaction is held to be usurious, as it undoubtedly is.² Deducting interest for one year in advance has been held not to be usury.³ Receiving interest for five years in advance has been held to be usury, where the amount reserved and the amount agreed to be paid together exceed the original loan with the highest legal rate of interest.⁴ So if such amount is exacted as to exceed the maximum legal rate upon the nominal amount loaned, the contract is clearly usurious.⁵

³ *Bank v. Haynes*, 23 O. S. 637.

¹ *Fowler v. Trust Co.*, 141 U. S. 384. (Interest at 10 per cent. 3 per cent. per annum reserved for five years in advance.) *Fleckner v. Bank*, 8 Wheat. (U. S.) 338; *Bank of Newport v. Cook*, 60 Ark. 288; 46 Am. St. Rep. 171; 29 L. R. A. 761; 30 S. W. 35; *McCall v. Herring*, 116 Ga. 235; 42 S. E. 468; *Willett v. Maxwell*, 169 Ill. 540; 43 N. E. 473; affirming 68 Ill. App. 119; *Polen v. Palmer*, 53 Ill. App. 223; *Telford v. Garrels*, 132 Ill. 550; 24 N. E. 573; *Brown v. Mortgage Co.*, 110; Ill. 235; *Warren Deposit Bank v. Robinson* (Ky.), 35 S. W. 275; *Swanson v. Debenture Cor-*

poration, 70 Minn. 380; 73 N. W. 165; *Steen v. Stretch*, 50 Neb. 572; 70 N. W. 48; *Pierce v. Davey*, 43 Neb. 45; 61 N. W. 92; *Manhattan Co. v. Osgood*, 15 Johns. (N. Y.) 162; *Geisborg v. Loan Association* (Tex. Civ. App.), 60 S. W. 478.

² *McCall v. Herring*, 116 Ga. 235; 42 S. E. 468.

³ *Willett v. Maxwell*, 169 Ill. 540; 48 N. E. 473; affirming 68 Ill. App. 119.

⁴ *McCall v. Herring*, 116 Ga. 235; 42 S. E. 468.

⁵ *Howell v. Pennington*, 118 Ga. 494; 45 S. E. 272; (over-charge of \$3.48).

§472. Interest paid at short intervals.

Requiring the payment of interest at short intervals is not usury,¹ even if the statute fixes the maximum rate of interest at a certain rate "payable annually."²

§473. Payment of principal in installments.

A contract for paying interest for the entire debt for the entire period of the loan, but providing for repaying the loan in installments, is usurious if the rate thus exacted exceeds the maximum legal rate for the time for which the money has been actually enjoyed by the debtor.¹ The favorite device for concealing the true rate of interest in such cases — sometimes even from the debtor — is to compute the interest for the entire time, add it to the principal, divide this sum by the number of months, and take notes, each for this amount, and due one each month.

If the contract does not require any payment before the end of the period for which interest is computed, and payment according to the terms of the contract would not result in usury, the fact that payment is in fact made by the debtor and accepted by the creditor before maturity cannot make the contract usurious.²

¹ Meyer v. Muscatine, 1 Wall. (U. S.) 384; monthly, Brower v. Ins. Co., 86 Fed. 748; Hatch v. Douglas, 48 Conn. 116; 40 Am. Rep. 154; quarterly, Mowry v. Shumway, 44 Conn. 493; Ragan v. Day, 46 Ia. 239; Brown v. Vandyke, 8 N. J. Eq. 795; 55 Am. Dec. 250; semi-annually, Goodrich v. Reynolds, 31 Ill. 490; 83 Am. Dec. 240; Hawley v. Howell, 60 Ia. 79; 14 N. W. 199; Taylor v. Heistand, 46 O. S. 345; Cook v. Courtright, 40 O. S. 248; 48 Am. Rep. 681; Monnett v. Sturges, 25 O. S. 384; Martin v. Bank, 5 Tex. Civ. App. 167; 23 S. W. 1032; Tallman v. Truesdell, 3 Wis. 443.

² Cook v. Courtright, 40 O. S. 248; 48 Am. Rep. 681.

¹ Missouri, etc., Co. v. Krumseig, 172 U. S. 351; Maxwell v. Improvement Co., — Fla. —; 34 So. 255; Union, etc., Co. v. Dottenheim, 107 Ga. 606; 34 S. E. 217; Mathews v. Trust Co., 69 Minn. 318; 72 N. W. 121; Missouri, etc., Co. v. McLachlan, 59 Minn. 468; 61 N. W. 560; Galveston, etc., Co. v. Grymes, 94 Tex. 609; 63 S. W. 860; affirming 50 S. W. 467; rehearing denied, 94 Tex. 618; 64 S. W. 778; Sproule v. McFarland (Tex. Civ. App.), 56 S. W. 693.

² Savannah Savings Bank v. Logan, 99 Ga. 291; 25 S. E. 692.

§474. Ante-dating note.

A form of disguising usury consists in computing it at a rate apparently legal, but for a period of time longer than that for which the debtor has the use of the money. The method generally resorted to in this form of usury is ante-dating the note so as to make interest begin to run from a time before the loan was made, and making the time for which interest is computed extend beyond the time at which the principal is to be repaid. Dating a note back before the time of the loan so as to make the interest run for a period longer than that for which the debtor has the use of the money is usury if the interest thus exacted exceeds the maximum legal rate for the actual time for which the loan is made.¹ If such ante-dating is not intended to cover usury,² as where the instrument was dated back to the time that the money was set aside for the debtor's use,³ even if not paid for some time thereafter owing to delay in erecting a building, the loan being payable as the building progresses;⁴ or where interest for the time between the date of the loan and the time that the debtor receives the money is credited to the debtor⁵ the contract is not usurious. The instrument cannot be dated back to the time when a loan was promised but no amount was agreed upon.⁶ An agreement made after an instrument has taken effect for paying a higher

¹ *Hiller v. Ellis*, 72 Miss. 701; 41 L. R. A. 707; 18 So. 95; *Vail v. Van Doren*, 45 Neb. 450; 63 N. W. 787; *Williams v. Williams*, 15 N. J. L. 255.

² *Ansley v. Bank*, 113 Ala. 467; 59 Am. St. Rep. 122; 21 So. 59; *Georgia, etc., R. R. v. Trust Co.*, 94 Ga. 306; 47 Am. St. Rep. 153; 21 S. E. 701; (with sub-title *McTighe v. Construction Co.*); *sub nomine* *McTighe v. Construction Co.*, 32 L. R. A. 208; *Waterman v. Baldwin*, 68 Ia. 255; 26 N. W. 435; *Rose v. Munford*, 36 Neb. 148; 54 N. W. 129.

³ *Ewing v. Howard*, 7 Wall. (U.

S.) 499. (A case in which the question of the real nature of the transaction was not raised in the trial court.) *Wilson v. Kirby*, 88 Ill. 566; *Holden v. Pollard*, 4 Pick. (Mass.) 173; *Daly v. Minnesota, etc., Co.*, 43 Minn. 517; 45 N. W. 1100; *Bevier v. Covell*, 87 N. Y. 50; *Geisburg v. Loan Association* (Tex. Civ. App.), 60 S. W. 478.

⁴ *Bishopp v. Blair*, 90 Ill. App. 64.

⁵ *Menzie v. Smith*, 63 Neb. 666; 88 N. W. 855.

⁶ *Hiller v. Ellis*, 72 Miss. 701; 41 L. R. A. 707; 18 So. 95.

rate than that originally stipulated, though not higher than that fixed by law, is not usurious though the time at which such higher rate is to begin is dated back before the date of such agreement.⁷

§475. Interest on interest.

In a contract which reserves the highest legal rate of interest, it is often provided that if the interest is not paid when due it shall bear interest or shall be added to the principal. Such contracts are generally held not to be usurious.¹ The reason given is that the creditor can avoid such interest on interest, by paying interest when due.² In some states, while such agreement is not usurious, the provision for interest on interest cannot be enforced.³ Some states, however, treat agreements for interest on interest as usurious, on the theory that the total interest to be paid under such contracts exceeds the maximum legal rate of interest on the principal.⁴ Since the borrower could pay interest when due and stop interest on interest, and since if he paid it when due, he could at once borrow the same amount and pay interest thereon, this view of the law seems absurd. Even where a provision in advance for interest on interest is not enforceable, the parties may, on the maturity of the debt, capitalize interest due, with the original principal, in a new note.⁵ Accordingly in some of the cases holding such con-

⁷ Harrell v. Parrott, 50 S. C. 16; 27 S. E. 521.

¹ Stickney v. Moore, 108 Ala. 590; 19 So. 76; Ginn v. Security Co., 92 Ala. 135; 8 So. 388; Steen v. Stretch, 50 Neb. 572; 70 N. W. 48; Taylor v. Hiestand, 46 O. S. 345; 20 N. E. 345; Heyward v. Williams, 63 S. C. 470; 41 S. E. 550; Newton v. Woodley, 55 S. C. 132; 32 S. E. 531; 33 S. E. 1; Baum v. Raley, 53 S. C. 32; 30 S. E. 713; Crider v. Loan Association, 89 Tex. 597; 35 S. W. 1047.

² Crider v. Loan Association, 89 Tex. 597; 35 S. W. 1047.

³ Steen v. Stretch, 50 Neb. 572; 70 N. W. 48.

⁴ Drury v. Wolfe, 134 Ill. 294; 25 N. E. 626; Sujette v. Wilson, 13 Or. 514; 11 Pac. 267; Ward v. Brandon, 1 Heisk. (Tenn.) 490.

⁵ United States Mortgage Co. v. Sperry, 138 U. S. 313 (a case arising under Illinois law); Telford v. Garrels, 132 Ill. 550; 24 N. E. 573; affirming 31 Ill. App. 441; Thayer v. Mining Co., 105 Ill. 540; Stanford v. Coram, 26 Mont. 285; 67 Pac. 1005; Hale v. Hale, 1 Coldw. (Tenn.) 233; 78 Am. Dec. 490; Austin v. Bacon, 28 Wis. 416.

tracts to be usurious, the courts appear to look upon their decisions as unsound in principle, and justified only by precedents which they felt bound to follow.⁶ Even where an agreement to pay interest on interest has been held to be usurious it has been held that separate interest coupons will bear interest after maturity.⁷ It appears therefore that even those courts which treat as usurious agreements in advance for interest on interest pay attention rather to the outward form of the contract than to its essential nature. If the credits on a debt exceed the interest, carrying the balance into a new debt less than the original principal cannot be said to exceed the legal rate, the rate contracted for not exceeding that allowed by law.⁸ If by statute compounding interest oftener than once a year is forbidden, a contract providing for compounding it oftener is usurious.⁹ Compound interest is sometimes specifically forbidden by statute and is therefore usury, even if the rate reserved is, after the compound interest is added, below the amount allowed by statute.¹⁰

§476. Sales as usurious contracts.

"Unless there was a loan there can be no usury."¹ The usury statutes, therefore, do not apply to a genuine contract for the payment of money in consideration of the sale of property.² A genuine contract of sale cannot be treated as usurious even if the price to be paid is in excess of the real value of the property.³ So a contract for the sale and repurchase of stock

⁶ *Hochmark v. Richler*, 16 Colo. 263; 26 Pac. 818; *Dyar v. Slingerland*, 24 Minn. 267.

⁷ *Humphreys v. Morton*, 100 Ill. 592; *Harper v. Ely*, 70 Ill. 581; s. c., 56 Ill. 179.

⁸ *Smith v. Butler*, 176 Mass. 38; 57 N. E. 322.

⁹ *Citizens' National Bank v. Donnell*, 172 Mo. 384; 72 S. W. 925.

¹⁰ *Vermont, etc., Co. v. Hoffman*, 5 Ida. 376; 95 Am. St. Rep. 186; 37 L. R. A. 509; 49 Pac. 314.

¹ *Struthers v. Drexel*, 122 U. S. 487.

² *Struthers v. Drexel*, 122 U. S. 487; *Wheeler v. Marchbanks*, 32 S. C. 594; 10 S. E. 1011; *Culver v. Bigelow*, 43 Vt. 249; *Hancock v. Clark*, 68 Vt. 302; 35 Atl. 317.

³ *Struthers v. Drexel*, 122 U. S. 487; *Kassing v. Ordway*, 100 Ia. 611; 69 N. W. 1013; *Saxe v. Womack*, 64 Minn. 162; 66 N. W. 269.

is not usurious, as there is no debt.⁴ The fact that the sale was at a greater price than that paid by the vendor,⁵ or that such advantageous sale was made at the same time as a loan, the note in question being given for both debts,⁶ does not of itself make the contract usurious. A contract of sale is, however, a favorite method of disguising usury. The transaction may be a real loan between the parties, and exorbitant interest may be charged by requiring the borrower as a part of the transaction to pay an excessive price for property sold to him by the lender. If this is the real intent of the parties, such contract is usurious.⁷ A contract to pay one dollar and twenty-five cents a week for sixty-three weeks, the party making such payments to receive, on surrender of his contract, a diamond which the adversary party agreed to buy back for one hundred and twenty dollars, was held to be usurious.⁸ So a transaction which takes the form of rescinding a sale of land and making a new sale at a higher price is usurious if the increase in price is meant as usury on the debt⁹ though a similar contract has been held not to be usurious.¹⁰ Usually in these forms of usury the lender acts as vendor, the borrower as vendee. The situation may, however, be reversed. Thus a borrower agreed to sell from his plantation an amount of cotton greatly in excess of what the plantation could produce, agreeing to pay a certain sum for each bale of the deficiency at a stipulated penalty. * If

⁴ *Struthers v. Drexel*, 122 U. S. 487.

⁵ *Kassing v. Ordway*, 100 Ia. 611; 69 N. W. 1013.

⁶ *Saxe v. Womack*, 64 Minn. 162; 66 N. W. 269.

⁷ *Sparks v. Robnson*, 66 Ark. 460; 51 S. W. 460; *Tillar v. Cleveland*, 47 Ark. 287; 1 S. W. 516; *Haggett v. Trulock*, 77 Ga. 369; 3 S. E. 162; *Barfield v. Jefferson*, 78 Ga. 220; 2 S. E. 554; *Morrison v. Markham*, 78 Ga. 161; 1 S. E. 425; *Pope v. Marshall*, 78 Ga. 635; 4 S. E. 116; *Gaither v. Clarke*, 67 Md. 18; 8 Atl. 740; *Barney v. Tontine*

Surety Co., 131 Mich. 192; 91 N. W. 140; *Kommer v. Harrington*, 83 Minn. 114; 85 N. W. 939; *Banning v. Hall*, 70 Minn. 89; 72 N. W. 817; *Quackenbos v. Sayer*, 62 N. Y. 344; *Martin v. Reese* (Tenn. Ch. App.), 57 S. W. 419; *Meem v. Dulaney*, 88 Va. 674; *Hathaway v. Hagan*, 59 Vt. 75; 8 Atl. 678; *Low v. Mussey*, 36 Vt. 183; *Crim v. Post*, 41 W. Va. 397; 23 S. E. 613.

⁸ *Barney v. Tontine Surety Co.*, 131 Mich. 192; 91 N. W. 140.

⁹ *Crim v. Post*, 41 W. Va. 397; 23 S. E. 613.

¹⁰ *Shirkey v. Hunt*, 18 Tex. 883.

such contract was a part of the contract for lending money, and the penalties were contracted for merely to cover usury, the transaction, it was held, would be usurious.¹¹ So if, as part of the contract of loan, the lender requires the borrower to sell him property at an inadequate price, to be reconveyed on payment of a much larger amount, such contract has been held to be usurious.¹² In a genuine sale of property between the parties an excessive price may be agreed upon in consideration of deferring the payment, with a provision for a less price in case of prompt payment. Even if the difference between the price in case of prompt payment and the price in case of deferred payment exceeds the maximum legal rate of interest, no usury exists.¹³ So a contract to pay a certain sum of money at a certain date, with a provision for discharging the obligation before maturity by delivering a specific article of merchandise at a specific price is not on its face usurious.¹⁴ If a debt is incurred by such means, however, an excessive rate of interest for delay constitutes usury as in the case of other debts.

§477. Purchase of note.

A purchase from the owner thereof, of a note or other obligation given by a third person is not usurious if a genuine sale, even if at such a discount as to exceed the maximum rate of interest,¹ and even if the vendor guarantees payment of such

¹¹ *Brown v. West*, 80 Miss. 764; 32 So. 52.

¹² *Heytle v. Logan*, 1 A. K. Mar. (Ky.) 529.

¹³ *Rushing v. Worsham*, 102 Ga. 825; 30 S. E. 541; *Bass v. Patterson*, 68 Miss. 310; 24 Am. St. Rep. 279; 8 So. 849; *Brooks v. Avery*, 4 N. Y. 225; *Churchill v. Turnage*, 122 N. C. 426; 30 S. E. 122; *Garity v. Cripp*, 4 Baxt. (Tenn.) 86.

¹⁴ *Walton Guano Co. v. Copelan*,

112 Ga. 319; 52 L. R. A. 268; 37 S. E. 411.

¹ *Nichols v. Fearson*, 7 Pet. (U. S.) 103; *Metcalf v. Pilcher*, 6 B. Mon. (Ky.) 529; *Becker's Investment Agency v. Rea*, 63 Minn. 459; 65 N. W. 928; *Siewart v. Hamel*, 91 N. Y. 199; *Baily v. Smith*, 14 O. S. 396; 84 Am. Dec. 385; *Cook v. Forker*, 193 Pa. St. 461; 74 Am. St. Rep. 699; 44 Atl. 560; *Gimmi v. Cullen*, 20 Gratt. (Va.) 439.

obligation in full.² If, however, there is an absolute guaranty,³ the transaction has been held usurious. If, however, the vendor sells an obligation on which he is primarily liable, at such discount, the transaction is merely one of giving an obligation for a sum larger than the debt, and is usurious if the discount exceeds the maximum rate of interest.⁴ If, however, by special statute the borrower under such circumstances is authorized to sell his own obligations at such rate of discount, the transaction is not usurious, as a sale by railroad of its own bonds.⁵ Under the National Banking Act discounts as well as loans are forbidden if at a greater rate than the maximum fixed by the state statutes. Accordingly, a discount of paper at a rate greater than that allowed by law is usurious if made by a national bank,⁶ even if, had state statute controlled, such discount would not have been usurious.⁷ Accommodation paper has no legal validity until it passes into the hands of one who pays value for it. This is its true execution. Accordingly as such taker is really buying from the maker, he commits usury if, with notice of its character, he discounts it at a rate exceeding the maximum legal rate of interest.⁸ If such holder has not notice of its character and believes that he is buying from the true owner thereof, the better reasoning holds that he is not guilty of usury by buying it at a discount exceeding the maximum legal rate.⁹ In other jurisdictions it is held that a discount of accommodation paper is

² *Oldham v. Turner*, 3 B. Mon. (Ky.) 67; *Durant v. Banta*, 27 N. J. L. 624.

³ *Bank v. Kirby*, 100 Va. 498; 42 S. E. 303.

⁴ See § 466.

⁵ *Junction R. R. v. Bank*, 12 Wall. (U. S.) 226; *Metropolitan Trust Co. v. Ry.*, 93 Fed. 702.

⁶ *Gloversville National Bank v. Johnson*, 104 U. S. 271; affirming 74 N. Y. 329; 30 Am. Rep. 302; *Smith v. Exchange Bank*, 26 O. S. 141 (obiter).

⁷ *Gloversville National Bank v. Johnson*, 104 U. S. 271; affirming, 74 N. Y. 329; 30 Am. Rep. 302.

⁸ *Richardson v. Scobee*, 10 B. Mon. (Ky.) 12; *Veazie Bank v. Paulk*, 40 Me. 109; *May v. Campbell*, 7 Hump. (Tenn.) 450.

⁹ *Dickerman v. Day*, 31 Ia. 444; 7 Am. Rep. 156; *Jackson v. Travis*, 42 Minn. 438; 44 N. W. 316; *Ramsey v. Clark*, 4 Hump. (Tenn.) 244; 40 Am. Dec. 645; *Otto v. Durege*, 14 Wis. 571.

usurious if at a rate exceeding the maximum legal rate, even if the party making such discount does not know of its character.¹⁰

§478. Building and loan association contracts.

A loan made by a building and loan association generally provides for payment of interest, premiums for making the loan, certain dues as a member of the association, dues on stock and fines and penalties for delinquencies. To what extent these different payments can be added together and counted as interest, for the purpose of determining whether the transaction is usurious, is a question upon which there is a conflict of authority in the absence of special statute. Some courts treat the different payments as in effect compensation for the use of the money loaned, and hold, therefore, that if the aggregate payments are by the contract to exceed the principal and the highest rate of interest the transaction is usurious.¹ In other States, such transactions are held not to be usurious.² Some courts

¹⁰ *Sylvester v. Swan*, 5 All. (Mass.) 134; 81 Am. Dec. 734; *Catlin v. Gunter*, 11 N. Y. 368; 62 Am. Dec. 113; *Ruffin v. Armstrong*, 2 Hawks. (N. C.) 411; 11 Am. Dec. 774.

¹ *Fidelity Savings Association v. Shea*, 6 Ida. 405; 55 Pac. 1022; *Stevens v. Loan Association*, 5 Ida. 741; 51 Pac. 779, 986; *Burlington, etc., Association v. Heider*, 55 Ia. 424; 5 N. W. 578; 7 N. W. 686; *United States, etc., Association v. Colson* (Ky.), 50 S. W. 988; *Locknane v. Loan Co.*, 103 Ky. 265; 44 S. W. 977; *Watts v. Loan Association*, 102 Ky. 29; 42 S. W. 839; *United States, etc., Association v. Scott*, 98 Ky. 695; 34 S. W. 235; *Shannon v. Loan Association*, 78 Miss. 955; 57 L. R. A. 801; 30 So. 51; *McDonnell v. Building Association*, 175 Mo. 250; 97 Am. St. Rep.

592; 75 S. W. 438; *National, etc., Association v. Keeney*, 57 Neb. 94; 77 N. W. 442; *Hallowell v. Loan Association*, 120 N. C. 286; 26 S. E. 781; *Smith v. Loan Association*, 119 N. C. 257; 26 S. E. 40; *Pacific States, etc., Co. v. Hill*, 40 Or. 280; 91 Am. St. Rep. 477; 56 L. R. A. 163; 67 Pac. 103; *Washington Investment Co. v. Stanley*, 38 Or. 319; 84 Am. St. Rep. 793; 58 L. R. A. 816; 63 Pac. 489; *Houser v. Building Association*, 41 Pa. St. 478; *Mechanics', etc., Association v. Dorsey*, 15 S. C. 462; *Building & Loan Association v. Griffin*, 90 Tex. 480; 39 S. W. 656; *International, etc., Association v. Biering*, 86 Tex. 476; 25 S. W. 622; 26 S. W. 39; *Pfeister v. Building Association*, 19 W. Va. 676.

² *Sheldon v. Loan Association*, 121 Ala. 278; 25 So. 820; *Black v.*

have assigned as the reason for this view, that payments of premiums and the like are not usury, since the members may by performing their contracts, participate in the fund formed by such premiums.³ Other States place the reason for this view on the ground that the time of payment, depending on the maturity of the shares, is uncertain,⁴ or that the transaction is a sale of the stock to the association,⁵ or a sale of future dividends,⁶ or that the loan is an advance payment to the borrower of the value of his stock.⁷ Special statutes have placed transactions of building and loan associations on a different footing in many states from ordinary transactions. As far as such transactions are authorized by statute they are of course not usurious.⁸ These statutes must be strictly complied with to make legal transactions which but for them would be made invalid by the general usury laws.⁶ Thus while premiums

Tompkins, 63 Ark. 502; 39 S. W. 553; Berteche v. Investment Association, 147 Mo. 343; 71 Am. St. Rep. 571; 48 S. W. 954; Richard v. Loan Association, 49 La. Ann. 481; 21 So. 643.

³ Cook v. Loan Association, 104 Ga. 814; 30 S. E. 911; Hollis v. Loan Association, 104 Ga. 318; 31 S. E. 215; Reynolds v. Loan Association, 102 Ga. 126; 29 S. E. 187; Bosworth v. Improvement Co., 100 Ga. 60; 28 S. E. 154; Goodrich v. Loan Association, 96 Ga. 803; 22 S. E. 585; Hawkins v. Loan Association, 96 Ga. 206; 22 S. E. 711; Delano v. Wild, 6 All. (Mass.) 1; 83 Am. Dec. 605; People's, etc., Association v. McPhilamy, 81 Miss. 61; 95 Am. St. Rep. 454; 59 L. R. A. 743; 32 So. 1001; Clarksville, etc., Association v. Stephens, 26 N. J. Eq. 351.

⁴ Black v. Tompkins, 63 Ark. 502; 39 S. W. 553.

⁵ Michigan, etc., Association v. McDevitt, 77 Mich. 1; 43 N. W. 760.

⁶ Patterson v. Loan Association, 14 Lea. (Tenn.) 677.

⁷ Fagan v. Loan Association, 55 Minn. 437; 57 N. W. 142; Clarksville, etc., Association v. Stephens, 26 N. J. Eq. 351.

⁸ West Winsted, etc., Association v. Ford, 27 Conn. 282; 71 Am. Dec. 66; Kirklín v. Loan Association, 107 Ga. 313; 33 S. E. 83 (Tennessee statute); Hawkeye, etc., Association v. Johnston, 106 Ia. 218; 76 N. W. 678; Livingston, etc., Association v. Drummond, 49 Neb. 200; 68 N. W. 375; Franklin Building Association v. Marsh, 29 N. J. L. 225; Vermont, etc., Association v. Whithed, 2 N. D. 82; 49 N. W. 318; Pollock v. Loan Association, 51 S. C. 420; 29 S. E. 77; Pioneer, etc., Co. v. Cannon, 96 Tenn. 599; 54 Am. St. Rep. 858; 36 S. W. 386.

⁹ Douglass v. Kavanaugh, 90 Fed. 373; 33 C. C. A. 107; Wilcoxon v. Smith, 107 Ia. 555; 70 Am. St. Rep. 220; 78 N. W. 217; Williar v. Annuity Association, 45 Md. 562; Floyd v. Investment Co., 49 W. Va.

fixed by competitive bidding to obtain priority in security loans may not be usurious though in addition to the maximum rate of interest¹⁰ a premium fixed by a loan association at an arbitrary sum in addition to the maximum rate of interest, without competitive bidding is usury.¹¹ If the transaction whereby the loan is made is independent of the transaction of subscription to the stock, the amount to be paid on the stock cannot of course be added to the amount to be paid as interest to determine whether the transaction is usurious.¹²

§479. Contract for work and labor.

A *bona fide* contract to pay for work and labor is not usury, even if the price agreed upon is excessive.¹ Such a contract may, however, be a cover for usury. Thus if the borrower agrees to pay in addition to interest a further sum to the lender as salary for a position accepted by the lender, which it is understood involves no duties, work or responsibility, such contract is usurious if a rate greater than the maximum allowed by law is thus exacted.²

§480. Commissions of commission agents.

A contract between the owner of goods and a commission merchant, by which the merchant is to make advances upon the goods and sell them and receive therefor commissions which exceed the legal rate of interest for the advances made, is not

327; 54 L. R. A. 536; 38 S. E. 653.

¹⁰ *Bertche v. Investment Association*, 147 Mo. 343; 71 Am. St. Rep. 571; 48 S. W. 954; *Pioneer Sav. & L. Co. v. Cannon*, 96 Tenn. 599; 54 Am. St. Rep. 858; 33 L. R. A. 112; 36 S. W. 386; *Setliff v. North Nashville Bldg. & Sav. Asso.* (Tenn. Ch. App.), 39 S. W. 546; *Counselman v. Loan Association*, 97 Va. 261; 33 S. E. 603. (Under Tennessee statute.)

¹¹ *Douglass v. Kavanaugh*, 90 Fed. 373; 33 C. C. A. 107; *Wileoxen v. Smith*, 107 Ia. 555; 70 Am. St. Rep.

220; 78 N. W. 217; *McDonnell v. Building Association*, 175 Mo. 250; 97 Am. St. Rep. 592; 75 S. W. 438; *Gray v. Loan Association*, 48 W. Va. 164; 54 L. R. A. 217; 37 S. E. 533.

¹² *Equitable, etc., Association v. Vance*, 49 S. C. 402; 27 S. E. 274; 29 S. E. 204.

¹ *White Water, etc., Co. v. Vallette*, 21 How. (U. S.) 414; *Pettyjohn v. Wilkin*, 11 Okla. 135; 66 Pac. 281.

² *Griffin v. Oil Co.*, 11 N. J. Eq. 49.

usurious if the transaction is a genuine one.¹ If, however, the contract specifically provides for additional commissions in case advances are made, which commissions exceed the legal rate of interest,² or if it appears that the entire transaction is merely a cover for a loan, and that the property sent to the so-called commission merchant is a pledge to secure such loan, the transaction is usurious.

§481. Commissions of agent of borrower.

A commission or bonus for obtaining a loan is often paid by the borrower in addition to the rate of interest. If the amount of this commission, together with the rate of interest, exceeds the maximum rate, the question whether usury exists or not depends then upon the relation of the parties to the transaction. If the agent is the agent of the borrower, the commission paid to him does not make the contract usurious.¹ If the agent of the borrower divides his commissions with the lender to induce him to make the loan, a question is presented whether the share of the commission thus received by the lender should be added to the interest agreed upon to determine whether the contract is usurious. On the one hand such commission enures to the benefit of the lender, and comes indirectly from the borrower; and accordingly some courts have held that if the commissions paid to the lender, and the interest agreed upon, exceed the legal rate the contract is usurious.² It is said that if the lender

¹ *Jarvis v. Grocery Co.*, 63 Ark. 225; 38 S. W. 148; *Bartlett v. Williams*, 1 Pick. (Mass.) 288; *Trotter v. Curtis*, 19 Johns. (N. Y.) 160; 10 Am. Dec. 211; *Allen-West Commission Co. v. Carroll*, 104 Tenn. 489; 58 S. W. 314.

² *Burton v. Blin*, 23 Vt. 151.

¹ *Union Mortgage, etc., Co. v. Haggood*, 97 Fed. 360; *George v. Security Co.*, 109 Ala. 548; 20 So. 331; *Johnson v. Shattuck*, 67 Ark. 159; 53 S. W. 888; *Sherwood v. Wilkins*, 65 Ark. 312; 45 S. W. 988; *Pitts v.*

Maier, 115 Ga. 281; 41 S. E. 570; *West v. Mortgage Co.*, 112 Ga. 377; 37 S. E. 357; *Cornwell v. McCoy*, 6 Ida. 219; 55 Pac. 240; *Haldeman v. Ins. Co.*, 120 Ill. 390; 11 N. E. 526; *Baldwin v. Doying*, 114 N. Y. 452; 21 N. E. 1007; *Stuart v. Saddlery Co.*, 21 Tex. Civ. App. 530; 53 S. W. 83; *Ottillie v. Waechter*, 33 Wis. 252.

² *Eslava v. Crampton*, 61 Ala. 507; *Pottle v. Lowe*, 99 Ga. 576; 59 Am. St. Rep. 246; 27 S. E. 145; *Collamer v. Goodrich*, 30 Vt. 628.

actually receives part of the commission, it makes no difference whether he receives it from his agent, a broker, or the borrower's agent.³ Still this principle has been held not to apply where the borrower's agent divides his commissions with the lender after the loan is made and not as the result of any previous agreement.⁴ On the other hand the lender has agreed to pay the commission to his agent, and as long as there is no understanding between borrower and lender for making such payment, such payment cannot be said with any accuracy to be made for the use of money. Accordingly other courts have held that the payment of such commissions cannot constitute usury.⁵

§482. Commissions of broker.

If the person to whom the commissions are paid is a broker, acting as an intermediary between the parties, but not representing either of them solely, commission paid to him cannot be computed as interest in order to determine whether the contract is usurious.¹ If the intermediary broker is a corporation the fact that the lender is a stockholder therein and thus receives an indirect benefit from the commissions paid to it on loans made by him does not make the contract usurious.²

§483. Commissions of agent of lender not shared with lender.

If the agent is the agent of the lender, the rule in some states, in the absence of statute, is that if the lender does not himself receive any part of the commission, and the agent retains it all, the transaction is not usurious.¹ In some states

³ *Pottle v. Lowe*, 99 Ga. 576; 59 Am. St. Rep. 246; 27 S. E. 145.

⁴ *Eslava v. Crampton*, 61 Ala. 507.

⁵ *Mahler v. Bank*, 65 Minn. 37; 67 N. W. 655.

¹ *Grant v. Ins. Co.*, 121 U. S. 105 (District of Columbia); *Best v. Mortgage Co.*, 79 Fed. 401 (N. C.);

Riley v. Olin, 82 Ga. 312; 9 S. E. 1095; *Kihlholz v. Wolf*, 103 Ill. 362; *Boylston v. Bain*, 90 Ill. 283; *Phillips v. Roberts*, 90 Ill. 492; *Ballinger v. Bourland*, 87 Ill. 513; 29 Am. Rep. 69.

² *West v. Mortgage Co.*, 112 Ga. 377; 37 S. E. 357.

¹ *Bean v. Lambert* (Minn.), 77

the transaction is held to be usurious.² Where this view obtains there is a further divergence of authority as to the effect of the lender's want of knowledge that the agent was exacting a bonus or commission for the agent's benefit. In some states such knowledge is spoken of as an essential element of usury, usury existing if the principal has such knowledge, and the commission plus the rate of interest contracted for exceeds the maximum rate allowed by law;³ while if the principal does not have such knowledge, the exaction of such commissions by his agent does not constitute usury.⁴ These cases go upon the theory that the borrower's agreement with the lender's agent to pay him a commission for making the loan is a conspiracy between

Fed. 862; *American Mortgage Co. v. Hartzog* (S. C.), 74 Fed. 993; *Leonhard v. Flood*, 68 Ark. 162; 56 S. W. 781; *Sidway v. Harris*, 66 Ark. 387; 50 S. W. 1002; *Secor v. Patterson*, 114 Mich. 37; 72 N. W. 9; *Acheson v. Chase*, 28 Minn. 211; 9 N. W. 734.

² *Hare v. Winterer*, 64 Neb. 551; 90 N. W. 544; *Hare v. Hooper*, 56 Neb. 480; 76 N. W. 1055.

³ *Fowler v. Trust Co.*, 141 U. S. 384 (decided under Illinois law); *Richards v. Bippus*, 18 App. (D. C.) 293; *McCall v. Herring*, 116 Ga. 235; 42 S. E. 468; *Clarke v. Havard*, 111 Ga. 242; 51 L. R. A. 499; 36 S. E. 837; *Payne v. Newcomb*, 100 Ill. 611; 39 Am. Rep. 69; *Hughson v. Loan Co.*, 57 N. J. Eq. 139; 41 Atl. 492; *Land, etc., Co. v. Gillam*, 49 S. C. 345; 26 S. E. 990; 29 S. E. 203.

⁴ *Call v. Palmer*, 116 U. S. 98; *Whaley v. Land Mortgage Co.*, 74 Fed. 73; 20 C. C. A. 306; affirming, *American Freehold Land Mortg. Co. v. Whaley*, 63 Fed. Rep. 743; *Dryfus v. Burnes*, 53 Fed. Rep. 410; *Taylor v. Land Mortgage Co.*, 106 Ga. 238; 32 S. E. 153; *McLean v. Camak*, 97

Ga. 804; 25 S. E. 493; *Short v. Pulen*, 63 Ark. 385; 38 S. W. 1113; *Sherwood v. Haney*, 63 Ark. 249; 38 S. W. 15; *Vahlberg v. Keaton*, 51 Ark. 534; 14 Am. St. Rep. 73; 4 L. R. A. 462; 11 S. W. 878; *Thompson v. Ingram*, 51 Ark. 546; 11 S. W. 881; *Baird v. Milwood*, 51 Ark. 548; 11 S. W. 881; *Holt v. Kirby*, 57 Ark. 251; 21 S. W. 432; *Massachusetts, etc., Ins. Co. v. Boggs*, 121 Ill. 119; 13 N. E. 550; *Chicago Fire Proofing Co. v. Bank*, 145 Ill. 481; 32 N. E. 534; *Cox v. Ins. Co.*, 113 Ill. 382; *Hoyt v. Pawtucket Institution*, 110 Ill. 390; *Richards v. Purdy*, 90 Ia. 502; 48 Am. St. Rep. 458; 58 N. W. 886; *Stein v. Swensen*, 46 Minn. 360; 24 Am. St. Rep. 234; 49 N. W. 55; *Lane v. Washington L. Ins. Co.*, 46 N. J. Eq. 316; 19 Atl. 617, 618; *Stillman v. Northrup*, 109 N. Y. 473; 17 N. E. 379; *Barger v. Taylor*, 30 Or. 228; 42 Pac. 615; 47 Pac. 618; *Brown v. Brown*, 38 S. C. 173; 17 S. E. 452; *New England Mortg. S. Co. v. Burley*, 44 S. C. 81; 21 S. E. 444, 885; *Williams v. Bryan*, 68 Tex. 593; 5 S. W. 401.

them to violate the law, and the consequences of such act should not be imposed upon the innocent lender,⁵ and that in making such exaction the agent is exceeding his authority and cannot charge his principal with the consequences of his acts.⁶ Indeed, from one point of view, it seems as if the borrower is paying the commission to the lender's agent to induce him to make the loan for some motive other than the sole consideration of his principal's interests; conduct which is rather fraud upon the principal than the commission by him of an illegal act. In some states the knowledge of the lender is held to be immaterial and the transaction is, in such cases, treated as usurious, even if the lender does not know that his agent is exacting commissions.⁷ In some cases a view is taken which reconciles some of the foregoing cases; namely that if the lender does not pay his agent for negotiating the loan he must be presumed to know that he has exacted a commission from the borrower.⁸

§484. Commissions of agent of lender shared with lender.

If the lender is to receive a part of the commission paid to his agent, the transaction is usurious.¹ If the payment to the agent is only a cover for the exaction of unlawful interest by the lender, the contract is usurious.² The existence of usury is clearer if the commission for securing the loan is paid directly to the lender himself.³

⁵ Call v. Palmer, 116 U. S. 98.

⁶ Call v. Palmer, 116 U. S. 98; Rogers v. Buckingham, 33 Conn. 81; Brigham v. Myers, 51 Ia. 397; 33 Am. Rep. 140; 1 N. W. 613; Conover v. Van Mater, 18 N. J. Eq. 481; Bell v. Day, 32 N. Y. 165.

⁷ Robinson v. Blake, 85 Minn. 242; 89 Am. St. Rep. 541; 88 N. W. 845; Western, etc., Co. v. Glasner, 169 Mo. 38; 68 S. W. 917.

⁸ Fowler v. Trust Co., 141 U. S. 384; Payne v. Newcomb, 100 Ill. 611; 39 Am. Rep. 69; Avery v. Creigh, 35 Minn. 456; 29 N. W. 154.

¹ McBroom v. Investment Co., 153

U. S. 318 (decided under New Mexico law).

² *In re Kellogg*, 113 Fed. 120.

³ Wagon v. Pease, 104 Ga. 417; 30 S. E. 895; Beach v. Lattner, 101 Ga. 357; 28 S. E. 110; Madsen v. Whitman (Ida.), 71 Pac. 152; Sanford v. Kane, 133 Ill. 199; 23 Am. St. Rep. 602; 24 N. E. 414; Bishopp v. Blair, 90 Ill. App. 64; Chandler v. Ward, 83 Ill. App. 315; Brown v. Follette, 155 Ind. 316; 58 N. E. 197; Leipziger v. Van Saun, 64 N. J. Eq. 37; 53 Atl. 1; Lockwood v. Mitchell, 7 O. S. 387; 70 Am. Dec. 78; Nunn v. Bird, 36 Or. 515; 59 Pac. 808.

§485. Agency a question of fact.

Wherever the question of whose agent the person receiving the commission is, becomes material, the question is as to the fact of the agency and not what the parties to the transaction agree to call it. Hence if he is really the agent of the lender, the fact that the borrower signs an agreement constituting such person his agent to procure the loan does not prevent him from being treated in law as the agent of the lender.¹ Payment of commissions to an agent must be distinguished from payment of commissions to a lender who then assigns the loan to another. The agent may, under his contract with the lender, advance his own money to the borrower and trust to subsequent reimbursement by the lender without himself becoming the lender.² If, however, he advances his own money to the borrower before the lender has agreed to make the loan in question, the so-called agent is the real lender, even if the so-called lender afterwards accepts the loan and authorizes the agent to reimburse himself from the lender's money in his hands.³

§486. Expenses of making loan.

A contract to pay the expenses of the lender in making the loan is not usurious if the transaction is a genuine one, even if the amount of the expenses thus charged, together with the interest reserved, exceeds the legal rate.¹ Thus a contract to pay to the lender his loss in sacrificing securities to obtain the money lent,² or the costs of examining the title, and preparing a

¹ Clarke v. Harvard, 111 Ga. 242; 51 L. R. A. 499; 36 S. E. 837.

² Stansell v. Trust Co., 96 Ga. 227; 22 S. E. 898; Hughes v. Griswold, 82 Ga. 299; 9 S. E. 1092; Merck v. Mortgage Co., 79 Ga. 213; 7 S. E. 265.

³ Beach v. Lattner, 101 Ga. 357; 28 S. E. 110; Sanford v. Kane, 133 Ill. 199; 23 Am. St. Rep. 602; 24 N. E. 414.

¹ Beadle v. Munson, 30 Conn. 175; Sanders v. Nicholson, 101 Ga. 739; 28 S. E. 976; Smith v. Wolf, 55 Ia. 555; 8 N. W. 429; Stevens v. Staples, 69 Minn. 178; 71 N. W. 929.

² Snow v. Nye, 106 Mass. 413; Comstock v. Wilder, 61 Ia. 274; 16 N. W. 108; Stevens v. Stevens, 64 Minn. 3; 64 N. W. 959; Thurston v. Cornell, 38 N. Y. 281.

mortgage,⁵ or legal services in cancelling a lien on the property mortgaged,⁴ even if the lender himself acts as attorney,⁵ or to pay the lender the expense of examining the security offered⁶ is not of itself necessarily usurious. Such a transaction, however, is a favorite method of disguising usury; and if the charge for the expenses is unreasonably excessive, the transaction is held to be usurious.⁷

§487. Taxes.

A provision that the borrower shall pay taxes,¹ or insurance premiums,² on the property mortgaged; or that the borrower shall pay the lender for services to be rendered as trustee of the mortgaged realty,³ is not usury, if *bona fide*. A provision that the borrower shall pay taxes upon the amount of the loan, and that if the lender is obliged, himself, to pay taxes thereon, the borrower will reimburse him, is held not to be usurious.⁴

§488. Expenses of collection.

A provision that if the debt is not paid at maturity the lender will pay attorney's fees, or the expenses of making the collection, in addition to the costs which the law would impose

³ Sanders v. Nicholson, 101 Ga. 739; 28 S. E. 976; Ammondson v. Ryan, 111 Ill. 506; Daly v. Investment Co., 43 Minn. 517; 45 N. W. 1100. Especially if the lender has not authorized such charges and does not share in the fee. Gannon v. Mortgage Co., 106 Ga. 510; 32 S. E. 591.

⁴ Sanders v. Nicholson, 101 Ga. 739; 28 S. E. 976.

⁵ Sanders v. Nicholson, 101 Ga. 739; 28 S. E. 976.

⁶ Smith v. Wolf, 55 Ia. 555; 8 N. W. 429.

⁷ Sanders v. Nicholson, 101 Ga. 739; 28 S. E. 976; Anderson v. Smith, 108 Mich. 69; 65 N. W. 615. (Services worth \$150; compensa-

tion agreed upon, \$2,000.) So where certain charges are specifically allowed by statute. Commonwealth v. Morris, 176 Mass. 19; 56 N. E. 896.

¹ Kidder v. Vandersloot, 114 Ill. 133; 28 N. E. 460; Stuart v. Saddlery Co., 21 Tex. Civ. App. 530; 53 S. W. 83.

² New England, etc., Co. v. Gay, 33 Fed. 636.

³ Portland Trust Co. v. Havelly, 36 Or. 234; 59 Pac. 466; 61 Pac. 346.

⁴ Banks v. McClelland, 24 Md. 62; 87 Am. Dec. 594; United States, etc., Co. v. Marquam, 41 Or. 391, 404; 69 Pac. 37, 41.

upon him in the event of suit, are held in some states not to be usurious,¹ on the theory that such provision does not operate until there has been a breach of the contract;² while in other states they are held to be usurious.³ It by no means follows that the provision for paying attorney fees is held valid in all the states which hold that it is not usurious.⁴ A promise made after the rendition of a judgment to induce forbearance in the collection thereof, to pay the fees of the attorney of the creditor, in addition to the maximum rate of interest allowed by law, has been held to be usurious.⁵

§489. Loan of credit.

A loan of credit by one person to another, whereby such other obtains a loan of money, or extension of credit from a third person, is not a contract for the use of money. Accordingly, a contract whereby the person borrowing the money agrees to pay the person lending him his credit a sum therefor which exceeds the lawful rate of interest upon the amount borrowed by him from such third person, is not usurious.¹

¹ *Fowler v. Trust Co.*, 141 U. S. 411 (decided under Illinois law); *Union, etc., Co. v. Hagood*, 97 Fed. 360; *Best v. Mortgage Co.*, 79 Fed. 401; *Shelton v. Aultman, etc., Co.*, 82 Ala. 315; 8 So. 232; *Williams v. Flowers*, 90 Ala. 136; 24 Am. St. Rep. 772; 7 So. 439; *Ginn v. Security Co.*, 92 Ala. 135; 8 So. 388; *Telford v. Garrels*, 132 Ill. 550; 24 N. E. 573; *Barton v. Bank*, 122 Ill. 352; 13 N. E. 503; *Haldeman v. Ins. Co.*, 120 Ill. 390; 11 N. E. 526; *Matzenbaugh v. Troup*, 36 Ill. App. 261; *Ricker v. Scofield*, 28 Ill. App. 32; *Duluth Loan & L. Co. v. Klov Dahl*, 55 Minn. 341; 56 N. W. 1119; *Peyser v. Cole*, 11 Or. 39; 50 Am. Rep. 451; 4 Pac. 520; *Imler v. Imler*, 94 Pa. St. 372; *Parham v. Pulliam*, 5 Coldw.

(Tenn.) 497; *Krause v. Pope*, 78 Tex. 478; 14 S. W. 616; *Stuart v. Saddlery Co.*, 21 Tex. Civ. App. 530; 53 S. W. 83. Though held to be a penalty. *Equitable, etc., Co. v. Smith (Ky.)*, 65 S. W. 609.

² *Best v. Mortgage Co.*, 79 Fed. 401.

³ *Williams v. Rich*, 117 N. C. 235; 23 S. E. 257; *Ohio v. Taylor*, 10 Ohio 378.

⁴ See § 193, and see Ch. XII.

⁵ *Fidelity, etc., Co. v. Ryan*, 109 Ky. 240; 58 S. W. 610; *Rosa v. Doggett*, 8 Neb. 48.

¹ *Jones v. McLean*, 18 Ark. 456; *Beckwith v. Mfg. Co.*, 14 Conn. 594; *Kitchell v. Schenck*, 29 N. Y. 515. *Contra*, *Moore v. Vance*, 3 Dana. (Ky.) 361.

§490. Partnership and sharing profits.

A genuine contract of partnership, by the terms of which a partner who advances money as capital is to receive out of the proceeds of the business an annual return exceeding the maximum legal rate of interest, is not usurious.¹ So if a loan is made, as distinguished from a partnership, a provision for sharing profits as a substitute for interest does not make the transaction usurious.² If, however, the amount of the probable profits is estimated in money, and the share that the lender is to receive is expressed in money, and not expressed as a part of the profits nor made contingent on the earning of such profits, the transaction is usurious.³ So if a loan of money is made, on which the maximum legal rate of interest is reserved, an agreement whereby the borrower is to divide with the lender the profits out of a certain transaction in addition to interest, is usurious.⁴

§491. Rent.

A contract for rent, if genuine, is not usurious even if the rent reserved is disproportionate to the real rental value of the property. A contract of rent, however, may be used as a means of disguising a usurious loan.¹

§492. Annuity contracts.

A contract for the payment of an annuity is not in itself usurious, even though the amount to be paid annually is not proportionate to the amount paid for such annuity by the

¹ *Scripps v. Crawford*, 123 Mich. 173; 81 N. W. 1098; *Orvis v. Curtiss*, 157 N. Y. 657; 68 Am. St. Rep. 810; 52 N. E. 690; *Payne v. Freer*, 91 N. Y. 43; 43 Am. Rep. 640; *Cunningham v. Green*, 23 O. S. 296; *Duffy v. Gilmore*, 202 Pa. St. 444; 51 Atl. 1026; *Scott v. Kennedy* (No. 1), 201 Pa. St. 462; 51 Atl. 384; *Foote v. Emerson*, 10 Vt. 338; 33 Am. Dec. 205.

² *Johnston v. Ferris*, 14 Daly (N. Y.) 302.

³ *Matthieson v. Schomberg*, 94 Wis. 1; 68 N. W. 416.

⁴ *Weaver v. Burnett*, 110 Ia. 567; 81 N. W. 771.

¹ *Grimes v. Shrieve*, 6 T. B. Mon. (Ky.) 546; *Gaither v. Clarke*, 67 Md. 18; 8 Atl. 740; *Phelps v. Bel lows*, 53 Vt. 539.

annuitant.¹ If the transaction is really the satisfaction of a debt by an annuity to be paid by the debtor to the creditor, the transaction is not usurious even if the annuity is called interest.² Such a transaction is sometimes made the means of disguising usury, and if the transaction is really a loan, the contract will be held to be usurious.³ The Supreme Court of the United States has held that an agreement to repay the loan is not essential to usury.⁴

§493. Insurance.

If the lender as a term of the contract of loan requires the borrower to take insurance on his own life from the lender, paying to the lender premiums thereon, some courts have held that the profit thus derived from the insurance must be added to the interest contracted for in determining whether the contract is usurious or not;¹ especially where the policy is assigned to the lender at once to secure the loan,² or where in addition to such assignment the payment of both loan and premiums is secured by a deed of trust on realty.³ Other states have held that such transactions are not necessarily usurious.⁴ A loan of a premium by an insurance company with a provision that

¹ *Chesterfield v. Janssen*, 1 Atk. 301, 339; 1 Wils. 286; *Scott v. Lloyd*, 9 Pet. (U. S.) 418; *Lloyd v. Scott*, 4 Pet. (U. S.) 205.

² *Price's Administratrix v. Price's Administratrix*, 111 Ky. 771; 66 S. W. 529; denying rehearing, 64 S. W. 746.

³ *Scott v. Lloyd*, 9 Pet. (U. S.) 418; *Lloyd v. Scott*, 4 Pet. (U. S.) 205.

⁴ *Scott v. Lloyd*, 9 Pet. (U. S.) 418.

¹ *Missouri, etc., Ins. Co. v. Kittle*, 1 McCrary (U. S.) 234; *National Life Ins. Co. v. Harvey*, 2 McCrary (U. S.) 576 (cited in *Union, etc.,*

Ins. Co. v. Hilliard, 16 Ohio C. C. 434, 438; 8 Ohio C. D. 437, which, however, was reversed in *Union, etc., Ins. Co. v. Hilliard*, 63 O. S. 478; 81 Am. St. Rep. 644; 59 N. E. 230). *Carter v. Ins. Co.*, 122 N. C. 338; 30 S. E. 341.

² *Brower v. Ins. Co.*, 86 Fed. 748.

³ *Miller v. Ins. Co.*, 118 N. C. 612; 54 Am. St. Rep. 741; 24 S. E. 484.

⁴ *Homeopathic, etc., Ins. Co. v. Crane*, 25 N. J. Eq. 418; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Union, etc., Ins. Co. v. Hilliard*, 63 O. S. 478; 81 Am. St. Rep. 644; 53 L. R. A. 462; 59 N. E. 230.

non-payment shall work a forfeiture of extended insurance has been held to be usury.⁵

III. EXECUTORY USURIOUS CONTRACTS.

§494. Executory contracts for payment of usury.

A contract usurious in its nature will not be enforced by the courts.¹ Whether such contract is illegal or merely void is a difficult question to answer, as the exact effect of such contract depends on the wording and construction of the statute by which such excessive rate of interest is forbidden. Such statutes in terms, varying in different jurisdictions, provide with considerable exactness the effect of such transactions; and the courts rarely feel authorized to apply thereto the Common Law principles of illegal or void contracts, in addition to the express requirements of the statute. This rests upon the familiar principle that where a statute creates a new right or offense and provides a specific remedy or punishment, that remedy alone can apply.² In some jurisdictions, apart from the question of the right to recover the principal, which is hereafter discussed, it is held that other provisions of an inseverable usurious contract, such as a valid provision for attorney's fees,³ are themselves enforceable if no other objection than that of usury exists thereto. Where this view obtains such contracts are not illegal. Further, in some jurisdictions, collateral securities are enforced up to the amount lawfully due.⁴ Where this view obtains such contracts cannot be classed as illegal, in the sense in which the term is used at Common Law.⁵ Under usury statutes the principal loaned may be recovered.⁶ The effect of the

⁵ *Mutual, etc., Ins. Co. v. Davis*, — Ky. —; 73 S. W. 1020.

¹ *Bates v. Bank*, 111 Ga. 756; 36 S. E. 949; *Simpson v. Loan Association*, 101 Ky. 496; 42 S. W. 834; 41 S. W. 570.

² *Hazeltine v. Bank*, 183 U. S. 132; *Barnet v. Bank*, 98 U. S. 555.

³ *Skinner v. Loan Association*, — Fla. —; 35 So. 67.

⁴ See § 535.

⁵ See §§ 506, 509.

⁶ *May v. Folsom*, 113 Ala. 198; 20 So. 984; *Chase v. Whitten*, 62 Minn. 498; 65 N. W. 84.

usury statutes is for the most part confined to the interest paid or agreed to be paid. Under many statutes an agreement for usury causes a forfeiture of the entire interest, leaving only the principal to be recovered.⁷ Accordingly, one who has tendered the principal may recover possession of property pledged to secure the loan.⁸ If the contract is originally for lawful interest, and usurious interest is subsequently contracted for, interest from and after the date of the usurious contract is forfeited.⁹ In some states the forfeiture applies only to interest due up to maturity, on the theory that from maturity interest is given by the law and not by the contract;¹⁰ in other states interest is forfeited both before and after maturity;¹¹ and under the statutes of other states, while interest up to maturity if not itself usurious is not forfeited, an exaction of the same rate after maturity, not being by express agreement, may cause the forfeiture of all interest after maturity.¹² Under other statutes the forfeiture is only the excess of interest over the legal rate.¹³

⁷ *May v. Folsom*, 113 Ala. 198; 20 So. 984; *Hawkins v. Pearson*, 96 Ala. 369; 11 So. 304; *Madsen v. Whitman*, — *Ida.* —; 71 Pac. 152; *Driscoll v. Tannock*, 76 Ill. 154; *Bishopp v. Blair*, 90 Ill. App. 64; *Estey v. Loan Association*, 131 Mich. 502; 91 N. W. 753; *Chase v. Whitten*, 62 Minn. 498; 65 N. W. 84; *Commercial Bank v. Auze*, 74 Miss. 609; 21 So. 754; *Chicago Lumber Co. v. Bancroft*, 64 Neb. 176; 57 L. R. A. 910; 89 N. W. 780; *Male v. Wink*, 61 Neb. 748; 86 N. W. 472; *Frenzer v. Richards*, 60 Neb. 131; 82 N. W. 317; *Smith v. Loan Association*, 119 N. C. 249; 26 S. E. 41; *Carpenter v. Lewis*, 60 S. C. 23; 38 S. E. 244; *Ehrhardt v. Varn*, 51 S. C. 550; 29 S. E. 225; *Greer v. Hale*, 95 Va. 533; 64 Am. St. Rep. 814; 28 S. E. 873; *Munford v. McVeigh*, 92 Va.

446; 23 S. E. 857; *Maynard v. Hall*, 92 Wis. 565; 66 N. W. 715.

⁸ *Frenzer v. Richards*, 60 Neb. 131; 82 N. W. 317.

⁹ *Chicago Lumber Co. v. Bancroft*, 64 Neb. 176; 57 L. R. A. 910; 89 N. W. 780.

¹⁰ *Richards v. Bippus*, 18 App. (D. C.) 293.

¹¹ *Maynard v. Hall*, 92 Wis. 565; 66 N. W. 715.

¹² *Ehrhardt v. Varn*, 51 S. C. 550; 29 S. E. 225.

¹³ *New York, etc., Co. v. Davis*, 96 Md. 81; 53 Atl. 669; *Swank v. Ry.*, 63 Minn. 258; 65 N. W. 452; *Wallace v. Goodlett*, 104 Tenn. 670; 58 S. W. 343; *Cotton States Bldg. Co. v. Rawlins* (Tex. Civ. App.), 62 S. W. 805; *Roberts v. Coffin*, 22 Tex. Civ. App. 127; 53 S. W. 597; *Farmers' Bank v. Burchard*, 33 Vt. 346.

§495. Executory contracts under National Banking Act.

Under the Federal statute which fixes the rate of interest which national banks may charge,¹ a contract for usurious interest causes a forfeiture of all interest.² This act is, however, exclusive as to the effect of usury upon the executory contract for interest, though it adopts the law of the state where the bank is located as to the rate which constitutes usury. Hence it applies to usurious contracts of national banks in determining their effect to the exclusion of state statutes.³ Hence even if the law of the state in which the bank is situated makes usury effect a forfeiture of the entire debt,⁴ usurious contracts made by a national bank causes a forfeiture of interest but not of principal.⁵

§496. Terms of relief.

Whether the debtor is bound to pay or tender the amount actually due with interest, to obtain relief against a usurious contract, depends in part upon the relation of the parties to the suit, and in part upon the provisions of the local statute. If the borrower seeks in equity the affirmative relief of cancellation, he must, in the absence of special statute, pay or offer to pay the amount of the indebtedness, with such interest thereon

¹ R. S. of U. S., § 5198.

² *Farmers', etc., Bank v. Dearing*, 91 U. S. 29; *Shaffer v. National Bank*, 53 Kan. 614; 36 Pac. 998; *Quint v. National Bank*, 9 Kan. App. 474; 58 Pac. 1010; *Faulkner v. National Bank (Ky.)*, 43 S. W. 249; *Citizens' National Bank v. Donnell*, 172 Mo. 384; 72 S. W. 925; *Tomblin v. Higgins*, 53 Neb. 92; 68 Am. St. Rep. 596; 73 N. W. 461; *Shunk v. National Bank*, 22 O. S. 508; 10 Am. Rep. 762.

³ *Farmers', etc., Bank v. Dearing*, 91 U. S. 29; *Wiley v. Starbuck*, 44 Ind. 298; *Davis v. Randall*, 115

Mass. 547; 15 Am. Rep. 146; *Columbus First National Bank v. Garlinghouse*, 22 O. S. 492; 10 Am. Rep. 751; *Brown v. Second National Bank*, 72 Pa. St. 209. *Contra*, *Whitehall First National Bank v. Lamb*, 50 N. Y. 95; 10 Am. Rep. 438; expressly disapproved in *Farmers', etc., Bank v. Dearing*, 91 U. S. 29.

⁴ *Whitehall First National Bank v. Lamb*, 50 N. Y. 95; 10 Am. Rep. 438.

⁵ *Farmers', etc., Bank v. Dearing*, 91 U. S. 29.

as is lawfully due.¹ If, however, the amount actually due, cannot be determined definitely until an accounting, an actual tender of the amount which the debtor admits to be due, together with an offer in the debtor's bill in equity to pay the amount legally due, is sufficient.² The provisions of certain statutes, however, make securities in contracts given on a usurious consideration absolutely void, and require their cancellation without conditions. Under such statutes an offer to repay the amount borrowed is not necessary in order to enable the debtor to have such contracts or conveyances cancelled.³ In a suit by the debtor for cancellation, he may have the amount paid in by him as usurious interest applied in payment of the principal, even if he could not maintain a separate action in equity to recover it.⁴ If the creditor is seeking to enforce a usurious contract, equity may in a proper case restrain him from enforcing it, without requiring the previous payment of the amount due. Thus in an action by the creditor to enforce the usurious contract, the debtor may interpose usury as a defense without paying or tendering the amount of the debt.⁵ If the statute prevents recovery of interest on a usurious contract, the creditor can recover only the amount actually loaned by him.⁶ If the creditor seeks in equity a reformation of a mort-

¹ Hubbard v. Tod, 171 U. S. 474; Ward v. Bank, 130 Ala. 597; 30 So. 341; Lindsay v. Loan Co., 127 Ala. 366; 51 L. R. A. 393; 28 So. 717; Turner v. Bank, 126 Ala. 397; 28 So. 469; New England, etc., Co. v. Powell, 97 Ala. 483; 12 So. 55; Tooke v. Newman, 75 Ill. 215; Morrison v. Miller, 46 Ia. 84; Vanderveer v. Holcomb, 17 N. J. Eq. 87, 547; Fanning v. Dunham, 5 Johns. Ch. (N. Y.) 122; 9 Am. Dec. 283; Boyers v. Boddie, 3 Humph. (Tenn.) 666; Rietz v. Foeste, 30 Wis. 693.

² Purvis v. Woodward, 78 Miss. 922; 29 So. 917.

³ Missouri, etc., Co. v. Krumseig, 172 U. S. 351; Lowe v. Loomis, 53 Ark. 454; 14 S. W. 674; Mathews v. Missouri, K. & T. Trust Co., 69 Minn. 318; 72 N. W. 121; Exley v. Berryhill, 37 Minn. 182; 33 N. W. 567; Scott v. Austin, 36 Minn. 460, 464; 32 N. W. 89, 864; Williams v. Fitzhugh, 37 N. Y. 444.

⁴ Vandergrif v. Swinney, 158 Mo. 527; 81 Am. St. Rep. 325; 59 S. W. 71.

⁵ Blakeman v. Busby, 61 Kan. 745; 60 Pac. 1064.

⁶ Carpenter v. Lewis, 60 S. C. 23; 38 S. E. 244.

gage which provides for usurious interest, he cannot have relief unless he offers to abate the whole of the usurious interest.⁷

§497. Estoppel to plead usury.

A debtor who has paid or agreed to pay usurious interest is not estopped to allege usury, either for the purpose of defeating the contract or recovering payments, unless it is shown that he has induced the adversary party to change or alter his position in ignorance of the fact that the contract is usurious.¹ No agreement to waive the defense of usury can work an estoppel as against a creditor with full knowledge of the facts.² Hence a mortgagor, by consenting to a decree for the sale of the mortgaged property, does not waive his right to require that usurious interest paid in should be applied to the principal.³ If, however, the debtor induces third persons to buy the mortgage debt, representing that the contract is valid, he will be estopped as to them to set up the fact of usury.⁴ No estoppel, however, could exist if the assignee had notice of the facts.⁵ If the maker induces the surety to sign in ignorance of the fact that the contract is usurious, and the surety pays the debt and takes the assignment of the contract, the debtor will be estopped to set up the fact of usury.⁶ If, however, the surety knows that the debt is usurious, the mere failure of the debtor to object to the surety's paying the entire debt, does not estop him from interposing the defense of usury against the surety in an action by the surety to recover the full amount thus paid.⁷

⁷ *Hawkins v. Pearson*, 96 Ala. 369; 11 So. 304.

¹ *Cade v. Larned*, 109 Ga. 292; 34 S. E. 566; *Hubert v. Investment Association*, 42 Or. 71; 71 Pac. 64.

² *Browning v. Thompson*, 13 B. Mon. (Ky.) 387; *New York, etc., Co. v. Davis*, 96 Md. 81; 53 Atl. 669; *Central Trust Co. v. Burton*, 74 Wis. 329; 43 N. W. 141.

³ *New York, etc., Co. v. Davis*, 96 Md. 81; 53 Atl. 669.

⁴ *Ryan v. Bank (Ky.)*, 55 S. W. 714.

⁵ *Duquesne Bank's Appeal*, 74 Pa. St. 426.

⁶ *Campbell v. Morgan*, 111 Ga. 200; 36 S. E. 621.

⁷ *Blakeley v. Adams*, — Ky. —; 68 S. W. 473.

§498. Judgments on usurious contracts.

If a judgment is rendered upon a claim which includes usury, such judgment is not void.¹ A sale and deed under such judgment are valid.² So a note given in satisfaction of a judgment cannot be avoided because the debt on which the judgment was rendered was usurious.³

IV. WHO CAN PLEAD USURY.

§499. Who can set up usury.—Debtor.

“The right to plead usury is the personal privilege of the debtor.”¹ This privilege may be exercised by him, even after a sale of the property mortgaged to secure such debt, as long as the original debtor is personally liable.² The defense may be interposed by a debtor who is liable for the debt, without reference to the form of the liability apparent upon the instrument evidencing the debt.³

§500. Legal representative of debtor.

Legal representatives of the debtor may interpose usury as a defense. A trustee may plead usury in a suit for the fore-

¹ *Turner v. Hamilton*, 88 Fed. 467; *McCandless v. Acid Co.*, 112 Ga. 291; 37 S. E. 419; *Chinn v. Mitchell*, 2 Met. (Ky.) 92; *Sherley v. Trabue*, 85 Ky. 71; 2 S. W. 656; *Bank v. Coke* (Ky.), 45 S. W. 867; *Footman v. Stetson*, 32 Me. 17; 52 Am. Dec. 634; *Charles v. Davis*, 62 N. H. 375; *Heath v. Frackleton*, 20 Wis. 320; 91 Am. Dec. 405.

² *McCandless v. Acid Co.*, 112 Ga. 291; 37 S. E. 419.

³ *Gipson v. Shanklin*, 83 Ind. 147; *Philips v. Gephart*, 53 Ia. 396; 5 N. W. 683.

¹ *Lemmon v. Whitman*, 75 Ind. 318, 328; 39 Am. Rep. 150. To the same effect are *Loomis v. Eaton*, 32 Conn. 550; *Myers v. Bank*, 78 Ill. 257; *Zellner v. Mobley*, 84 Ga. 746;

20 Am. St. Rep. 390; 11 S. E. 402; *Coriell v. Allen*, 13 Ia. 289; *Kenningham v. Bedford*, 1 B. Mon. (Ky.) 325; *Morling v. Bronson*, 37 Neb. 608; 56 N. W. 205; *Billington v. Wagoner*, 33 N. Y. 31; overruling, *Vilas v. Jones*, 1 N. Y. 274; *Cramer v. Lepper*, 26 O. S. 59; 20 Am. Rep. 756; *Bird v. Kendall*, 62 S. C. 178; 40 S. E. 142; *Hamilton v. Prouty*, 50 Wis. 592; 36 Am. Rep. 866; 7 N. W. 659.

² *People's, etc., Association v. Palmer* (Neb.), 89 N. W. 316; *Male v. Wink*, 61 Neb. 748; 86 N. W. 472.

³ *Faison v. Grandy*, 128 N. C. 438; 38 S. E. 897; affirming, 126 N. C. 827; 36 S. E. 276.

closure of a mortgage executed upon the trust estate by the trustee.¹ An assignee or trustee in insolvency or bankruptcy may interpose usury as a defense if the fact that such usury exists affects the amount of assets coming into his hands.² If, however, the assignee is appointed for the benefit of certain creditors, not including the creditor whose contract is usurious, and the assignee holds no property in that capacity which is chargeable with such debt, and the assets coming to him will not be affected by the fact of such usury, the assignee cannot interpose the defense of usury.³ The receivers of a corporation may interpose the defense of usury against the mortgage given by such corporation,⁴ even if in the particular case the defense will enure exclusively to the benefit of a subsequent mortgagee.⁵ A widow, claiming her year's support, may attack as usurious a deed given by her husband to secure a debt.⁶

§501. Surety of debtor.

It is held in some states that the surety cannot set up the defense of usury to defeat his liability if the principal debtor does not see fit to do so,¹ even if the surety executes the note in ignorance of such usury.² There is some conflict of authority as to whether the surety may have usurious interest paid by his principal credited upon the actual amount of the indebtedness with legal interest; some states holding that such credit can be

¹ *Wagnon v. Pease*, 104 Ga. 417; 30 S. E. 895.

² *In re Kellogg*, 113 Fed. 120; *Blakeman v. Busby*, 61 Kan. 745; 60 Pac. 1064. *Contra*, *Snyder v. Construction Co.*, 52 W. Va., 655; 44 S. E. 250.

³ *Parker v. Hotel Co.*, 96 Tenn. 252; 34 S. W. 209.

⁴ *Short v. Post*, 58 N. J. Eq. 130; 42 Atl. 569.

⁵ *Short v. Post*, 58 N. J. Eq. 130; 42 Atl. 569.

⁶ *Marshall v. Charland*, 106 Ga. 42; 31 S. E. 791.

¹ *Selser v. Brock*, 3 Ohio St. 302; *First National Bank v. Garlinghouse*, 22 O. S. 492; 10 Am. Rep. 751.

² *First National Bank v. Garlinghouse*, 22 O. S. 492; 10 Am. Rep. 751.

made,³ and others that it cannot.⁴ If a surety, knowing that a contract is usurious, pays the entire amount thereof, he cannot recover from his principal the amount of usury thus paid, in jurisdictions where the surety could have resisted recovery beyond the amount of the loan and legal interest.⁵ So if A, for B's accommodation, gives his own note to X, and takes therefor a note from B, B can interpose the defense of usury, even though the notes bear the rate originally agreed upon between B and X.⁶

§502. Creditor holding usurious debt.

The creditor who has exacted usurious interest cannot take advantage of the usury to avoid the contract.¹ Hence, if a note payable in the future has been given to evidence such debt, the creditor cannot sue before the maturity of the note, upon the theory that the entire transaction is void;² nor can he sue upon a prior valid note which has been paid by the usurious note.³

§503. Other creditor.

In the absence of statute, a creditor of the debtor cannot set up the fact of usury in a contract between such debtor and another creditor,¹ even if the creditor setting up such defense has a lien upon the debtor's property, which is inferior to the lien held

³ *Weldon v. Ayers*, 116 Ga. 181; 42 S. E. 473; *Whinery v. Garrett* (Ky.), 71 S. W. 855; *Sanner v. Smith*, 89 Ill. 123; 31 Am. Rep. 70; *Roberts v. Coffin*, 22 Tex. Civ. App. 127; 53 S. W. 597.

⁴ *Lamoille County National Bank v. Bingham*, 50 Vt. 105; 28 Am. Rep. 490.

⁵ *Boren v. Boren*, 29 Tex. Civ. App. 221; 68 S. W. 184; *Wallace's Administratrix v. Lipp's Administrator*, 47 W. Va. 339; 34 S. E. 731.

⁶ *Stokeley v. Buckler* (Ky.), 61 S. W. 460.

¹ *Leipziger v. Van Saun*, 64 N. J. Eq. 37; 53 Atl. 1; *Miller v. Kerr*, 1 Bail. (S. C.) 4; *Riley v. Gregg*, 16 Wis. 666.

² *Leipziger v. Van Saun*, 64 N. J. Eq. 37; 53 Atl. 1.

³ *Austin v. Chittenden*, 33 Vt. 553.

¹ *Griebel v. Imboden*, 158 Mo. 632; 59 S. W. 957.

by such creditor,² and even though such debtor is insolvent.³ Under statutes in force in many jurisdictions, a creditor who holds a lien subsequent to another lien which secures a usurious debt may set up usury as a defense against such debt,⁴ especially if the debtor is insolvent.⁵ So under a statute making void a pledge given for a usurious debt, a subsequent mortgagee who agrees to take subject to outstanding liens may avoid such pledge.⁶

§504. Grantee or assignee of debtor.

A purchaser of property from a debtor, which is encumbered by a lien given to secure a usurious debt, cannot interpose usury as a defense against the enforcement of such lien.¹ Hence the assignee of a contract cannot avail himself of the defense of usury.² So if one of several persons jointly liable upon a note, assumes the payment of the shares of other persons liable on such note for a valuable consideration, he cannot set up usury as to the shares of such persons, though he may plead it as to his own.³ One who has purchased mortgaged realty cannot set

² *Stickney v. Moore*, 108 Ala. 590; 19 So. 76; *Union National Bank v. International Bank*, 123 Ill. 510; 14 N. E. 859; *Pritchett v. Mitchell*, 17 Kan. 355; 22 Am. Rep. 287; *Lee v. Feamster*, 21 W. Va. 108; 45 Am. Rep. 549; *Ready v. Huebner*, 46 Wis. 692; 32 Am. Rep. 749; 1 N. W. 344.

³ *Stickney v. Moore*, 108 Ala. 590; 19 So. 76.

⁴ *In re Miller* (Ga.), 118 Fed. 360; *Banta v. Building Co. (Ky.)*, 59 S. W. 501; *Trusdell v. Dowden*, 47 N. J. Eq. 396; 20 Atl. 972. Subsequent mortgagee by chattel mortgage, *Western, etc., Co. v. Glasner*, 169 Mo. 38; 68 S. W. 917. Attaching creditor, *Marx v. Hart*, 166 Mo. 503; 89 Am. St. Rep. 715; 66 S. W. 260.

⁵ *Parker v. Bank*, 107 Ga. 650; 34 S. E. 365; *Cole v. Bansemer*, 26 Ind. 94.

⁶ *Western, etc., Co. v. Glasner*, 169 Mo. 38; 68 S. W. 917.

¹ *Gray v. Lumber Co.*, 128 Mich. 427; 54 L. R. A. 731; 87 N. W. 376; *Farmers', etc., Bank v. Kimmel*, 1 Mich. 84; *Sellers v. Botsford*, 11 Mich. 59; *People's, etc., Association v. Pickard* (Neb.), 96 N. W. 337; *People's, etc., Association v. Palmer* (Neb.), 89 N. W. 316; *Nance v. Gregory*, 6 Lea. (Penn.) 343; 40 Am. Rep. 41; *Spaulding v. Davis*, 51 Vt. 77; *Reed v. Eastman*, 50 Vt. 67; *Low v. Mussey's Estate*, 36 Vt. 183:

² *Barney v. Surety Co.*, 131 Mich. 192; 91 N. W. 140.

³ *Marks v. Bank* (Ky.), 50 S. W.

up usury as a defense to the foreclosure of such mortgage,⁴ especially if he has assumed and agreed to pay such indebtedness, in which case he cannot avail himself of usury as a defense to avoid paying the full amount of the debt;⁵ nor can he in such case resist sale of the property under the mortgage,⁶ nor have payments of usurious interest by his grantor applied in discharge of the principal of the debt.⁷ It has been held, however, that if the clause of assumption of indebtedness does not specifically refer to the mortgage, either by description, or as to amount, the grantee may set up usury as a defense.⁸ If, after the purchase of such realty, without assuming personal liability therefor, the vendee subsequently agrees with the creditor to assume the usurious debt personally, and to pay the usurious interest due, such contract is in itself usurious.⁹ One who buys real or personal property¹⁰ at an execution sale cannot attack mortgages or other liens thereon on the ground of usury in the indebtedness secured by them. One exception to this general rule exists. If the mortgage¹¹ upon usurious consideration is void or voidable, and the original debtor intends in

1103. Partner assuming firm debt, *Farmers', etc., Co. v. Bazore*, 67 Ark. 252; 54 S. W. 339.

⁴*De Wolf v. Johnson*, 10 Wheat. (U. S.) 367; *Johnson v. Loan Association*, 121 Ala. 524; 26 So. 201; *Eslava v. Loan Association*, 121 Ala. 480; 25 So. 1013; *Zeigler v. Maner*, 53 S. C. 115; 69 Am. St. Rep. 842; 30 S. E. 829; *Stayton v. Riddle*, 114 Pa. St. 464; 7 Atl. 72; *Smith v. McMillan*, 46 W. Va. 577; 33 S. E. 283.

⁵*Anderson v. Mortgage Co.*, — Ida. —; 69 Pac. 130; *Spinney v. Miller*, 114 Ia. 210; 89 Am. St. Rep. 351; 86 N. W. 317; *Male v. Wink*, 61 Neb. 748; 86 N. W. 472; *Building, etc., Association v. Walker*, 59 Neb. 456; 81 N. W. 308; *Jones v. Ins. Co.*, 40 O. S. 583; *Cramer v. Lepper*, 26 O. S. 59; 20 Am. Rep.

756; *Nance v. Gregory*, 6 Lea. (Tenn.) 343; 40 Am. Rep. 41; *Southern, etc., Association v. Winans*, 24 Tex. Civ. App. 544; 60 S. W. 825; *North Texas, etc., Association v. Hay*, 23 Tex. Civ. App. 98; 56 S. W. 580.

⁶*Dickenson v. Investment Co.*, 93 Va. 498; 25 S. E. 548.

⁷*Frost v. Savings Co.*, 42 Or. 44; 70 Pac. 814.

⁸*Washington, etc., Association v. Andrews*, 95 Md. 696; 53 Atl. 573.

⁹*Ganz v. Lancaster*, 169 N. Y. 357; 58 L. R. A. 151; 62 N. E. 413.

¹⁰*Turner v. Bank*, 126 Ala. 397; 28 So. 469. *Contra*, *Cummins v. Wire*, 6 N. J. Eq. 73; *Turner v. Bank*, 126 Ala. 397; 28 So. 469.

¹¹*Newman v. Kershaw*, 10 Wis. 333.

making a subsequent conveyance thereof to treat the former conveyance as void, his grantee under the second conveyance may also treat it as void.

§505. Other parties.

One who is not a party to the usurious contract, nor the legal representative of the debtor, cannot set up the defense of usury in the absence of special circumstances.¹ An agent of the creditor who has collected a debt bearing usurious interest cannot interpose such usury in an action by his principal to compel an accounting.² An insurance company cannot resist an action brought by an assignee of a policy on the ground that the assignment was pursuant to a usurious contract.³ Special circumstances may, however, make a different rule apply. Thus if the contract to pay usury is separate from the contract to pay the principal and lawful interest, it lacks consideration and is not enforceable even as against a third person.⁴ So if notes have been obtained by fraud and subsequently pledged under a usurious contract, the maker can set up the fact of usury to show that the holder is not a *bona fide* purchaser under a statute making a pledge based on usury "invalid and illegal."⁵

¹ Scott v. Williams, 100 Ga. 540; 62 Am. St. Rep. 340; 28 S. E. 243; Anderson v. Mortgage Co., — Ida. —; 69 Pac. 130.

² Vette v. Geist, 155 Mo. 27; 55 S. W. 871.

³ Planters', etc., Association v. Loan Co., 68 Ark. 8; 56 S. W. 443.

⁴ Bean v. Saving Association (Neb.), 90 N. W. 222.

⁵ Keim v. Vette, 167 Mo. 389; 67 S. W. 223.

CHAPTER XXIX.

EFFECT OF EXECUTORY ILLEGAL AND VOID CONTRACTS.

§506. Illegal and void contracts distinguished.

The class of void contracts includes all illegal contracts and in addition a number of contracts which are unenforceable but have not the distinct element of illegality.¹ Illegal contracts are not only unenforceable, but they contain the additional quality of rendering transactions and contracts void if connected with the illegal contract too closely.² As far as concerns an action to enforce a given covenant it makes no difference whether it is void or illegal.³

The term illegal is often loosely used. Thus it is sometimes applied to contracts which are merely *ultra vires* of the corporation making the contract,⁴ though such contracts should not be so classed.⁵ This confusion has doubtless arisen because many contracts are both illegal and *ultra vires*. So it is sometimes applied to contracts which are merely in excess of the authority

¹ "An illegal consideration is void, but a consideration may be void, though not illegal, a contract may have no consideration for a part of the promise and one that has totally failed. In such cases if it be possible to sever that part of the contract founded on this void or defective consideration from the good part, it may be done and the good part will stand. But if the consideration for any part of it be illegal, the whole contract is void." Chandler v. Johnson, 39 Ga. 85, 90.

² The effect of collateral connected

contracts is discussed in Ch. XXIX.

³ See §§ 507, 508.

Thus in Gulf, etc., Ry. v. Hume, 87 Tex. 211; 27 S. W. 110, a covenant with a common carrier that in case of loss citation should be served on such carrier in forty days is called "void" and "illegal" without discrimination.

⁴ Such contract is termed "unlawful." Buckeye, etc., Co. v. Harvey, 92 Tenn. 115; 36 Am. St. Rep. 71; 18 L. R. A. 252; 20 S. W. 427.

⁵ Gorrell v. Ins. Co., 63 Fed. 371; 11 C. C. A. 240.

of the agent who attempts to bind his principal. Cases of these last classes are of course not settled on principles of illegality at all.

The term "void" is also often loosely used. A distinction must be made between contracts which are void and those which may be made void at the election of one of the parties thereto.⁶ *Prima facie* the word void means that the transaction is null,⁷ yet the word is often misused for voidable.⁸ An illegal contract is not "voidable," as there is nothing to avoid.⁹ As far as it is executory it has no validity. Even third persons may take advantage of the illegality of an executory contract.¹⁰

Unless the terms of the contract or the surrounding facts show that the contract is illegal, the court will presume it to be valid.¹¹ Thus a contract of lease of Indian lands is valid so that rent may be recovered thereunder where lessee actually enjoys possession, though lessor, while holding the lands apparently with consent of the Indians, could have no valid title thereto, since his possession with their consent, is not illegal, and absence of consent is not shown.¹² On the other hand, if the contract is of a class *prima facie* illegal, such as a contract to influence legislation,¹³ it will be held illegal unless additional facts are shown which make it legal.

⁶ "The word 'void' is sometimes used in the sense of absolutely void, so that no title passes under a contract to which it applies, and sometimes in the restricted sense of voidable. . . . Few if any words are more inaccurately used in the books than the word 'void.' . . . The primary and strictly accurate meaning of the word 'void' is that of absolute nullity." *Land, etc., Co. v. McIntyre*, 100 Wis. 245, 251; 69 Am. St. Rep. 915; 75 N. W. 964.

⁷ *Wickliff v. Robinson*, 18 Ill. 145; *Woodbury v. Parker*, 19 Vt. 353; 47 Am. Dec. 695; *Land, etc., Co. v. McIntyre*, 100 Wis. 245; 69 Am. St. Rep. 915; 75 N. W. 964.

⁸ *Hoffman v. Harrington*, 28 Mich.

90; *White v. Iselin*, 26 Minn. 487; 5 N. W. 359; *Melms v. Brewing Co.*, 93 Wis. 153; 57 Am. St. Rep. 899; 66 N. W. 244.

⁹ So of a gambling contract. *Merrill v. Garver* (Neb.), 96 N. W. 619.

¹⁰ *Cumberland, etc., Co. v. Evansville*, 127 Fed. 187.

¹¹ *Burdine v. Burdine*, 98 Va. 515; 81 Am. St. Rep. 741; 36 S. E. 992; *Houlton v. Nichol*, 93 Wis. 393; 57 Am. St. Rep. 928; 33 L. R. A. 166; 67 N. W. 715.

¹² *United States v. Hunter*, 21 Fed. 615; *Kansas, etc., Co. v. Thompson*, 57 Kan. 792; 48 Pac. 34.

¹³ *Powers v. Skinner*, 34 Vt. 274; 80 Am. Dec. 677.

If it can by its terms be performed lawfully, it will be treated as legal,¹⁴ even if performed in an illegal manner;¹⁵ while a contract entered into with intent to violate the law is illegal even if the parties may in performing depart from the contract and keep within the law.¹⁶

§507. Effect of illegal contract containing a single covenant.

If A makes a promise to B consisting of one covenant only and B in consideration thereof does or agrees to do one thing only, then if A's promise is to do an act which is either illegal or merely void, it is equally unenforceable. In such cases, therefore, there is no practical distinction between illegal and void contracts. Confusion in nomenclature in such cases is not uncommon.

Thus no action can be maintained on an illegal contract, the parties thereto being *in pari delicto*.¹ It is true that in refus-

¹⁴ Fox v. Rogers, 171 Mass. 546; 50 N. E. 1041; Barry v. Capen, 151 Mass. 99; 6 L. R. A. 808; 23 N. E. 735. Thus a lease of premises for the sale of intoxicating liquors is valid if such sale can be made lawfully. Goodall v. Brewing Co., 56 O. S. 257; 46 N. E. 983; Weitzel v. Slavin, 13 Ohio C. C. 221; 7 Ohio Dec. 142.

¹⁵ Fox v. Rogers, 171 Mass. 546; 50 N. E. 1041. "A contract is not necessarily illegal because it is carried out in an illegal way." Fox v. Rogers, 171 Mass. 546, 547; 50 N. E. 1041.

¹⁶ Brooks v. Cooper, 50 N. J. Eq. 761; 35 Am. St. Rep. 793; 21 L. R. A. 617; 26 Atl. 978.

¹ Gibbs v. Gas. Co., 130 U. S. 396; Marshall v. R. R., 16 How. (U. S.) 314; Hanover National Bank v. Bank, 109 Fed. 421; 48 C. C. A. 482; Youngblood v. Birmingham, etc., Co., 95 Ala. 521; 36 Am. St. Rep. 245; 20 L. R. A.

58; 12 So. 579; Tatum v. Kelly, 25 Ark. 209; 94 Am. Dec. 717; Tappan v. Brewing Co., 80 Cal. 570; 13 Am. St. Rep. 174; 5 L. R. A. 428; 22 Pac. 257; Santa Clara, etc., Co. v. Hayes, 76 Cal. 387; 9 Am. St. Rep. 211; 18 Pac. 391; Alford v. Burke, 21 Ga. 46; 68 Am. Dec. 449; Person v. Jones, 12 Ga. 371; 58 Am. Dec. 476; McNulta v. Bank, 164 Ill. 427; 56 Am. St. Rep. 203; 45 N. E. 954; affirming, 63 Ill. App. 593; Goodrich v. Tenney, 144 Ill. 422; 36 Am. St. Rep. 459; 19 L. R. A. 371; 33 N. E. 44; Kirkpatrick v. Clark, 132 Ill. 342; 22 Am. St. Rep. 531; 8 L. R. A. 511; 24 N. E. 71; Linn v. Bank, 1 Scam. (Ill.) 87; 25 Am. Dec. 71; Cummings v. Foss, 40 Ill. App. 523; Cleveland, etc., Ry. v. Closser, 126 Ind. 348; 22 Am. St. Rep. 593; 9 L. R. A. 754; 26 N. E. 159; Coquillard v. Bearss, 21 Ind. 479; 83 Am. Dec. 362; Stansfield v. Kunz, 62 Kan. 797; 64 Pac. 614; Bowman v. Phillips, 41 Kan. 364;

ing to enforce such contracts, one party is given an advantage over the other. Courts cannot adjudicate rights under illegal contracts, however, and the interests of the parties must yield to considerations of public welfare.² So as lotteries are illegal,

13 Am. St. Rep. 292; 3 L. R. A. 631; 21 Pac. 230; Wood v. McCann, 6 Dana (Ky.) 366; Bowman v. Gonegal, 19 La. Ann. 328; 92 Am. Dec. 537; Schmidt v. Barker, 17 La. Ann. 261; 87 Am. Dec. 527; Gravier v. Carralry, 17 La. 118; 36 Am. Dec. 608; Milne v. Davidson, 5 Mart. (N. S.) (La.) 409; 16 Am. Dec. 189; Wildey v. Collier, 7 Md. 273; 61 Am. Dec. 346; Harvey v. Merrill, 150 Mass. 1; 15 Am. St. Rep. 159; 5 L. R. A. 200; 22 N. E. 49; Cobbs v. Hixson, 75 Mich. 260; 4 L. R. A. 682; 42 N. W. 818; Buckley v. Humason, 50 Minn. 195; 36 Am. St. Rep. 637; 16 L. R. A. 423; 52 N. W. 385; Cherokee, etc., Association v. Cass, etc., Co., 138 Mo. 394; 40 S. W. 107; Board of Trade v. Brady, 78 Mo. App. 585; Commonwealth, etc., Ins. Co. v. Hayden, 60 Neb. 636; 83 Am. St. Rep. 545; 83 N. W. 922; Wilson v. Parrish, 52 Neb. 6; 71 N. W. 1010; Storz v. Finklestein, 46 Neb. 577; *sub nom.*, Storz v. Finkelstein, 30 L. R. A. 644; 65 N. W. 195; Brooks v. Cooper, 50 N. J. Eq. 761; 35 Am. St. Rep. 793; 21 L. R. A. 617; 26 Atl. 978; Gulick v. Ward, 10 N. J. L. 87; 18 Am. Dec. 389; Leonard v. Poole, 114 N. Y. 371; 11 Am. St. Rep. 667; 4 L. R. A. 728; 21 N. E. 707; Woodworth v. Bennett, 43 N. Y. 273; 3 Am. Rep. 706; Hooker v. Vandewater, 4 Denio (N. Y.) 349; 47 Am. Dec. 258; Jacobs v. Mitchell, 22 N. E. 768; 46 O. S. 601; McQuade v. Rosecrans, 36 O. S. 442; Bradford v. Beyer, 17 O. S. 388; Goudy v. Gebhart, 1 O. S. 262;

Phoenix Silk Co. v. Reilly, 187 Pa. St. 526; 41 Atl. 523; Swan v. Scott, 11 S. & R. (Pa.) 155; Hibernia Turnpike Corporation v. Henderson, 8 S. & R. (Pa.) 219; 11 Am. Dec. 593; Haworth v. Montgomery, 91 Tenn. 16; 18 S. W. 399; Ohio, etc., Co. v. Merchants, etc., Co., 11 Humph. (Tenn.) 1; 53 Am. Dec. 742; Wiggins v. Bisso, 92 Tex. 219; 71 Am. St. Rep. 837; 47 S. W. 637; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170; 40 S. W. 837; Dow v. Taylor, 71 Vt. 337; 76 Am. St. Rep. 775; 45 Atl. 220; Spalding v. Preston, 21 Vt. 9; 50 Am. Dec. 68; Land, etc., Co. v. McIntyre, 100 Wis. 245; 69 Am. St. Rep. 915; 75 N. W. 964; Milwaukee, etc., Association v. Niezerowski, 95 Wis. 129; 60 Am. St. Rep. 97; 37 L. R. A. 127; 70 N. W. 166; Rose v. Kimberly, 89 Wis. 545; 46 Am. St. Rep. 855; 27 L. R. A. 556; 62 N. W. 526; Ry. v. Ry., 75 Wis. 224; 6 L. R. A. 601; 44 N. W. 17. "The moment the illegality of the contract is disclosed the gates of legal and equitable relief and remedy are at once shut against the party who seeks to enforce such a contract." Sprague v. Rooney, 104 Mo. 349, 358; 16 S. W. 505. "The parties will be left for redress to their own code of ethics." Hankins v. Ottinger, 115 Cal. 454; 40 L. R. A. 76; 47 Pac. 254.

² Gill v. Williams, 12 La. Ann. 219; 68 Am. Dec. 767; Mutual Beneficial Association v. Hoyt, 46 Mich. 473; 9 N. W. 497; McDermott v. Sedgwick, 140 Mo. 172; 39 S. W.

no action can be maintained on such a contract,³ either for the prize⁴ or for tickets sold.⁵ So as wager contracts are now generally illegal, the winner cannot maintain an action against the loser for the thing wagered;⁶ nor can his assignee in bankruptcy,⁷ nor can one who acts as banker for betting and gambling recover from the losers for amounts advanced to winners.⁸

776; *Hope v. Linden Park, etc., Association*, 58 N. J. L. 627; 55 Am. St. Rep. 614; 34 Atl. 1070; *Jacobs v. Mitchell*, 46 O. S. 601; 22 N. E. 768; *Burck v. Abbott*, 22 Tex. Civ. App. 216; 54 S. W. 314. "The sentiment of 'honor among thieves' cannot be enforced in courts of justice." *Woodworth v. Bennett*, 43 N. Y. 273, 277; 3 Am. Rep. 706. "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of contrary to real justice, as between him and the plaintiff, by accident, if I may so say." Lord Mansfield in *Holman v. Johnson*, 1 Cowp. 341.

³ *Lynch v. Rosenthal*, 144 Ind. 86; 54 Am. St. Rep. 168; 31 L. R. A. 835; 42 N. E. 1103; *Dieckhoff v. Fox*, 56 Minn. 438; 57 N. W. 930; *Roby v. West*, 4 N. H. 285; 17 Am. Dec. 423.

⁴ *Barclay v. Pearson* (1893), 2 Ch. 154; *Allebach v. Godschalk*, 116 Pa. St. 329.

⁵ *Clarke v. Havens*, 1 A. K. Mar. (Ky.) 198.

⁶ *Pearce v. Rice*, 142 U. S. 28; *Metropolitan National Bank v. Jansen*, 108 Fed. 572; 47 C. C. A. 497; *Waldron v. Johnston*, 86 Fed. 757; *Morris v. Norton*, 75 Fed. 912; 21 C. C. A. 553; *Shain v. Goodwin*, 46

Fed. 564; *West v. Sanders*, 104 Ga. 727; 31 S. E. 619; *Jamieson v. Wallace*, 167 Ill. 388; 59 Am. St. Rep. 302; 47 N. E. 762; *Pearce v. Dill*, 149 Ind. 136; 48 N. E. 788; *Creston First National Bank v. Carroll*, 80 Ia. 11; 8 L. R. A. 275; 45 N. W. 304; *Billingslea v. Smith*, 77 Md. 504; 26 Atl. 1077; *Mohr v. Miesen*, 47 Minn. 228; 49 N. W. 862; *Campbell v. Bank*, 74 Miss. 526; 21 So. 400; 23 So. 25; *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713; *Scott v. Brown*, 54 Mo. App. 606; *Rogers v. Marriott*, 59 Neb. 759; 82 N. W. 21; *Sprague v. Warren*, 26 Neb. 326; 3 L. R. A. 679; 41 N. W. 1113; *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394; 45 Atl. 611; *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308; *Burbage v. Windley*, 108 N. Car. 357; 12 S. E. 839; *Dows v. Glaspel*, 4 N. D. 251; 60 N. W. 60; *Kahn v. Walton*, 46 O. S. 195; 20 N. E. 203; *Harper v. Crain*, 36 O. S. 338; 38 Am. Rep. 589; *Waite v. Frank*, 14 S. D. 626; 86 N. W. 645; *Mechanics' etc., Co. v. Duncan* (Tenn. Ch. App.), 36 S. W. 887; *Tate v. Building Association*, 97 Va. 74; 75 Am. St. Rep. 770; 45 L. R. A. 243; 33 S. E. 382; *Schoenberg v. Adler*, 105 Wis. 645; 81 N. W. 1055; *Lowry v. Dillman*, 59 Wis. 197; 18 N. W. 4.

⁷ *Shoolbred v. Roberts* (1899), 2 Q. B. 560.

⁸ *Olson v. Goodman Co.*, 110 Wis. 149; 53 L. R. A. 648; 85 N. W. 640.

Wager contracts are not only void, but illegal.⁹ So a monopoly contract being illegal cannot be enforced by the parties thereto.¹⁰ No recovery can be had for a breach thereof,¹¹ as for a failure to pay over profits under the contract,¹² or to pay dividends in ac-

⁹ *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159; 5 L. R. A. 200; 22 N. E. 49; *Love v. Harvey*, 114 Mass. 80; *Gregory v. Wendell*, 40 Mich. 432; *Story v. Salomon*, 71 N. Y. 420; *Dickson v. Thomas*, 97 Pa. St. 278; *Barnard v. Backhaus*, 52 Wis. 593; 6 N. W. 252; 9 N. W. 595.

¹⁰ *Merz Capsule Co. v. Capsule Co.*, 67 Fed. 414; *Tuscaloosa Mfg. Co. v. Williams*, 127 Ala. 110; 85 Am. St. Rep. 125; 50 L. R. A. 175; 28 So. 669; *Vulcan Powder Co. v. Powder Co.*, 96 Cal. 510; 31 Am. St. Rep. 242; 31 Pac. 581; *Pacific Factor Co. v. Adler*, 90 Cal. 110; 25 Am. St. Rep. 102; 27 Pac. 36; *Inter Ocean Publishing Co. v. Associated Press*, 184 Ill. 438; 75 Am. St. Rep. 184; 48 L. R. A. 568; 56 N. E. 822; *Adams v. Brennan*, 177 Ill. 194; 69 Am. St. Rep. 222; 42 L. R. A. 718; 52 N. E. 314; *South Chicago City Ry. v. Ry.*, 171 Ill. 391; 49 N. E. 576; affirming 70 Ill. App. 254; *More v. Bennett*, 140 Ill. 69; 33 Am. St. Rep. 216; 15 L. R. A. 361; 29 N. E. 888; *Chicago, etc., Co. v. Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; 13 N. E. 169; *Consumers' Oil Co. v. Nunnemacher*, 142 Ind. 560; 51 Am. St. Rep. 193; 41 N. E. 1048; *Cleveland, etc., Ry. v. Closser*, 126 Ind. 348; 22 Am. St. Rep. 593; 9 L. R. A. 754; 26 N. E. 159; *Beechley v. Mulville*, 102 Ia. 602; 63 Am. St. Rep. 479; 70 N. W. 107; 71 N. W. 428; *Chapin v. Brown*, 83 Ia. 156; 32 Am. St. Rep. 297; 12 L. R. A. 428; 48 N. W. 1074; *Anderson*

v. Jett, 89 Ky. 375; 6 L. R. A. 390; 12 S. W. 670; *Fabacher v. Bryant*, 46 La. Ann. 820; 15 So. 181; *Texas, etc., Co. v. Ry. Co.*, 41 La. Ann. 970; 17 Am. St. Rep. 445; 6 So. 888; *Gamewell, etc., Co. v. Crane*, 160 Mass. 50; 39 Am. St. Rep. 458; 22 L. R. A. 673; 35 N. E. 98; *Bishop v. Palmer*, 146 Mass. 469; 4 Am. St. Rep. 339; 16 N. E. 299; *Cohen v. Envelope Co.*, 166 N. Y. 292; 59 N. E. 906; *Cummings v. Stone Co.*, 164 N. Y. 401; 79 Am. St. Rep. 655; 52 L. R. A. 262; 58 N. E. 525; *Judd v. Harrington*, 139 N. Y. 105; 34 N. E. 790; *Culp v. Love*, 127 N. Car. 457; 37 S. E. 476; *Lufkin Rule Co. v. Fringeli*, 57 O. S. 596; 63 Am. St. Rep. 736; 41 L. R. A. 185; 49 N. E. 1030; *Emery v. Candle Co.*, 47 O. S. 320; 21 Am. St. Rep. 819; 24 N. E. 660; *Central Ohio Salt Co. v. Guthrie*, 35 O. S. 666; *Crawford v. Wick*, 18 O. S. 190; 98 Am. Dec. 103; *Nester v. Brewing Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894; 24 L. R. A. 247; 29 Atl. 102; *Fuqua v. Brewing Co.*, 90 Tex. 298; 35 L. R. A. 241; 38 S. W. 29; rehearing denied 38 S. W. 750; *Texas, etc., Co. v. Lawson*, 89 Tex. 394; 32 S. W. 871; 34 S. W. 919; *Milwaukee, etc., Association v. Niezerowski*, 95 Wis. 129; 60 Am. St. Rep. 97; 37 L. R. A. 127; 70 N. W. 166.

¹¹ *Santa Clara, etc., Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; 18 Pac. 391; *More v. Bennett*, 140 Ill. 69; 33 Am. St. Rep. 216; 15 L. R. A. 361; 29 N. E. 888.

¹² *Nester v. Brewing Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894; 24

cordance with the contract,¹³ or to pay into an unlawful pooling combination the additional sum on each job required by the rules of the combination,¹⁴ even if an express promise to pay the same is made after the job is contracted for;¹⁵ nor can rent be collected under an ostensible lease which is really a contract to induce the nominal lessor to stop work;¹⁶ nor can an action for fraudulently inducing plaintiff to enter into such a contract be maintained if plaintiff knew it was a monopoly contract;¹⁷ nor can an action be maintained against the vendor of a patent right for infringement thereof where the assignment of such a patent was a part of a monopoly contract.¹⁸ A monopoly contract providing for the suspension and boycotting of any member who breaks the contract is no defense to an action for damages caused by such boycott of a member after he has been expelled.¹⁹ On the other hand, no damages can be had for the act of one party in terminating the monopoly contract.²⁰ A dissenting stockholder may enjoin the performance of a contract to turn over the corporate property to a combination, under a monopoly contract.²¹ So no action can be maintained on a Sun-

L. R. A. 247; 29 Atl. 102; *Wiggins v. Bisso*, 92 Tex. 219; 71 Am. St. Rep. 837; 47 S. W. 637; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690; 15 L. R. A. 598; 19 S. W. 274.

¹³ *Cravens v. Carter-Crume Co.*, 92 Fed. 479; 34 C. C. A. 479; *Richardson v. Buhl*, 77 Mich. 632; 6 L. R. A. 457; 43 N. W. 1102.

¹⁴ *Bailey v. Plumbers' Association*, 103 Tenn. 99; 46 L. R. A. 561; 52 S. W. 853.

¹⁵ As where a note is given by a member for membership privileges. *Milwaukee, etc., Association v. Niezzerowski*, 95 Wis. 129; 60 Am. St. Rep. 97; 37 L. R. A. 127; 70 N. W. 166.

¹⁶ *Clark v. Needham*, 125 Mich. 84; 84 Am. St. Rep. 559; 51 L. R.

A. 785; 83 N. W. 1027; *Field Cordage Co. v. Cordage Co.*, 6 Ohio C. C. 615; so by statute, *American Strawboard Co. v. Strawboard Co.*, 65 Ill. App. 502.

¹⁷ *Schubart v. Coke Co.*, 41 Ill. App. 181.

¹⁸ *National Harrow Co. v. Hench*, 84 Fed. 226.

¹⁹ *Ertz v. Exchange Co.*, 82 Minn. 173; 83 Am. St. Rep. 419; 51 L. R. A. 825; 84 N. W. 743; *Ertz v. Exchange Co.*, 79 Minn. 140; 79 Am. St. Rep. 433; 48 L. R. A. 90; 81 N. W. 737.

²⁰ *Beechley v. Mulville*, 102 Ia. 602; 63 Am. St. Rep. 479; 70 N. W. 107; 71 N. W. 428.

²¹ *Harding v. Glucose Co.*, 182 Ill. 551; 74 Am. St. Rep. 189; 55 N. E. 577.

day contract.²² Other illustrations of this doctrine will be found under each of the chapters on illegal contracts.²³

§508. Effect of void contract containing a single covenant.

So, as has been said,¹ a promise by A to B consisting of a single covenant which is void, is unenforceable.² Thus contracts in unreasonable restraint of trade are unenforceable.³ Even if performed voluntarily, a covenant in restraint of trade is no consideration for a promise based thereon.⁴ Equity will not enforce such contracts.⁵ On the other hand, equity will not give affirmative relief in the nature of cancellation of such a contract.⁶ So contracts waiving judicial rights,⁷ contracts waiving the discharge of duties imposed by law,⁸ wager insurance,⁹ and contracts in unreasonable restraint of marriage¹⁰ are unenforceable.

§509. Effect of contract containing two covenants, one only being illegal.

If A makes a promise to B consisting of two or more covenants, upon a valuable and legal consideration, and one of the

²² *Kelley v. Cosgrove*, 83 Ia. 229; 17 L. R. A. 779; 48 N. W. 979; *Pike v. King*, 16 Ia. 49; *Myers v. Meinrath*, 101 Mass. 366; 3 Am. Rep. 368; *Thompson v. Williams*, 58 N. H. 248.

²³ See Chs. XXI—XXVII.

¹ See § 506.

² A contract to build a dam forbidden by law. *William Wilcox Mfg. Co. v. Brazos*, 74 Conn. 208; 50 Atl. 722.

³ *Union Strawboard Co. v. Bonfield*, 193 Ill. 420; 86 Am. St. Rep., 346; 61 N. E. 1038; *Sternberg v. O'Brien*, 48 N. J. Eq. 370; 22 Atl. 348; *Mandeville v. Harman*, 42 N. J. Eq. 185; 7 Atl. 37; *Brewer v. Marshall*, 19 N. J. Eq. 537; 97 Am. Dec. 679; *People v. Milk Exchange*, 145 N. Y. 267; 45 Am. St. Rep. 609; 27

L. R. A. 437; 39 N. E. 1062; *People v. Sheldon*, 139 N. Y. 251; 36 Am. St. Rep. 690; 23 L. R. A. 221; 34 N. E. 785; *Judd v. Harrington*, 139 N. Y. 105; 34 N. E. 790; *Leonard v. Poole*, 114 N. Y. 371; 11 Am. St. Rep. 667; 4 L. R. A. 728; 21 N. E. 707; and see cases cited in §§ 373-381.

⁴ *Oliver v. Gilmore*, 52 Fed. 562.

⁵ See § 518.

⁶ At least where an action on such contract can be defended successfully without formal cancellation. *National Harrow Co. v. Hench*, 76 Fed. 667.

⁷ See §§ 347-358.

⁸ See §§ 359-372.

⁹ See §§ 383-394.

¹⁰ See § 424.

covenants made by A is illegal and the other is legal, the question of whether the legal covenant can be enforced or not depends on whether the contract is severable or not. If the contract is severable, consisting in legal effect of distinct contracts, the legal covenant can be enforced.¹ Thus a contract whereby A agrees for compensation to make an illegal bid on certain realty for B, and to manage such realty at a certain rate of wages per month is enforceable as to the latter covenant.²

If the contract is inseverable, consisting in legal effect of but one entire contract, the legal covenant cannot be enforced.³ A

¹ *Sims v. Brewing Co.*, 132 Ala. 311; 31 So. 35; *City Carpet, etc., Works v. Jones*, 102 Cal. 506; 36 Pac. 841; *Treadwell v. Davis*, 34 Cal. 601; 94 Am. Dec. 770; *Corcoran v. Coal Co.*, 138 Ill. 390; 28 N. E. 759; reversing 37 Ill. App. 577; *Pierce v. Pierce*, 17 Ind. App. 107; 46 N. E. 480; *Stewart v. Pierce*, 116 Ia. 733; 89 N. W. 234; *Rand v. Mather*, 11 Cush. (Mass.) 1; 59 Am. Dec. 131; *Koontz v. Hannibal, etc., Co.*, 42 Mo. 126; 97 Am. Dec. 325; *Erie Ry. Co. v. Express Co.*, 35 N. J. L. 240; *McCausland v. Okers*, 24 Ohio C. C. 711. "When one for a legal and valuable consideration agrees to perform two acts which are severable, one of which is lawful and the other unlawful, the contract may be enforced as to that for which it was lawful to contract and held void as to the other. But when the two things to be done are so blended that they cannot be separated, one lawful and the other not, the whole contract is void." *Gulf, etc., Ry. v. Hume*, 87 Tex. 211, 218; 27 S. W. 110.

² *McVicker v. McKenzie*, 136 Cal. 656; 69 Pac. 495.

³ *Meguire v. Corwine*, 101 U. S. 108; *Marshall v. R. R.*, 16 How. (U. S.) 314; *Providence Tool Co. v.*

Norris, 2 Wall. (U. S.) 45; *United States v. Bradley*, 10 Pet. (U. S.) 343; *Owens v. Wilkinson*, 20 App. D. C. 51; *Edwards v. Randle*, 63 Ark. 318; 58 Am. St. Rep. 108; 36 L. R. A. 174; 38 S. W. 343; *Humboldt County v. Stern*, 136 Cal. 63; 68 Pac. 324; *Santa Clara, etc., Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; 18 Pac. 391; *Douthart v. Congdon*, 197 Ill. 349; 90 Am. St. Rep. 167; 64 N. E. 348; *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596; 49 N. E. 864; *Gipps Brewing Co. v. De France*, 91 Ia. 108; 51 Am. St. Rep. 329; 28 L. R. A. 386; 58 N. W. 1087; *Sedgwick County v. State*, 66 Kan. 634; 72 Pac. 284; *Fleming v. Greene*, 48 Kan. 646; 30 Pac. 11; *Bishop v. Palmer*, 146 Mass. 469; 4 Am. St. Rep. 339; 16 N. E. 299; *Case v. Smith*, 107 Mich. 416; 61 Am. St. Rep. 341; 31 L. R. A. 282; 65 N. W. 279; *Lyon v. Waldo*, 36 Mich. 345; *Snyder v. Willey*, 33 Mich. 483; *Handy v. Publishing Co.*, 41 Minn. 188; 16 Am. St. Rep. 695; 4 L. R. A. 166; 42 N. W. 872; *Malone v. Casualty Co.*, 71 Mo. App. 1; *Bixby v. Moor*, 51 N. H. 402; *Foley v. Speir*, 100 N. Y. 552; 3 N. E. 477; *Crawford v. Wick*, 18 O. S. 90; 98 Am. Dec. 103; *Widoe v. Webb*, 20

party to such a contract cannot ignore the illegal part and enforce the legal part.⁴ Thus where under an arrangement assumed to be illegal, stock was deposited as part of a pooling arrangement for voting it and was to be sold only on consent of three-fourths of the parties owning it, specific performance of a sale would not be decreed where less than three-fourths consented.⁵ Thus no recovery can be had on a contract in part for illegal lobbying services and in part for legal services if the contract is inseverable.⁶ Thus by the weight of modern authority and the better reasoning, a contract in restraint of trade, which of itself is reasonable and valid, is invalid if an inseverable part a scheme for creating a monopoly.⁷ Thus where a contract for the sale of beer is illegal, there can be no action on a covenant of such contract to return the barrels and cases⁸ or bottles⁹ in which such beer was shipped. So a contract for personal services, some of which are legal and others illegal, is invalid.¹⁰

This same rule is stated in a different form from the standpoint of consideration. If any part of an entire and indivisible consideration is illegal, all the promises based thereon are unenforceable, even though the residue of such consideration is

O. S. 431; 5 Am. Rep. 664; Gulf, etc., Ry. v. Hume, 87 Tex. 211; 27 S. W. 110; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170; 40 S. W. 837; Cobb v. Cowdery, 40 Vt. 25; 94 Am. Dec. 370.

⁴ "Where part of a consideration of an entire contract is illegal the contract is tainted and the courts will not compel its performance." Gerlach v. Skinner, 34 Kan. 86, 89; 55 Am. Rep. 240; 8 Pac. 257; quoted in Fleming v. Greene, 48 Kan. 646, 650; 30 Pac. 11.

⁵ Ryan v. McLane, 91 Md. 175; 80 Am. St. Rep. 438; 50 L. R. A. 501; 46 Atl. 340.

⁶ Trist v. Child, 21 Wall. (U. S.) 441; Owens v. Wilkinson, 20 App. D. C. 51; McBratney v. Chandler, 22

Kan. 692; 31 Am. Rep. 213; Richardson v. Scott's Bluff Co., 59 Neb. 400; 80 Am. St. Rep. 682; 48 L. R. A. 294; 81 N. W. 309.

⁷ Addyston, etc., Co. v. United States, 175 U. S. 211; Fox, etc., Co. v. Schoen, 77 Fed. 29.

⁸ Gipps Brewing Co. v. DeFrance, 91 Ia. 108; 51 Am. St. Rep. 329; 28 L. R. A. 386; 58 N. W. 1087.

⁹ Wirth v. Roche, 92 Me. 383; 42 Atl. 794 (citing Holt v. O'Brien, 15 Gray (Mass.) 311; Bligh v. James, 6 Allen (Mass.) 570).

¹⁰ Handy v. Publishing Co., 41 Minn. 188; 16 Am. St. Rep. 695; 4 L. R. A. 466; 42 N. W. 872; Bixby v. Moor, 51 N. H. 402; Sullivan v. Horgan, 17 R. I. 409; 9 L. R. A. 110; 20 Atl. 232

legal.¹¹ Thus no recovery can be had on a note the consideration of which is in part borrowed money and in part a gambling debt,¹² or in part money advanced and in part commissions for making gambling future sales,¹³ or in part groceries sold lawfully and in part liquor sold unlawfully.¹⁴ So a note given for the difference between the amount of an inventory and a specified sum is unenforceable where the inventory is made excessive by intentional duplicate charges and overcharges.¹⁵ So a contract to pay extra compensation to a public clerk for performing certain services, some of which were imposed on him by law, being illegal as to such services is totally void.¹⁶ So a contract is unenforceable if it consists in part of lawful services and in

¹¹ *Wadsworth v. Dunnam*, 117 Ala. 661; 23 So. 699; *Patton v. Gilmer*, 42 Ala. 548; 94 Am. Dec. 665; *Valentine v. Stewart*, 15 Cal. 387; *Shortall v. Connell Co.*, 93 Ill. App. 231; *Brieske v. Ry. Co.*, 82 Ill. App. 256; *Ricketts v. Harvey*, 106 Ind. 564; 6 N. E. 325; *Koster v. Seney*, 99 Ia. 584; 68 N. W. 824; *Gerlach v. Skinner*, 34 Kan. 86; 55 Am. Rep. 240; 8 Pac. 257; *Kimbrough v. Lane*, 11 Bush (Ky.) 556; *Simpson v. Normand*, 51 La. Ann. 1355; 26 So. 266; *Deering v. Chapman*, 22 Me. 488; 39 Am. Dec. 592; *Bishop v. Palmer*, 146 Mass. 469; 4 Am. St. Rep. 339; 16 N. E. 299; *McNamara v. Gargett*, 68 Mich. 454; 13 Am. St. Rep. 355; 36 N. W. 218; *Snyder v. Willey*, 33 Mich. 483; *Cotten v. McKenzie*, 57 Miss. 418; *Bick v. Seal*, 45 Mo. App. 475; *Padget v. O'Connor*, — Neb. —; 98 N. W. 870; *McCormick, etc., Co. v. Miller*, 54 Neb. 644; 74 N. W. 1061; *Kidder v. Blake*, 45 N. H. 530; *Baldwin v. Short*, 125 N. Y. 553; 26 N. E. 928; *Widoe v. Webb*, 20 O. S. 431; 5 Am. Rep. 664 (disapproving *Doty v. Bank*, 16 O. S. 133); *Bredin's Appeal*, 92 Pa. St. 241; 37 Am. Rep. 677; *Potts v.*

Gray, 3 Coldw. (Tenn.) 468; 91 Am. Dec. 294; *Edwards County v. Jennings*, 89 Tex. 618; 35 S. W. 1053; affirming 33 S. W. 585; *Sanger v. Miller*, 26 Tex. Civ. App. 111; 62 S. W. 425; *Burek v. Abbott*, 22 Tex. Civ. App. 216; 54 S. W. 314; *Dow v. Taylor*, 71 Vt. 337; 76 Am. St. Rep. 775; 45 Atl. 220; *Woodruff v. Hinman*, 11 Vt. 592; 34 Am. Dec. 712. "If the promises are separate and the consideration is divisible, the legal part of the contract is upheld; but if the consideration is entire, the whole must fail." *Foote v. Nickerson*, 70 N. H. 496; 54 L. R. A. 554; 48 Atl. 1088.

¹² *Mobley v. Porter* (Tex. Civ. App.), 54 S. W. 655.

¹³ *Douthart v. Congdon*, 197 Ill. 349; 90 Am. St. Rep. 167; 64 N. E. 348.

¹⁴ *Widoe v. Webb*, 20 O. S. 431; 5 Am. Rep. 664.

¹⁵ *Fleming v. Greene*, 48 Kan. 646; 30 Pac. 11. (Decided under a local statute making such false inventory criminal.)

¹⁶ *Humboldt County v. Stern*, 136 Cal. 63; 68 Pac. 324.

part of a contract to furnish supplies, unlawful because the vendor was an officer of the vendee public corporation, the compensation for services being fixed with reference to the illegal sale.¹⁷ So a contract is unenforceable if the consideration consists in part of a lawful consideration and in part of alleged rights growing out of an illegal transaction.¹⁸

If, however, the parties have apportioned the different considerations among the respective covenants and such legal reciprocal considerations and covenants can be separated from the illegal, the legal ones can be enforced.¹⁹ This is the severable covenant already referred to in this section.

§510. Effect of contract containing two covenants, one only being void.

If A makes a promise to B, consisting of two or more covenants upon valuable and legal consideration, and one of the covenants made by A is void by reason of its subject-matter but not illegal, then the legal covenant can be enforced whether the contract is severable or inseverable.¹ In cases of this sort the distinction between void and illegal contracts is of the highest practical importance. Thus, as contracts in restraint of trade are merely void, and not illegal,² a promise in unreasonable re-

¹⁷ *Sedgwick County v. State*, 66 Kan. 634; 72 Pac. 284.

¹⁸ *Alabama National Bank v. Halsey*, 109 Ala. 196; 19 So. 522; *Oakes v. Merrifield*, 93 Me. 297; 45 Atl. 31; *Handy v. Publishing Co.*, 41 Minn. 188; 16 Am. St. Rep. 695; 4 L. R. A. 466; 42 N. W. 872; *Crawford v. Wick*, 18 O. S. 190; 98 Am. Dec. 103.

¹⁹ *Emshwiler v. Tyner*, 21 Ind. App. 347; 69 Am. St. Rep. 360; 52 N. E. 459; *Osgood v. Bauder*, 75 Ia. 550; 1 L. R. A. 655; 39 N. W. 887; *Shaw v. Carpenter*, 54 Vt. 155; 41 Am. Rep. 837; and see *Carneal v. May*, 2 A. K. Marsh. (Ky.) 587; 12 Am. Dec. 453.

¹ *Trammell v. Chambers County*, 93 Ala. 388; 9 So. 815; *St. Louis, etc., Ry. v. Matthews*, 64 Ark. 398; 39 L. R. A. 467; 42 S. W. 902; *Mack v. Jastro*, 126 Cal. 130; 58 Pac. 372; *Grime v. Borden*, 166 Mass. 198; 44 N. E. 216; *Parish v. Stone*, 14 Pick. (Mass.) 198; 25 Am. Dec. 378; *Rosenbaum v. Credit System Co.*, 65 N. J. L. 255; 53 L. R. A. 449; 48 Atl. 237; *Fishell v. Gray*, 60 N. J. L. 5; 37 Atl. 606; *Lange v. Werk*, 2 O. S. 519; *State v. Findley*, 10 Ohio 51; *Cobb v. Cowdery*, 40 Vt. 25; 94 Am. Dec. 370.

² *Haynes v. Doman* (1899), 68 L. J. Ch. 419; 80 L. T. N. S. 569;

straint of trade made in connection with a sale of good-will is itself unenforceable, but the rest of the contract is valid if there is a consideration therefor.³ If a contract, one provision of which is in unreasonable restraint of trade is divisible, the remaining provisions will be enforced if supported by a consideration.⁴ Hence if a contract restrains trade over several different areas, and it is reasonable as to some but not as to others, it will be enforced as to the former though not as to the latter.⁵ Thus a contract in restraint of trade in a given city or any other place is valid as to such city;⁶ one restraining trade in a given county, state or the United States is valid as to such county,⁷ and one restraining trade in a given state or in the United

Green v. Price, 13 Mees. & W. 695; Price v. Green, 16 Mees. & W. 346; American, etc., Co. v. Stock Exchange, 143 Ill. 210; 36 Am. St. Rep. 385; 18 L. R. A. 190; 32 N. E. 274; Aetna Ins. Co. v. Commonwealth, 106 Ky. 864; 45 L. R. A. 355; 51 S. W. 624; Rosenbaum v. Credit System Co., 65 N. J. L. 255; 53 L. R. A. 449; 48 Atl. 237; Fishell v. Gray, 60 N. J. L. 5; 37 Atl. 606; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; partly affirming and partly reversing 56 N. J. Eq. 680; 39 Atl. 923. "Contracts in restraint of trade are illegal only in the sense that the law will not enforce them. They are simply void. The law does not prohibit the making of contracts in restraint of trade. It merely declines after they have been made to recognize their validity." American, etc., Co. v. Stock Exchange, 143 Ill. 210, 235; 36 Am. St. Rep. 385; 18 L. R. A. 190; 32 N. E. 274. *Contra*, that such contracts are illegal as well as void. Saratoga County Bank v. King, 44 N. Y. 87.

³ Rosenbaum v. Credit System Co., 65 N. J. L. 255; 53 L. R. A. 449; 48 Atl. 237; Fishell v. Gray, 60 N. J. L. 5; 37 Atl. 606.

⁴ Haynes v. Doman (1899), 68 L. J. Ch. 419; 80 L. T. N. S. 569; United States, etc., Co. v. Skelley Co., 126 Fed. 364.

⁵ Underwood v. Barker (1899), 1 Ch. 300; City Carpet-beating Works v. Jones, 102 Cal. 506; 36 Pac. 841; Hubbard v. Miller, 27 Mich. 15; 15 Am. Rep. 153; Peltz v. Eichele, 62 Mo. 171; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; partly affirming and partly reversing 56 N. J. Eq. 680; 39 Atl. 923 (reversal on this point); Lange v. Werk, 2 O. S. 519; Thomas v. Miles, 3 O. S. 274; Smith's Appeal, 113 Pa. St. 579; 6 Atl. 251.

⁶ Peltz v. Eichele, 62 Mo. 171.

⁷ Lange v. Werk, 2 O. S. 519. *Contra*, More v. Bonnet, 40 Cal. 251; 6 Am. Rep. 621, where a contract not to engage in business in the city or county of San Francisco or in the state of California was held indivisible and void.

States except Arizona and Nevada was held valid as to such state, where the business sold did not extend over the United States.⁸ If the contract restrains trade over an unreasonable area as a unit, the court cannot make a new contract for the parties by holding the contract good as to such part of that area as would be reasonable. Thus a contract not to engage in the retail sale of oil in any part of Indiana except Indianapolis being held unreasonable, cannot be enforced as to the town of Hammond, where the business sold was located.⁹ However, a contract not to compete within ten miles of a given point, which went in part beyond the limits of the county within which in California restraint is lawful, was held valid as to such county.¹⁰ If the contract is unreasonable as to time it is upheld for so long a time as the law allows where such time is definite. In California a contract in restraint of trade must, by statute, be limited to a county or part thereof and to such time as the vendee or one claiming under him should carry on the business purchased. A contract in restraint of trade, without time limit, has been held valid up to the statutory limit and void as to the residue.¹¹ A distinction is made in some courts between a contract not to engage in business, which if reasonable in space may be unlimited as to time,¹² and a contract not to engage in a profession, which must be reasonable as to time.¹³ So a contract otherwise valid containing a covenant void as in restraint

⁸ *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; partly affirming and partly reversing 56 N. J. Eq. 680; 39 Atl. 923.

⁹ *Consumers' Oil Co. v. Nunemaker*, 142 Ind. 560; 51 Am. St. Rep. 193; 41 N. E. 1048.

¹⁰ *Franz v. Bieler*, 126 Cal. 176; 56 Pac. 249; 58 Pac. 466. (The covenant was not to compete within such county within ten miles of the point specified.)

¹¹ *Gregory v. Speiker*, 110 Cal.

150; 52 Am. St. Rep. 70; 42 Pac. 576. A covenant in general restraint of trade is held to be personal only and not to run with the land. *Tardy v. Creasy*, 81 Va. 553; 59 Am. Rep. 676. (A covenant not to do business of any kind on the land conveyed.)

¹² *Swanson v. Kirby*, 98 Ga. 586; 26 S. E. 71; *Brewer v. Lamar*, 69 Ga. 656; 47 Am. Rep. 766; *Goodman v. Henderson*, 58 Ga. 567; *Ellis v. Jones*, 56 Ga. 504.

¹³ *Rakestraw v. Lanier*, 104 Ga. 188; 69 Am. St. Rep. 154; 30 S. E.

of marriage is not thereby entirely invalidated, but only such covenant is void.¹⁴ So bills of lading otherwise valid, containing covenants void as relieving a common carrier from liability for negligence, is not entirely invalidated thereby, but only such provision is void.¹⁵ Like principles control insurance policies which contain covenants void as ousting the jurisdiction of courts,¹⁶ and contracts which attempt to waive statutory rights.¹⁷ This rule is sometimes expressed under the form of consideration. If one of two distinct considerations for a promise is void, as distinguished from illegal, the other legal consideration may support the contract.¹⁸

§511. Ratification.

Ratification in its correct sense is impossible equally of an illegal¹ and of a void contract.² Thus a contract to arbitrate losses arising out of a future wagering sale is itself unlawful.³

735. (Citing *French v. Parker*, 16 R. I. 219; 27 Am. St. Rep. 733; 14 Atl. 870.)

¹⁴ *King v. King*, 63 O. S. 363; 81 Am. St. Rep. 635; 52 L. R. A. 157; 59 N. E. 111.

¹⁵ See § 359.

¹⁶ See § 347 *et seq.*

¹⁷ See § 355.

¹⁸ *King v. King*, 63 O. S. 363; 81 Am. St. Rep. 635; 52 L. R. A. 157; 59 N. E. 111. (In this case the void consideration, i. e., a promise not to marry, was in fact performed by the party who agreed not to marry.)

¹ *Central Transportation Co. v. Palace Car Co.*, 139 U. S. 24, 61; *Moog v. Hannon*, 93 Ala. 503; *sub nom.*, *Moog v. Espalla*, 9 So. 596; *Lindt v. Uihlein*, 109 Ia. 591; 79 N. W. 73; rehearing denied (opinion in 79 N. W. 73 modified), 80 N. W. 658; *Comstock v. Draper*, 1 Mich. 481; 53 Am. Dec. 78; *Handy v. Publishing Co.*, 41 Minn. 188; 16

Am. St. Rep. 695; 4 L. R. A. 466; 42 N. W. 872; *American Fire Ins. Co. v. Bank*, 73 Miss. 469; 18 So. 931; *Bick v. Seal*, 45 Mo. App. 475; *McCormick Harvesting Machine Co. v. Miller*, 54 Neb. 644; 74 N. W. 1061; *Boutelle v. Melendy*, 19 N. H. 196; 49 Am. Dec. 152; *Shisler v. Vandike*, 92 Pa. St. 447; 37 Am. Rep. 702; *Rue v. Ry.*, 74 Tex. 474; 15 Am. St. Rep. 852; 8 S. W. 533; *Buck v. Albee*, 26 Vt. 184; 62 Am. Dec. 364; *Melchoir v. McCarty*, 31 Wis. 252; 11 Am. Rep. 605.

² *Breckenridge v. Ormsby*, 1 J. J. Mar. (Ky.) 236; 19 Am. Dec. 71; *Newell v. Fisher*, 11 Smedes & M. (Miss.) 431; 49 Am. Dec. 66; *Henry Christian, etc., Association v. Walton*, 181 Pa. St. 201; 59 Am. St. Rep. 636; 37 Atl. 261.

³ *Benton v. Singleton*, 114 Ga. 548; 58 L. R. A. 181; 40 S. E. 811.

Certain exceptions to this general rule exist in some jurisdictions. Whether a contract executed on Sunday may be ratified on a week day is a question on which courts differ. Some courts hold that such a contract cannot be ratified.⁴ An admission of the execution of the contract,⁵ or a part performance,⁶ or complete performance on one side,⁷ do not give the contract validity where this view of the law is held. Thus where A leased to B on Sunday at a given rent and B occupies the premises, A cannot recover the contract price but must sue for a reasonable rental.⁸ Keeping and using property sold and delivered on Sunday⁹ or money loaned on Sunday¹⁰ does not effect a ratification in such jurisdictions. Other courts hold that a Sunday contract may be ratified subsequently,¹¹ as by part payment of a Sunday note on a week day,¹² or by cashing on a week day a check given on Sunday,¹³ or payment of interest on a week

⁴ *Butler v. Lee*, 11 Ala. 885; 46 Am. Dec. 230; *Day v. McAllister*, 15 Gray (Mass.) 433; *Acme, etc., Co. v. Van Derbeck*, 127 Mich. 341; 89 Am. St. Rep. 476; 86 N. W. 786; *Winfield v. Dodge*, 45 Mich. 355; 40 Am. Rep. 476; 7 N. W. 906; *Gwinn v. Simes*, 61 Mo. 335; *Riddle v. Keller*, 61 N. J. Eq. 513; 48 Atl. 818; *Gennert v. Wuestner*, 53 N. J. Eq. 302; 31 Atl. 609; *Cannon v. Ryan*, 49 N. J. L. 314; 8 Atl. 293; *Nibert v. Baghurst*, 47 N. J. Eq. 201; 20 Atl. 252; s. c. (N. J. Eq.); 25 Atl. 474.

⁵ *Riddle v. Keller*, 61 N. J. Eq. 513; 48 Atl. 818.

⁶ *Gennert v. Wuestner*, 53 N. J. Eq. 302; 31 Atl. 609.

⁷ *Ainsworth v. Williams*, 111 Wis. 17; 86 N. W. 551.

⁸ *McIntosh v. Lee*, 57 Ia. 356; 10 N. W. 895; *Ainsworth v. Williams*, 111 Wis. 17; 86 N. W. 551. So *Vinz v. Beatty*, 61 Wis. 645; 21 N. W. 787. But where one party performed on a week day the other was held bound for what he re-

ceived, and it seems that the contract controlled as to terms of compensation. *Bollin v. Hooper*, 127 Mich. 287; 86 N. W. 795.

⁹ *Williams v. Lane*, 87 Wis. 152; 58 N. W. 77.

¹⁰ *Troewert v. Decker*, 51 Wis. 46; 37 Am. Rep. 808; 8 N. W. 26.

¹¹ *Evansville v. Morris*, 87 Ind. 269; 44 Am. Rep. 763; *Perkins v. Jones*, 26 Ind. 499; *Williamson v. Brandenburg*, 6 Ind. App. 97; 32 N. E. 1022; *Russell v. Murdock*, 79 Ia. 101; 18 Am. St. Rep. 348; 44 N. W. 237; *Harrison v. Colton*, 31 Ia. 16; *Cook v. Forker*, 193 Pa. St. 461; 74 Am. St. Rep. 699; 44 Atl. 560. "Acts of ratification will make them new contracts which the parties are bound to perform." *Cook v. Forker*, 193 Pa. St. 461; 74 Am. St. Rep. 699; 44 Atl. 560.

¹² *Russell v. Murdock*, 79 Ia. 101; 18 Am. St. Rep. 348; 44 N. W. 237.

¹³ *Cook v. Forker*, 193 Pa. St. 461; 74 Am. St. Rep. 699; 44 Atl. 560.

day,¹⁴ or pre-payment of a part of a debt on a week day as consideration for a promise to extend the rest,¹⁵ or payment of the purchase price on a week day.¹⁶

Conduct which of itself amounts to a new contract is said to make valid a contract made on Sunday.¹⁷ Thus where A is appointed on Sunday to collect rents for a club, his appointment is made valid by his subsequently on week days acting as such collector and paying rents over to the club.¹⁸ An express promise made on a week day to perform a contract made on Sunday is held to make it valid,¹⁹ even in some jurisdictions where ratification in general is not recognized;²⁰ as by stating an account between the parties, including items for liquor sold on Sunday.²¹ In other jurisdictions an express promise is held not to make a Sunday contract valid.²² Where a Sunday contract is held void, and property²³ or services²⁴ are received thereunder, the party receiving the same is bound to pay a reasonable price therefor, though not the contract price. Such liability may therefore be the consideration for a subsequent express promise based thereon, even if in terms the same as the original promise.²⁵ Analysis of the cases cited shows some confusion of thought between the following theories: (a) that retention on a week day of benefits received on a week day under

¹⁴ *Whitmire v. Montgomery*, 165 Pa. St. 253; 30 Atl. 1016.

¹⁵ *Uhler v. Applegate*, 26 Pa. St. 140.

¹⁶ *McKinney v. Demby*, 44 Ark. 74.

¹⁷ *Parker v. Fitts*, 73 Ind. 597; 38 Am. Rep. 155. So an obiter in *Catlett v. Church*, 62 Ind. 365; 30 Am. Rep. 197. (Overruled on another point by *Bryan v. Watson*, 127 Ind. 42; 11 L. R. A. 63; 26 N. E. 666. See § 458.)

¹⁸ *Flynn v. Columbus Club*, 21 R. I. 534; 45 Atl. 551.

¹⁹ *Williams v. Paul*, 6 Bing. 653; *Winchell v. Carey*, 115 Mass. 560; 15 Am. Rep. 151; *Gwinn v. Simes*,

61 Mo. 335; *Goss v. Whitney*, 27 Vt. 272; *Melchoir v. McCarty*, 31 Wis. 252; 11 Am. Rep. 605.

²⁰ *Bradley v. Rea*, 103 Mass. 188; 4 Am. Rep. 524; *Brewster v. Banta*, 66 N. J. L. 367; 49 Atl. 718; *Reeves v. Butcher*, 31 N. J. L. 224.

²¹ *Melchoir v. McCarty*, 31 Wis. 252; 11 Am. Rep. 605.

²² *Pope v. Linn*, 50 Me. 83.

²³ *Gennert v. Wuestner*, 53 N. J. Eq. 302; 31 Atl. 609; *Ainsworth v. Williams*, 111 Wis. 17; 86 N. W. 551.

²⁴ *Spahn v. Willman*, 1 Penn. (Del.) 125; 39 Atl. 787.

²⁵ *Smith v. Case*, 2 Oreg. 192; *Sayles v. Wellman*, 10 R. I. 465.

a Sunday contract ratifies it; (b) that such retention of benefits gives rise to an "implied promise" to pay a reasonable price therefor; (c) that such retention together with an express promise ratify the original contract; (d) that such retention is a consideration sufficient to support a subsequent express promise; and (e) that where the contract is both made on Sunday and to be performed on Sunday is illegal and creates no liability. In most cases the question of liability can be decided without necessarily determining which of these theories is the correct one. So by some statutes a contract invalid, when entered into because one of the parties thereto had not paid the license tax required by law, may be made valid by a subsequent payment of such license.²⁶

§512. Illegal contract as consideration for new promise.

Modification or abandonment of an illegal contract by mutual agreement cannot be a lawful consideration for a new contract based on such original contract, even if there is some additional lawful consideration.¹ So dismissal of an action on an illegal contract is no lawful consideration for a promise based thereon.² So an express promise intended to discharge liability growing out of a wager contract in whole or in part is unenforceable.³ Options forbidden by statute, if not gambling, are at most

²⁶ *McMahan v. Savings Association*, 75 Miss. 965; 23 So. 431; *American Fire Ins. Co. v. Bank*, 73 Miss. 469; 18 So. 931.

¹ *Alabama National Bank v. Halsey*, 109 Ala. 196; 19 So. 522; *Oakes v. Merrifield*, 93 Me. 297; 45 Atl. 31; *Handy v. Publishing Co.*, 41 Minn. 188; 16 Am. St. Rep. 695; 4 L. R. A. 466; 42 N. W. 872; *Boutelle v. Melendy*, 19 N. H. 196; 49 Am. Dec. 152; *Hooker v. De Palos*, 28 O. S. 251; *Crawford v. Wick*, 18 O. S. 190; 98 Am. Dec. 103.

² *Reed v. Brewer*, 90 Tex. 144;

37 S. W. 418; affirming 36 S. W. 99.

³ *Morris v. Norton*, 75 Fed. 912; 21 C. C. A. 553; *Treat v. Snyder*, 92 Ill. App. 458; *Miles v. Andrews*, 40 Ill. App. 155; *Koster v. Seney*, 99 Ia. 584; 68 N. W. 824; *Violett v. Mangold* (Miss.), 27 So. 875; *Woolfolk v. Duncan*, 80 Mo. App. 421; *Mechanics', etc., Bank v. Duncan* (Tenn. Ch. App.), 36 S. W. 887. A bill of sale of goods, without delivery of the goods, is unenforceable. *Hockaday v. Willis*, 1 Spear Law (S. C.) 379; 40 Am. Dec. 606.

merely void and do not invalidate other provisions of such contract.⁴ A reward offered to any one who produces a lottery ticket which has not been cashed promptly, if a winning ticket, affirms the unlawful wager contract and is itself illegal.⁵

An agreement subsequent to an unlawful act and made with reference thereto may be lawful if the original unlawful act is no part of the consideration therefor.⁶ Thus where A had made a contract with a city, which was illegal by statute since A was an alderman of such city, and A being financially involved, agreed with B to repay such sums as B would advance to complete such contract, A was not allowed to avoid liability to B because of the illegality of A's contract with the city.⁷ Property acquired under an illegal transaction may be a consideration for a subsequent new contract between the same parties.⁸

§513. Renewal and purging usury.

A renewal of a usurious contract has no greater validity than the original contract as long as the usurious charges enter into and form a part of the new contract.¹ A renewal made after

⁴ *Corcoran v. Coal Co.*, 37 Ill. App. 577.

⁵ *Dieckhoff v. Fox*, 56 Minn. 438; 57 N. W. 930.

⁶ *Armstrong v. Toler*, 11 Wheat. (U. S.) 258; *Hubbard v. Mulligan*, 13 Colo. App. 116; 57 Pac. 738; *Phalen v. Clark*, 19 Conn. 421; 50 Am. Dec. 253; *Guilfoil v. Arthur*, 158 Ill. 600; 41 N. E. 1009; *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642; 21 N. E. 616; *Daniels v. Barney*, 22 Ind. 207; *Green v. Brewing Co.*, 103 Ia. 252; 72 N. W. 655; *Martin v. Richardson*, 94 Ky. 183; 42 Am. St. Rep. 353; 19 L. R. A. 692; 21 S. W. 1039; *Harris v. Woodruff*, 124 Mass. 205; 26 Am. Rep. 658; *Gallagher v. Cornelius*, 23 Mont. 27; 57 Pac. 447; *Fulton v. Lancaster County*, 162 Pa. St. 294; 29 Atl. 763. (The contract is

called "illegal" though the county lacked authority to make the contract originally; but acquired authority before it made the second contract.) *Evans v. Dravo*, 24 Pa. St. 62; 62 Am. Dec. 359; *Scott v. Duffy*, 14 Pa. St. 18; *De Leon v. Trevino*, 49 Tex. 88; 30 Am. Rep. 101.

⁷ *Gallagher v. Cornelius*, 23 Mont. 27; 57 Pac. 447.

⁸ *Washington Irrigation Co. v. Krutz*, 119 Fed. 279.

¹ *Walker v. Bank*, 3 How. (U. S.) 62; *Newburg v. Coyne*, 85 Ill. App. 74; *Brown v. Lacy*, 83 Ind. 436; *Pardoe v. National Bank*, 106 Ia. 345; 76 N. W. 800; *Fitzpatrick v. Apperson*, 79 Ky. 272; *Churchill v. Turnage*, 122 N. C. 426; 30 S. E. 122; *Baggs v. Loudonback*, 12 Ohio 153; *Schutt v. Evans*, 109 Pa. St.

a change in the law has been made, legalizing the rate of interest contracted for, may be held to be a new and legal contract.² If, however, the parties to a usurious contract rescind the original contract and make a new contract based only upon the amount loaned and the amount of interest that may be lawfully charged thereunder, eliminating all items of usury, such contract is enforceable.³

§514. Negotiable instruments on illegal consideration.

Negotiable paper given on an illegal consideration is invalid in the hands of the payee¹ and all who take with notice of the illegality,² or in the hands of one who takes without giving value therefor.³ A negotiable instrument given to stifle criminal prosecution is valid in the hands of a *bona fide* holder⁴ unless a statute makes it invalid.⁵ If transferred to a *bona fide* holder who takes without notice, for value, and before maturity, such negotiable paper is valid,⁶ except where a statute makes it absolutely void, even in the hands of *bona fide* hold-

625; 1 Atl. 76; State, etc., Co. v. Fuller, 26 Tex. Civ. App. 318; 63 S. W. 552.

²Campbell v. Linder, 50 S. C. 169; 27 S. E. 648.

³Garvin v. Linton, 62 Ark. 370; 35 S. W. 430; 37 S. W. 569; Sanford v. Kunz, — Ida. —; 71 Pac. 612; Kassing v. Ordway, 100 Ia. 611; 69 N. W. 1013; Vermeule v. Vermeule, 95 Me. 138; 49 Atl. 608; Peters Shoe Co. v. Arnold, 82 Mo. App. 1.

¹Schmueckle v. Waters, 125 Ind. 265; 25 N. E. 281; Friend v. Miller, 52 Kan. 139; 39 Am. St. Rep. 340; 34 Pac. 397; Scollans v. Flynn, 120 Mass. 271; Haynes v. Rudd, 102 N. Y. 372; 55 Am. Rep. 815; 7 N. E. 287; Morris Run Coal Co. v. Coal Co., 68 Pa. St. 173; 8 Am. Rep. 159; Seeligson v. Lewis, 65 Tex. 215; 57 Am. Rep. 593.

²Pierce v. Kibbee, 51 Vt. 559.

³Oakes v. Merrifield, 93 Me. 297; 45 Atl. 31.

⁴Wentworth v. Blaisdell, 17 N. H. 275.

⁵Jones v. Dannenberg Co., 112 Ga. 426; 52 L. R. A. 271; 37 S. E. 729.

⁶Biegler v. Trust Co., 164 Ill. 197; 45 N. E. 512; affirming 62 Ill. App. 560; Sondheim v. Gilbert, 117 Ind. 71; 10 Am. St. Rep. 23; 5 L. R. A. 432; 18 N. E. 687; Crawford v. Spencer, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713. But in Roquemore v. Alloway, 33 Tex. 461, a note given for a horse to be used in the cavalry service of the Confederate army was held void in the hands of a *bona fide* holder.

ers.⁷ So an illegal warehouse receipt, apparently regular on its face passes title.⁸

§515. Negotiable instruments given under wager contracts.

Where wager contracts are illegal or void, a note given in settlement of losses on such contracts is unenforceable where not in the hands of a *bona fide* holder,¹ as where it is in the

⁷ Bowyer v. Brampton, 2 Strange 1155; Hitchcock v. Way, 6 Ad. & E. 943; 33 Eng. Com. L. 249; Shillito v. Theed, 7 Bing. 405; 20 Eng. Com. L. 181; Henderson v. Benson, 8 Price 281; Summerfeldt v. Worts, 12 Ont. 48; Thompson v. Bowie, 4 Wall. (U. S.) 463; Root v. Merriam, 27 Fed. 909; Kuhl v. Press Co., 123 Ala. 452; 82 Am. St. Rep. 135; 26 So. 535; Wyatt v. Wallace, 67 Ark. 575; 55 S. W. 1105; Conklin v. Roberts, 36 Conn. 461; Cunningham v. Bank, 71 Ga. 400; 51 Am. Rep. 266; Eagle v. Kohn, 84 Ill. 292; Chapin v. Drake, 57 Ill. 295; 11 Am. Rep. 15; International Bank v. Van Kirk, 39 Ill. App. 23; New v. Walker, 108 Ind. 365; 58 Am. Rep. 40; 9 N. E. 386; Spray v. Burk, 123 Ind. 565; 24 N. E. 588; Aurora v. West, 22 Ind. 88; 85 Am. Dec. 413; Traders' Bank v. Alsop, 64 Ia. 97; 19 N. W. 863; Morton v. Fletcher, 2 A. K. Marsh. (Ky.) 137; 12 Am. Dec. 366; Emerson v. Townsend, 73 Md. 224; 20 Atl. 984; Vallett v. Parker, 6 Wend. (N. Y.) 615; Glenn v. Farmers' Bank, 70 N. C. 191; Lagonda Nat. Bank v. Portner, 46 O. S. 381; 21 N. E. 634; Harper v. Young, 112 Pa. St. 419; 3 Atl. 670; Mordecai v. Dawkins, 9 Rich. L. (S. C.) 262; Snoddy v. Bank, 88 Tenn. 573; 17 Am. St. Rep. 918; 7 L. R. A. 705; 13 S. W. 127; Taylor v. Beck, 3 Rand. (Va.) 316; Woodson v. Barrett, 2

Hen. & M. (Va.) 80; 3 Am. Dec. 612.

⁸ H. A. Thierman Co. v. Laupheimer (Ky.), 55 S. W. 925. (A owned whiskey in B's warehouse, and sold it to C, giving A's own warehouse receipts. C took title, not knowing that the whiskey was not in A's warehouse. C's title was held valid.)

¹ Pearce v. Rice, 142 U. S. 28; Morris v. Norton, 75 Fed. 912; 21 C. C. A. 553; Shain v. Goodwin, 46 Fed. 564; Ayer v. Younker, 10 Colo. App. 27; 50 Pac. 218; Benson v. Warehouse Co., 99 Ga. 303; 25 S. E. 645; Treat v. Snyder, 92 Ill. App. 458; Schmuckle v. Waters, 125 Ind. 265; 25 N. E. 281; Koster v. Seney, 99 Ia. 584; 68 N. W. 824; Bride v. Clark, 161 Mass. 130; 36 N. E. 745; McNamara v. Gargett, 68 Mich. 454; 13 Am. St. Rep. 355; 36 N. W. 218; Violett v. Mangold (Miss.), 27 So. 875; Woolfolk v. Duncan, 80 Mo. App. 421; Specht v. Beindorf, 56 Neb. 553; 42 L. R. A. 429; 76 N. W. 1059; Gooch v. Faucett, 122 N. C. 270; 39 L. R. A. 835; 29 S. E. 362; Russell v. Pyland, 2 Humph. (Tenn.) 131; 36 Am. Dec. 307; Mechanics' Bank v. Duncan (Tenn. Ch. App.); 36 S. W. 887; Munroe v. Smelly, 25 Tex. 586; 78 Am. Dec. 541; Conner v. Mackey, 20 Tex. 747; Mobley v. Porter (Tex. Civ. App.), 54 S. W. 655.

hands of a holder with notice.² If the note is given on a wager contract it is unenforceable even though not given by the loser but by another person.³ So if A loses to B at cards, and C who owes A gives B his note to secure A's loss with A's consent, B cannot enforce such note against C.⁴ However, a note given in purchase of a right to recover from brokers either winnings or money paid is on consideration.⁵ Where a note given in settlement of a wager contract is in the hands of a *bona fide* holder, it is valid unless there is a statute making notes for wagers void even in the hands of a *bona fide* holder.⁶ If made void by statute in the hands of a *bona fide* holder, no recovery can be had thereon.⁷ A statute making a wager contract a crime, and making the transfer of a note on a wager consideration to a *bona fide* holder a crime, avoids such note in the hands of a *bona fide* holder, without a special provision to that effect.⁸

² Woolf v. Hamilton (C. A.) (1898), 2 Q. B. 337; Lyle v. Lindsey, 5 B. Mon. (Ky.) 123; Maine Mile-Track Association v. Hammond, 127 Mich. 690; 87 N. W. 135.

³ "A note by which one merely assumes payment of a broker's obligation to pay a gambling debt without any new consideration is void for illegality." Syllabus of Morris v. Norton, 75 Fed. 912; 21 C. C. A. 553.

⁴ Little v. Stokely, 99 Ga. 306; 25 S. E. 650. If, however, it is given by the loser directly to an innocent third party who parts with value therefor to the winner, it is held valid. H. O. Hurlburt & Sons v. Straub, — W. Va. —; 46 S. E. 163.

⁵ Morris v. Norton, 75 Fed. 912; 21 C. C. A. 553.

⁶ Kuhl v. Press Co., 123 Ala. 452; 82 Am. St. Rep. 135; 26 So. 535; Haight v. Joyce, 2 Cal. 64; 56 Am. Dec. 311; Pope v. Hanke, 155 Ill. 617; 28 L. R. A. 568; 40 N. W.

839; Sondheim v. Gilbert, 117 Ind. 71; 10 Am. St. Rep. 23; 5 L. R. A. 432; 18 N. E. 687; Shaw v. Clark, 49 Mich. 384; 43 Am. Rep. 474; 13 N. W. 786; Crawford v. Spencer, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713.

⁷ Kuhl v. Press Co., 123 Ala. 452; 82 Am. St. Rep. 135; 26 So. 535; Hawley v. Bibb, 69 Ala. 52; Pearce v. Foote, 113 Ill. 228; 55 Am. Rep. 414; Irwin v. Marquett, 26 Ind. App. 383; 84 Am. St. Rep. 297; 59 N. E. 38; First National Bank v. Carroll, 80 Ia. 11; 8 L. R. A. 275; 45 N. W. 304; Traders' Bank v. Alsop, 64 Ia. 97; 19 N. W. 863; Morris v. White, 83 Mo. App. 194; Lagonda National Bank v. Portner, 46 O. S. 381; 21 N. E. 634; Snoddy v. Bank, 88 Tenn. 573; 17 Am. St. Rep. 918; 7 L. R. A. 705; 13 S. W. 127; Swinney v. Edwards, 8 Wyom. 54; 80 Am. St. Rep. 916; 55 Pac. 306.

⁸ Snoddy v. Bank, 88 Tenn. 573; 17 Am. St. Rep. 918; 7 L. R. A.

Neither renewals⁹ nor subsequent promises to pay such notes¹⁰ add to their validity. The maker may estop himself, however, from setting up the illegality of such note against an assignee.¹¹ The indorsement of a valid instrument to pay a gambling debt is invalid and passes no title.¹² Subsequent *bona fide* indorseees of a negotiable instrument which was originally given or indorsed on a wager or gambling consideration may recover from prior indorsers,¹³ until the party is reached who gave the instrument on a gambling consideration. No recovery from him can be had.¹⁴ Thus an acceptor who was obliged to pay an indorsee cannot recover from the drawer of a bill drawn in payment of a gaming debt.¹⁵ If the bank pays a check given for a gambling debt without notice of such fact it may credit such check on the account of the maker; but if the bank pays with notice, it is liable to the maker as if such check had never been given.¹⁶ A statute which makes "gambling" notes void in the hands of a *bona fide* holder does not avoid other wager contracts as notes for future wager sales.¹⁷ By statute in some jurisdictions where a check for gambling is void, a check issued for a loan of money, which money the payee then wins from the maker is void.¹⁸

705; 13 S. W. 127; *Swinney v. Edwards*, 8 Wyom. 54; 80 Am. St. Rep. 916; 55 Pac. 306.

⁹ *Kuhl v. Press Co.*, 123 Ala. 452; 82 Am. St. Rep. 135; 26 So. 535.

¹⁰ *Swinney v. Edwards*, 8 Wyom. 54; 80 Am. St. Rep. 916; 55 Pac. 306.

¹¹ *Pritchett v. Aherns*, 26 Ind. App. 56; 84 Am. St. Rep. 274; 59 N. E. 42.

¹² *Commercial National Bank v. Spaid*, 8 Ill. App. 493; *Williams v. Wall*, 60 Mo. 318; *Drinkall v. Bank*, 11 N. D. 10; 95 Am. St. Rep. 693; 57 L. R. A. 341; 88 N. W. 724. *Contra*, *Poorman v. Mills*, 39 Cal. 345; 2 Am. Rep. 451.

¹³ *Hoyt v. Cross*, 108 N. Y. 76; 14 N. E. 801.

¹⁴ *Lagonda National Bank v. Portner*, 46 O. S. 381; 21 N. E. 634.

¹⁵ *Crowley v. White* (Q. B.), 78 Law T. Rep. (N. S.) 167.

¹⁶ *Drinkall v. Bank*, 11 N. D. 10; 95 Am. St. Rep. 693; 57 L. R. A. 341; 88 N. W. 724. (A cashier's check to A was indorsed by A to B for a gambling debt. The bank paid the check to B after A had ordered the bank not to pay it, giving no reason therefor.)

¹⁷ *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713. See § 450.

¹⁸ *Ash v. Clark*, 32 Wash. 390; 73 Pac. 351.

§516. Negotiable usurious instruments.

If a negotiable instrument is given pursuant to a usurious contract, the defense of usury may be interposed as against the original payee, and all claiming under him other than *bona fide* holders for value. Whether usury can be interposed as a defense against a *bona fide* holder for value is a question upon which there is a conflict of authority, due in part to the wording of the local statutes. In some jurisdictions it is held that the defense of usury may be set up, even as against a *bona fide* holder for value.¹ This result is reached partly through construing the word "void" in the usury statutes making notes on usurious consideration "void"; and partly through the specific terms of certain local statutes. In other jurisdictions it is held that the defense of usury can not be made as against a *bona fide* holder for value.² This result is reached, partly by construing "void" as meaning "voidable," and partly by specific provisions of local statutes. In such jurisdictions, as is said elsewhere, the debtor has the right to recover from the original payee the difference between the amount which he is obliged to pay under such contract to the *bona fide* holder and the amount which the payee might have recovered from the debtor.³

§517. Necessity of pleading illegality as a defense.

So unwilling are courts to enforce illegal contracts that they may, under proper circumstances, dismiss actions thereon of

¹ *Lowe v. Waller*, Dougl. 736; *Angier v. Smith*, 101 Ga. 844; 28 S. E. 167; *Kendall v. Robertson*, 12 Cush. (Mass.) 156; *Bridge v. Hubbard*, 15 Mass. 96; 8 Am. Dec. 86; *Claffin v. Boorum*, 122 N. Y. 385; 25 N. E. 360; *Faison v. Grandy*, 128 N. C. 438; 83 Am. St. Rep. 693; 38 S. E. 897; *Ward v. Sugg*, 113 N. C. 489; 24 L. R. A. 280; 8 S. E. 717; *Flemming v. Mulligan*,

2 McC. (S. C.) 173; 13 Am. Dec. 707.

² *Saylor v. Daniels*, 37 Ill. 331; 87 Am. Dec. 250; *Gross v. Funk*, 20 Kan. 655; *First National Bank v. Bentley*, 27 Minn. 87; 6 N. W. 422; *Knox v. Williams*, 24 Neb. 630; 8 Am. St. Rep. 220; 39 N. W. 786; *Frazer v. Sybert*, 2 Heisk. (Tenn.) 340.

³ See § 521.

their own motion, though illegality is not pleaded as a defense.¹ The parties cannot impose upon the court the duty of deciding rights arising out of an illegal contract by omitting to call the court's attention to the illegality,² nor can they waive such defense.³ There is, however, some confusion about the limits of the power of the court to dismiss an action or give a peremptory instruction for the defendant or to admit evidence of illegality, where illegality has not been pleaded but is disclosed by the evidence admitted or offered. At Common Law under the general issue any defense might be interposed which showed that plaintiff never had any claim; and under this rule illegality, though not pleaded as a defense, might be interposed to defeat plaintiff's claim.⁴ Thus where a license was required by law, an action by an unlicensed broker⁵ or an unlicensed liquor dealer⁶ might be defeated by showing that no license had been taken out, under the general issue. This Common Law rule applied where plaintiff could make out his case without resort-

¹ *Oscanyan v. Arms Co.*, 103 U. S. 261; *Ball v. Putnam*, 123 Cal. 134; 55 Pac. 773; *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207; 28 Pac. 1068; *Bowman v. Gonegal*, 19 La. Ann. 328; 92 Am. Dec. 537; *Schmidt v. Barker*, 17 La. Ann. 261; 87 Am. Dec. 527; *Clafin v. Credit System Co.*, 165 Mass. 501; 52 Am. St. Rep. 528; 43 N. E. 293; *Richardson v. Buhl*, 77 Mich. 632; 6 L. R. A. 457; 43 N. W. 1102; *Wilde v. Wilde*, 37 Neb. 891; 56 N. W. 724; *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394; 45 Atl. 611; *Cansler v. Penland*, 125 N. C. 578; 48 L. R. A. 441; 34 S. E. 683; *Field Cordage Co. v. Cordage Co.*, 6 Ohio C. C. 615.

² *Ball v. Putnam*, 123 Cal. 134; 55 Pac. 773; *Wright v. Cudahy*, 168 Ill. 86; 48 N. E. 39; affirming 64 Ill. App. 453; *Wilde v. Wilde*, 37 Neb. 891; 56 N. W. 724.

³ *Cardoze v. Swift*, 113 Mass. 250;

Cansler v. Pentland, 125 N. C. 578; 48 L. R. A. 441; 34 S. E. 683; *Reed v. Johnson*, 27 Wash. 42; 57 L. R. A. 404; 67 Pac. 381.

⁴ *Oscanyan v. Arms Co.*, 103 U. S. 261; *Craig v. Missouri*, 4 Pet. (U. S.) 410; *Hulet v. Stratton*, 5 Cush. (Mass.) 539; *Dixie v. Abbott*, 7 Cush. (Mass.) 610 (and see *Robinson v. Howard* in note to *Dixie v. Abbott*); *Snyder v. Willey*, 33 Mich. 483; *Johnson v. Hulings*, 103 Pa. St. 498; 49 Am. Rep. 131; *Ham v. Smith*, 87 Pa. St. 63; *Thorne v. Ins. Co.*, 80 Pa. St. 15; 21 Am. Rep. 89; *Morris Run Coal Co. v. Coal Co.*, 68 Pa. St. 174; *Wight v. Rindskopf*, 43 Wis. 344.

⁵ *Johnson v. Hulings*, 103 Pa. St. 498; 49 Am. Rep. 131; *Holt v. Green*, 73 Pa. St. 198; 13 Am. Rep. 737.

⁶ *Dixie v. Abbott*, 7 Cush. (Mass.) 610.

ing to the illegal transaction, and defendant sought to introduce evidence of such facts as an affirmative defense.⁷ Many other defenses besides illegality might be interposed under the general issue—the rule in question not being in any way peculiar to illegality. However, the old Common Law rules of pleading have been greatly modified in many states, by statute or by rules of court, largely in order to restrict the broad range of the general issue. Defendants, under the new procedure, are required to plead or to give notice of the facts on which they mean to rely, and this requires them to plead the facts which made the contract illegal, if they wish to introduce affirmative evidence thereof.⁸ Illegality will not ordinarily be presumed.⁹ Thus an action on a contract dated on a secular day cannot be defeated by showing that it was entered into on Sunday, unless defendant has alleged that fact in his answer.¹⁰ So an action on a contract for the sale of a stock of goods cannot be defeated by evidence showing that part of such stock was liquor sold contrary to law, where such fact was not pleaded.¹¹ There is an important qualification to the modern statutory rule. If plaintiff discloses the illegality of the contract, either by pleading it in such form as to disclose its illegality,¹² or in the opening statements of counsel to the jury setting forth the facts,¹³ or in plaintiff's evidence to make out

⁷ It was "not necessary to the plaintiff's recovery in that case that he should have proved that he had license, for that might have been presumed, but the fact that he had not license appeared on cross-examination; hence he lost his case." *Johnson v. Hulings*, 103 Pa. St. 498, 502; 49 Am. Rep. 131.

⁸ *Goss v. Austin*, 11 All. (Mass.) 525; *Bradford v. Tinkham*, 6 Gray (Mass.) 494 (suit on a check for liquors sold unlawfully); *Granger v. Ilsley*, 2 Gray (Mass.) 521 (suit for lumber sold before it was surveyed); *Horton v. Rohlf*, — Neb. —; 95 N. W. 36; *Wilde v. Wilde*, 37 Neb. 891; 56 N. W. 724; *Barnes*

v. Barnes, 104 N. C. 613; 10 S. E. 304 (an obiter as there was neither allegation nor evidence of illegality).

⁹ *Hocker v. Telegraph Co.*, — Fla. —; 34 So. 901. See § 1120.

¹⁰ *Lee v. Lee*, 83 Ia. 565; 50 N. W. 33; *Riech v. Bolch*, 68 Ia. 526; 27 N. W. 507.

¹¹ *Shawyer v. Chamberlain*, 113 Ia. 742; 86 Am. St. Rep. 411; 84 N. W. 661.

¹² *Field Cordage Co. v. Cordage Co.*, 6 Ohio C. C. 615.

¹³ *Oscanyan v. Arms Co.*, 103 U. S. 261. In illegal contracts "the objection to a recovery could not be obviated or waived by any sys-

his case,¹⁴ the court should dismiss the action or instruct the jury to find for defendant, either on defendant's motion or on the court's own motion.¹⁵ It has been said that if illegality is not pleaded the court will dismiss the action if illegality appears from any "evidence material to the issue."¹⁶ The weight of authority seems to be that if the party seeking to enforce the contract is able to make out a *prima facie* case without disclosing the illegality, the adversary party cannot avail himself of it as a defense unless he has pleaded it.¹⁷ In

tem of pleading, or even by the express stipulation of the parties." *Oscanyan v. Arms Co.*, 103 U. S. 261, 267.

¹⁴ *Cardoze v. Smith*, 113 Mass. 250; *Wight v. Rindskopf*, 43 Wis. 344. "They do not hold, we know of no case which does, that when a contract is in terms *contra bonos mores* it is necessary for the defendant to plead the objection; or that a court will proceed to judgment upon it, both parties even assenting." *Wight v. Rindskopf*, 43 Wis. 344, 348.

¹⁵ In *Clafin v. Credit System Co.*, 165 Mass. 501; 52 Am. St. Rep. 528; 43 N. E. 293, C sued the C. S. Company on a policy of insurance against bad accounts. The report of the case does not show what defense was interposed; but it was not alleged that defendant had not complied with the Massachusetts statutes concerning insurance, which statutes made it "unlawful" to insure except in compliance with such statute. There was no authority in such statutes for insurance of credits or accounts; and while it appeared that defendant was a foreign insurance company, it did not appear from the record that it had been admitted to transact business in Massachusetts, nor on the other

hand did it appear that it had not been admitted. The court said: "The illegality of the contract is not set up in defense, nor was it noticed in the superior court, where the plaintiff had a verdict. But no court will consciously lend its aid for the enforcement of an illegal contract. *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, 120 Mass. 285; *Riley v. Jordan*, 122 Mass. 231, 233; *Low v. Peers*, Wilm. 364, 378. In the present case, the question was brought to the attention of counsel by the court at the argument, and since the argument, counsel have been given an opportunity to argue it upon briefs and have declined or omitted so to do. . . . In our view of the case, the questions argued by the parties are immaterial to the decision of the case and need not be discussed." 165 Mass. 503. The court treated the contract as illegal, both on its face, as credit insurance, and also by reason of extrinsic facts, the omission to show that the corporation was authorized to do business in the state.

¹⁶ *Wilde v. Wilde*, 37 Neb. 891; 56 N. W. 724.

¹⁷ "That a denial does put in issue the validity of the contract 'sued on' is undoubtedly true. That

such cases the theory has been advanced that it is optional with the trial court whether it will hear or dismiss the action.¹⁸ Some cases which seem to uphold the right of defendant to prove illegality without alleging it, under modern procedure, can be explained on other grounds. Thus where A lent B money, taking a note and mortgage, and to avoid taxation and in part as payment of a debt, A indorsed the note to X, A's father, a non-resident, without delivering the note to him, suit in X's name by A was not allowed, though B made no allegation that the transfer to X was illegal, in avoiding taxation. But the assignment had to be proved as part of plaintiff's case; and

is when the contract is offered in evidence in support of the allegations of the petition and its illegality appears on its face relief should be denied, whatever the condition of the pleadings. The same is true where the plaintiff can only make out his case through the medium of an illegal transaction to which he himself is a party. Hence the common statement of the courts that 'if it appear from plaintiff's own showing that the contract arises from an immoral cause, or a transgression of a positive law, the court will at once refuse its assistance.' But when the illegality does not appear from the contract itself, or from the evidence necessary to prove it, but depends on extraneous facts, the defense is new matter, and must be pleaded in order to be available." *McDearmott v. Sedgwick*, 140 Mo. 172, 182; 39 S. W. 776. (Citing *St. Louis, etc., Association v. Delano*, 108 Mo. 217; 18 S. W. 1101; *Musser v. Adler*, 86 Mo. 445; *Moore v. Ringo*, 82 Mo. 468; *Sybert v. Jones*, 19 Mo. 86; overruling *Sprague v. Rooney*, 104 Mo. 349; 16 S. W. 505.) To the same effect see *Barber Asphalt Pav-*

ing Co. v. Botsford, 56 Kan. 532; 44 Pac. 3; *Kingman, etc., R. R. v. Quinn*, 45 Kan. 477; 25 Pac. 1068. In *Mathews v. Leaman*, 24 O. S. 615, the court raised the question whether illegality ought not to be pleaded, without deciding it.

¹⁸ "In such an action a defendant who has not pleaded illegality in the contract sued on has no right to offer evidence of such illegality, or even to avail himself of it when disclosed in the plaintiff's testimony, if the court does not refuse to entertain the case. . . . But no waiver by the defendant or consent of parties can oblige a court of justice to try or enforce a claim which upon the plaintiff's own showing has no foundation in law." *Cardoze v. Smith*, 113 Mass. 250, 252. (In this case plaintiff's own evidence showed that the contract was a Sunday contract; and the court instructed the jury that if plaintiff's evidence showed that the contract was a Sunday contract they should find for the defendant, though he had not pleaded such defense. The Supreme Court sustained the trial court.)

further the evidence tended to show that X was not the real party in interest.¹⁹

§518. Illegal contracts in equity.

Equity does not, in general, give relief to either party to an illegal executory contract if they are *in pari delicto*.¹ There are, however, many cases in which equity has interfered on the theory that the public interest will be subserved better by preventing either party from enforcing such contract.² Equity will not attempt to prevent persons who wish to do so from entering into wager or gambling contracts, but leaves such matters to the preventive power of the criminal law.³ Even a stockholder in a fair association cannot enjoin it from allowing gambling on its grounds without showing that his stock is depreciated thereby.⁴ After a wager has been made, the jurisdiction of equity is often invoked to enjoin the winner from enforcing it. Where special facts call for the exercise of the powers of equity, the courts differ as to the propriety of interfering in wagers. Some courts treat the statutes against wagers as framed for the public good, to prevent wagers, without regard to the merits of the parties. Such courts restrain

¹⁹ Sheldon v. Pruessner, 52 Kan. 579; 22 L. R. A. 709; 35 Pac. 201.

¹ Owens v. Machinery Co., 96 Ga. 408; 31 L. R. A. 767; 23 S. E. 416; Compton v. Bank, 96 Ill. 301; 36 Am. Rep. 147; Allison v. Hess, 28 Ia. 388; Atwood v. Fisk, 101 Mass. 363; 100 Am. Dec. 124; Cedar Springs v. Schlich, 81 Mich. 405; 8 L. R. A. 851; 45 N. W. 994; Elliott v. Chamberlin, 38 N. J. Eq. 604; 48 Am. Rep. 327; Kahn v. Walton, 46 O. S. 195; 20 N. E. 203; Pacific Live Stock Co. v. Gentry, 38 Or. 275; 61 Pac. 422; 65 Pac. 597; Albertson v. Laughlin, 173 Pa. St. 525; 51 Am. St. Rep. 777; 34 Atl. 216; Rock v. Mathews, 35 W. Va. 531; 14 L. R. A. 508; 14 S. E. 137.

² Petillon v. Hipple, 90 Ill. 420; 32 Am. Rep. 31; Basket v. Moss, 115 N. C. 448; 44 Am. St. Rep. 463; 48 L. R. A. 842; 20 S. E. 733; Johnson v. Cooper, 2 Yerg. (Tenn.) 524; 24 Am. Dec. 502. Thus an injunction was given against the use of a proxy irrevocable for five years. Cone v. Russell, 48 N. J. Eq. 208; 21 Atl. 847.

³ People v. Lake County, 26 Colo. 386; 46 L. R. A. 850; 58 Pac. 604; State v. Patterson, 14 Tex. Civ. App. 465; 37 S. W. 478. Equity will not enforce the wager contract. Baxter v. Deneen, — Md. —; 57 Atl. 601.

⁴ Cope v. Fair Association, 99 Ill. 489; 39 Am. Rep. 30.

the enforcement of wager contracts by injunction,⁵ even after they have been reduced to judgment.⁶ This power is usually assumed under statutes which make even judgments void if on gambling consideration.⁷ Under a statute specifically giving equity power to grant relief against judgments rendered on gambling contracts, equity will enjoin the collection of a judgment rendered on a lease of realty to be used for gambling, but will not decree repayment of money paid on prior judgments.⁸

Other courts look on these statutes as framed for the benefit of the loser, and accordingly refuse equitable relief to the loser on the ground that he does not come into equity with clean hands, and that such remedy as the statute gives him is at law.⁹ Where this theory is adopted injunctions against enforcing judgments based on wager contracts are refused.¹⁰ Equity will not enforce a foreign judgment rendered on a wager contract.¹¹

Equity will not give preventive relief against a contract to stifle criminal prosecution.¹² If a mortgage is given under such a contract it cannot be foreclosed,¹³ and on the other hand equity

⁵ *Petillon v. Hipple*, 90 Ill. 420; 32 Am. Rep. 31; *Chapin v. Dake*, 57 Ill. 295; 11 Am. Rep. 15; *Martin v. Terrell*, 12 Sm. & M. (Miss.) 571; *Rucker v. Wynne*, 2 Head (Tenn.) 617; disapproving *Weakly v. Watkins*, 7 Humph. (Tenn.) 356.

⁶ *Cheatham v. Young*, 5 Ala. 353; *Finn v. Barclay*, 15 Ala. 626; *Mallett v. Butcher*, 41 Ill. 382 (under Illinois statute); overruling *Abrams v. Camp*, 4 Ill. 290; *Gill v. Webb*, 4 T. B. Mon. (Ky.) 299; *Lyon v. Respess*, 1 Litt. (Ky.) 133; *Emerson v. Townsend*, 73 Md. 224; 20 Atl. 984.

⁷ *Finn v. Barclay*, 15 Ala. 626; *Cheatham v. Young*, 5 Ala. 353; *McAuley v. Mardis*, Walk. (Miss.) 307.

⁸ *Boddie v. Brewing Co.*, 204 Ill. 352; 68 N. E. 394; affirming 107 Ill. App. 357.

⁹ *Kahn v. Walton*, 46 O. S. 195; 20 N. E. 203; *Thomas v. Cronise*, 16 Ohio 54; *Albertson v. Laughlin*, 173 Pa. St. 525; 51 Am. St. Rep. 777; 34 Atl. 216; *Stewart v. Parnell*, 147 Pa. St. 523; 23 Atl. 838; *Beer v. Landman*, 88 Tex. 450; 31 S. W. 805.

¹⁰ *Owens v. Machinery Co.*, 96 Ga. 408; 31 L. R. A. 767; 23 S. E. 416; *Giddens v. Lea*, 3 Humph. (Tenn.) 133.

¹¹ *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394; 45 Atl. 611.

¹² *Allison v. Hess*, 28 Ia. 388; *Gotwalt v. Neal*, 25 Md. 434; *Cowles v. Raguet*, 14 Ohio 38; *Rock v. Mathews*, 35 W. Va. 531; 14 L. R. A. 508; 14 S. E. 137. *Contra*, *Porter v. Jones*, 6 Coldw. (Tenn.) 313.

¹³ *Raguet v. Ball*, 7 Ohio (1st pt.) 76.

will not cancel it.¹⁴ Where ejectment can be brought on a mortgage it seems that it is no defense that such mortgage was given to stifle prosecution,¹⁵ and equity will not enjoin the grantee from proceeding to enforce such mortgage by ejectment.¹⁶ So if a note is given on such a consideration, equity will not order it delivered up and cancelled,¹⁷ especially if it is overdue.¹⁸ Equity has given preventive relief against contracts to procure appointment to public office.¹⁹ Equity will give no relief against a contract for the sale of property forbidden by law to be sold.²⁰

If the contract is performed equity will not, in the absence of statute, extend its aid to undo what the parties have voluntarily done.²¹ Thus equity will not set aside a deed given on illegal consideration,²² as to defraud the grantor's creditors²³ or other parties,²⁴ or on a gambling consideration.²⁵

If the parties are not *in pari delicto*,²⁶ as where the party seeking relief was subjected to duress,²⁷ equity will grant relief.

¹⁴ Shattuck v. Watson, 53 Ark. 147; 7 L. R. A. 551; 13 S. W. 516.

¹⁵ Williams v. Englebrecht, 37 O. S. 383; Raguet v. Roll, 7 Ohio (2d pt.) 70.

¹⁶ Cowles v. Raguet, 14 Ohio 38. But in Henderson v. Palmer, 71 Ill. 579; 22 Am. Rep. 117, it was held that if such mortgage was enforced by a proceeding in which the legality of the consideration could not be inquired into, equity would give relief even after judgment.

¹⁷ Paige v. Hieronymus, 192 Ill. 546; 61 N. E. 832; s. c. 180 Ill. 637; 54 N. E. 583; Worcester v. Eaton, 11 Mass. 368; Malone v. Casualty Co., 71 Mo. App. 1.

¹⁸ Atwood v. Fisk, 101 Mass. 363; 100 Am. Dec. 124.

¹⁹ Whittingham v. Burgoyne, 3 Anstr. 900; Basket v. Moss, 115 N. C. 448; 44 Am. St. Rep. 463; 48 L. R. A. 842; 20 S. E. 733.

²⁰ Thus an injunction was refused

against enforcing a judgment on a note given for slaves to be taken into a state contrary to law. Sample v. Barnes, 14 How. (U. S.) 70; Creath v. Sims, 5 How. (U. S.) 192.

²¹ Watkins v. Nugen, 118 Ga. 375; 45 S. E. 262.

²² Kassing v. Durand, 41 Ill. App. 93; Montgomery v. Kerr, 6 Coldw. (Tenn.) 199; 98 Am. Dec. 450.

²³ Kassing v. Durand, 41 Ill. App. 93.

²⁴ Walton v. Blackman (Tenn. Ch. App.), 36 S. W. 195.

²⁵ Thomas v. Cronise, 16 Ohio 54.

²⁶ See § 525.

²⁷ James v. Roberts, 18 Ohio 548. In Booker v. Wingo, 29 S. C. 116; 7 S. E. 49, duress seems to have existed, but the court based its decision on the fact that as the maker was a married woman the note was void under the law in force.

CHAPTER XXX.

RIGHTS ARISING ON PERFORMANCE OF ILLEGAL CONTRACT.

§519. Effect of performance of illegal contract.

If both parties to an illegal contract are in equal fault and one of them has performed in whole or in part, he cannot at Common Law, avoid the contract and recover from the adversary party a reasonable compensation for such performance.¹ No rights, therefore, arise out of an illegal transaction, even on the theory of constructive contracts.² The law leaves the parties to illegal contracts where it finds them and gives them no assistance in extricating themselves from the situation in which they have placed themselves.³ A surety who with full knowl-

¹ *Scott v. Brown* (1892), 2 Q. B. 724; *Equitable, etc., Society v. Wetherill*, 127 Fed. 947; *Edwards v. Randle*, 63 Ark. 318; 58 Am. St. Rep. 108; 36 L. R. A. 174; 38 S. W. 343; *Howell v. Fountain*, 3 Ga. 176; 46 Am. Dec. 415; *McNulta v. Bank*, 164 Ill. 427; 56 Am. St. Rep. 203; 45 N. E. 954; affirming 63 Ill. App. 593; *Gubbins v. Bank*, 79 Ill. App. 150; *American Strawboard Co. v. Strawboard Co.*, 65 Ill. App. 502; *Bowman v. Phillips*, 41 Kan. 364; 13 Am. St. Rep. 292; 3 L. R. A. 631; 21 Pac. 230; *Bauer v. Land Co.*, — Minn. —; 97 N. W. 428; *Murray v. Haldorn*, 25 Mont. 218; 64 Pac. 511; 69 Pac. 835; *Webb v. Fulchire*, 3 Ired. Law (N. C.) 485; 40 Am. Dec. 419; *Hooker v. De Palos*,

28 O. S. 251; *Roll v. Raguet*, 4 Ohio 400; 22 Am. Dec. 759; *Denton v. English*, 2 N. & McC. (S. C.) 581; 10 Am. Dec. 638; *Montgomery v. Kerr*, 6 Cald. (Tenn.) 199; 98 Am. Dec. 450; *Henley v. Franklin*, 3 Cald. (Tenn.) 472; 91 Am. Dec. 296; *Capehart v. Rankin*, 3 W. Va. 571; 100 Am. Dec. 779.

² See Ch. XXXVII.

³ *White v. Crew*, 16 Ga. 416; *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642; 21 N. E. 616; *Miller v. Marckle*, 21 Ill. 151; *Bowman v. Phillips*, 41 Kan. 364; 13 Am. St. Rep. 292; 3 L. R. A. 631; 21 Pac. 230; *Smith v. Hubbs*, 10 Me. 71; *Richardson v. Buhl*, 77 Mich. 632; 6 L. R. A. 457; 43 N. W. 1102; *Sedalia Board of Trade v. Brady*, 78 Mo. App. 585; *Brindley v. Lawton*,

edge of the facts pays a note given on an illegal consideration cannot recover such payment.⁴ Where by statute it is unlawful to work or agree to work more than eight hours a day, no recovery can be had on a contract to work overtime, though performed by employee.⁵ So a stock certificate delivered by a man to a woman as consideration for her living with him in unlawful sexual relations cannot be recovered by the executor of such man.⁶ So where warrants issued in aid of rebellion have been received in payment of a debt, such debt cannot be collected thereafter.⁷ So if a street railway company deposits money with the officers of a town to become the property of the town if the company has not ten miles of road in operation in a year, it cannot recover such money if it fails to construct such road.⁸ So as contracts requiring private solicitation and personal influence are illegal and not merely void,⁹ no recovery can be had for services rendered thereunder either on the express contract or on an implied contract or on *quantum meruit*.¹⁰ So money paid to an executor to induce him to resign cannot be recovered.¹¹ Contracts to stifle criminal prosecution are illegal, and if the contract has been performed in whole or in part, the party performing cannot recover what he has parted with.¹² If a deed to land has been delivered under such a contract, legal title passes and the illegality of the consideration does not enable the grantor to recover the land or defend against

53 N. J. Eq. 259; 31 Atl. 394; *Henry v. Franklin*, 3 Caldwell (Tenn.) 472; 91 Am. Dec. 296.

⁴ *Singer Mfg. Co. v. Ferrell* (Ky.), 48 S. W. 1078.

⁵ *Short v. Bullion, etc., Co.*, 20 Utah 20; 45 L. R. A. 603; 57 Pac. 720.

⁶ *Brindley v. Lawton*, 53 N. J. Eq. 259; 31 Atl. 394.

⁷ *Houston, etc., R. R. v. Texas*, 177 U. S. 66.

⁸ *West Springfield, etc., Ry. v. Bodurtha*, 181 Mass. 583; 64 N. E.

414. (If such contract is valid the provision is binding; if illegal, no recovery can be had.)

⁹ *Trist v. Child*, 21 Wall. (U. S.) 441; *Spalding v. Ewing*, 149 Pa. St. 375; 34 Am. St. Rep. 608; 15 L. R. A. 727; 24 Atl. 219.

¹⁰ *Richardson v. Scott's Bluff Co.*, 59 Neb. 400; 80 Am. St. Rep. 682; 48 L. R. A. 294; 81 N. W. 309.

¹¹ *Ellicott v. Chamberlin*, 38 N. J. Eq. 604; 48 Am. Rep. 327.

¹² *Johnson v. Douglass*, 32 Wash. 293; 73 Pac. 374.

ejectment.¹³ Equity will not set such a deed aside.¹⁴ Equity will not relieve against a note and mortgage given to stifle criminal prosecution.¹⁵ So no recovery can be had for money or other property furnished or services rendered under a Sunday contract.¹⁶ In accordance with these general principles some courts have held that in sales,¹⁷ loans,¹⁸ bailments¹⁹ and gifts,²⁰ if the possession of the property passes on Sunday, such property cannot be recovered,²¹ even though payment of the price is refused,²² and there can be no recovery for either a reasonable price or the contract price, if a sale is made on Sunday.²³ Payment for Sunday labor, made voluntarily, cannot be recovered.²⁴ Money paid under a contract creating an unlawful monopoly cannot be recovered,²⁵ nor can property sold in aid of lotteries be recovered.²⁶ No recovery can be had even if after performance there is an express promise to pay therefor.²⁷ No recovery can be had of money paid for a larger sum of counterfeit money though such counterfeit money is not delivered.²⁸

¹³ *Treadwell v. Torbert*, 119 Ala. 279; 72 Am. St. Rep. 918; 24 So. 54; *Williams v. Englebrecht*, 37 O. S. 383; *Raguet v. Rall*, 7 Ohio (2d pt.) 70. *Contra*, that he can defend against ejectment. *Southern Express Co. v. Duffey*, 48 Ga. 358.

¹⁴ *Moore v. Adams*, 8 Ohio 372; 32 Am. Dec. 723.

¹⁵ *Shattuck v. Watson*, 53 Ark. 147; 7 L. R. A. 551; 13 S. W. 516.

¹⁶ *Kinney v. McDermot*, 55 Ia. 674; 39 Am. Rep. 191; 8 N. W. 656.

¹⁷ *Myers v. Meinrath*, 101 Mass. 366; 3 Am. Rep. 368; *Thompson v. Williams*, 58 N. H. 248; *Greene v. Godfrey*, 44 Me. 25.

¹⁸ *Troewert v. Decker*, 51 Wis. 46; 37 Am. Rep. 808; 8 N. W. 26.

¹⁹ *Thornhill v. O'Rear*, 108 Ala. 299; 31 L. R. A. 792; 19 So. 382; *Rosenbaum v. Hayes*, 10 N. D. 311; 86 N. W. 973.

²⁰ *Wheeler v. Glasgow*, 97 Ala. 700; 11 So. 758.

²¹ *Thompson v. Williams*, 58 N. H. 248.

²² *Kinney v. McDermot*, 55 Ia. 674; 39 Am. Rep. 191; 8 N. W. 656.

²³ *Pike v. King*, 16 Ia. 49; *Meader v. White*, 66 Me. 90; 22 Am. Rep. 551; *Cranson v. Goss*, 107 Mass. 439; 9 Am. Rep. 45; *Foreman v. Ahl*, 55 Pa. St. 325.

²⁴ *Calkins v. Mining Co.*, 5 S. D. 299; 58 N. W. 797.

²⁵ *Griffin v. Piper*, 55 Ill. App. 213.

²⁶ *Hooker v. De Palos*, 28 O. S. 251. And see § 452.

²⁷ *Brown v. Tarkington*, 3 Wall. (U. S.) 377; *Morris Run Coal Co. v. Coal Co.*, 68 Pa. St. 173; 8 Am.

²⁸ *Chapman v. Haley*, — Ky. —; 80 S. W. 190.

§520. Where recovery allowed.—Statutory rule.

While parties to an illegal contract cannot at Common Law recover what they may have parted with thereunder, there are three general classes of cases not included in this rule: (1) when such recovery is specifically allowed by statute, (2) when the parties are not *in pari delicto*, and (3) when the law allows one party to repent before the illegal purpose is accomplished, and to recover what he has parted with — known as the doctrine of *locus pœnitentiæ*. In some classes of contracts, the legislature has provided, as the most effective way of discouraging such contracts, that parties thereto may recover what they have parted with thereunder.¹ In the absence of special statute the loser who has voluntarily paid in money or property under a wager contract cannot recover the same.² But one whose money has been taken by an agent without authority and deposited as margin in future gambling sales may recover it in equity from such broker.³ In order to discourage wager contracts, statutes have been passed in almost all American and English jurisdictions, allowing the loser who has paid his loss to recover the same.⁴ Unless the statute provides for it, interest on the money

¹ Examples of such contracts are wager contracts (see Ch. XXVI.), and contracts for the unlawful sale of intoxicating liquors.

² *Boyce v. Commission Co.*, 109 Fed. 758; *Paulk v. Land Co.*, 116 Ala. 178; 22 So. 495; *Frank v. Pennie*, 117 Cal. 254; 49 Pac. 208; *Gregory v. King*, 58 Ill. 169; 11 Am. Rep. 56; *Snyder v. Nelson*, 101 Ill. App. 619; *Schlosser v. Smith*, 93 Ind. 53; *Love v. Harris*, 18 B. Mon. (Ky.) 122; *Bingham v. Scott*, 177 Mass. 208; 58 N. E. 687; *Northrup v. Buffington*, 171 Mass. 468; 51 N. E. 7; *Webb v. Fulchire*, 3 Ired. L. (N. C.) 485; 40 Am. Dec. 419; *Hooker v. De Palos*, 28 O. S. 251; *Allen v. Dodd*, 4 Humph. (Tenn.) 131; 40 Am. Dec. 632.

³ *Central Stock & Grain Exchange v. Bendinger*, 109 Fed. 926; 48 C. C. A. 726; 56 L. R. A. 875; *Beard v. Milmine*, 88 Fed. 868.

⁴ *Universal Stock Exchange v. Strachan* (1896), A. C. 166; *Parker v. Otis*, 130 Cal. 322; 92 Am. St. Rep. 56; 62 Pac. 571, 927; *Kruse v. Kennett*, 181 Ill. 199; 54 N. E. 965; reversing 69 Ill. App. 566; *Elder v. Talcott*, 43 Ill. App. 439; *Wehmhoff v. Rutherford*, 98 Ky. 91; 32 S. W. 288; *Triplett v. Seelbach*, 91 Ky. 30; 14 S. W. 948; *Lester v. Buel*, 49 O. S. 240; 34 Am. St. Rep. 556; 30 N. E. 821; *Lucas v. Harper*, 24 O. S. 328; *Rice v. Winslow*, 182 Mass. 273; 65 N. E. 366; *Munns v. Commission Co.*, 117 Ia. 516; 91 N. W. 789; *McGrew v.*

paid in cannot be recovered.⁵ Such statutes are held in some jurisdictions to impose penalties,⁶ in others, not.⁷ They are usually rather strictly construed. Thus statutes allowing one who loses betting on a "game" to recover from the winner, does not apply to other wagers.⁸ Under such statutes no recovery can be had of money lost on future gambling contracts.⁹ Under such a statute, a bet lost on a wrestling match may be recovered.¹⁰ But statutes allowing such recovery in wagers and bets generally, apply to future wager sales without specifically mentioning them.¹¹ Under such statute allowing recovery of money lost on a bet or wager money lost on a bet on a primary election can be recovered.¹² Under a statute allowing recovery of margins from one employed to buy or sell in future wagers on prices, one who buys stocks on margin as an accommodation, without compensation, is not "employed," and such margins cannot be recovered from him.¹³ Persons associated in partnership with the person actually receiving the money from the

Produce Exchange, 85 Tenn. 572; 4 Am. St. Rep. 771; 4 S. W. 38. By some statutes the loser may recover twice the amount of his loss. Meyers v. Dillon, 39 Or. 581; 65 Pac. 867; affirmed on rehearing, 66 Pac. 814.

⁵ Parker v. Otis, 130 Cal. 322; 92 Am. St. Rep. 56; 62 Pac. 571, 927.

⁶ Fitzgerald v. Schloss, 62 N. J. L. 472; 41 Atl. 677; Cooper v. Rowley, 29 O. S. 547.

⁷ Wall v. Stock Exchange, 168 Mass. 282; 46 N. E. 1062. So of the provision in the constitution of California. Parker v. Otis, 130 Cal. 322; 92 Am. St. Rep. 56; 62 Pac. 571, 927.

⁸ Boyce v. Commission Co., 109 Fed. 758; Sondheim v. Gilbert, 117 Ind. 71; 10 Am. St. Rep. 23; 5 L. R. A. 432; 18 N. E. 687; Woodcock v. McQueen, 11 Ind. 14; McHatton v. Bates, 4 Blackf. (Ind.) 63; Northrup v. Buffington, 171 Mass. 468; 51 N. E. 7 (rule changed by

the act of 1890); Bingham v. Scott, 177 Mass. 208; 58 N. E. 687; Lassen v. Karrer, 117 Mich. 512; 76 N. W. 73; Shaw v. Clark, 49 Mich. 384; 43 Am. Rep. 474; 13 N. W. 786; Connor v. Black, 132 Mo. 150; 33 S. W. 783; Dows v. Glaspel, 4 N. D. 251; 60 N. W. 60.

⁹ Lancaster v. McKinley, — Ind. App. —; 67 N. E. 947; Loughlin v. Parkinson, 184 Mass. 565; 69 N. E. 319; Wilson v. Head, 184 Mass. 515; 69 N. E. 317.

¹⁰ Desgain v. Wessner, 161 Ind. 205; 67 N. E. 991.

¹¹ Kruse v. Kennett, 181 Ill. 199; 54 N. E. 965; reversing 69 Ill. App. 566; Lester v. Buel, 49 O. S. 240; 34 Am. St. Rep. 556; 30 N. E. 821.

¹² Mitchell v. Orr, 107 Tenn. 534; 64 S. W. 476.

¹³ Bingham v. Scott, 177 Mass. 208; 58 N. E. 687.

loser,¹⁴ a banker who sells and cashes chips to be used in gambling,¹⁵ or principles of such agent,¹⁶ or persons interested in the commissions paid by the loser in future wagers,¹⁷ are liable to the loser. Not only the loser but his trustee in bankruptcy¹⁸ may recover. Some statutes give a right of action to the creditors of the loser against the winner for money lost at gambling,¹⁹ or to any person who may sue as an informer.²⁰ Losses in a continuous series of wagers amount to but one cause of action,²¹ and may be set up as a counterclaim in an action on the original transaction.²² If the wife of the loser sues to recover the losses of her husband the winner may set up his losses to her husband as a counterclaim. She can recover only the net loss.²³ Even under a statute allowing the loser to recover, the winner may avoid liability by tendering back what he has received

¹⁴ *Cramer v. Pomeroy*, 47 W. Va. 56; 34 S. E. 762. To the same effect see *White v. Wilson*, 100 Ky. 367; 37 L. R. A. 197; 38 S. W. 495; reversing on rehearing 37 S. W. 677, where such associate could not recover on a note of the loser for money loaned by the former, and which the latter used in gambling.

¹⁵ *Vincent v. Taylor*, 60 O. S. 309; 54 N. E. 264.

¹⁶ *Lear v. McMillen*, 17 O. S. 464; *Meyers v. Dillon*, 39 Or. 581; 65 Pac. 867; affirmed on rehearing, 66 Pac. 814.

¹⁷ *Rogers v. Edmund*, 21 Ohio C. C. 675; 12 Ohio C. D. 291.

¹⁸ *Marden v. Phillips*, 103 Fed. 196.

¹⁹ *Chiles v. Anderson*, 3 B. Mon. (Ky.) 30; *Cofer v. Riseling*, 153 Mo. 633; 55 S. W. 235. (Under this statute it is not necessary that the creditor first obtain a judgment against the loser; the winner cannot object that the loser's property is being taken without due process of law; the loser need not be a

party to the action; a recovery by the creditor bars the loser; and the action is at law under the statute, and not in equity. *Cofer v. Riseling*, *supra*; citing *Laytham v. Agnew*, 70 Mo. 48; *Connor v. Black*, 132 Mo. 150; 33 S. W. 783; *Mace v. Vendig*, 23 Mo. App. 253; *Swagard v. Hancock*, 25 Mo. App. 596; *Crooks v. McMahon*, 48 Mo. App. 48.)

²⁰ *Johnson v. McGregor*, 157 Ill. 350; 41 N. E. 558; affirming 55 Ill. App. 530; *Ervin v. State*, 150 Ind. 332; 48 N. E. 249. Under such statute the wife of the loser may recover. *Vincent v. Taylor*, 60 O. S. 309; 54 N. E. 264.

²¹ *Boyce v. Commission Co.*, 107 Fed. 58. The whole game amounts to a technical "sitting," and not merely one hand. *Zellers v. White*, 208 Ill. 518; 70 N. E. 669; affirming 106 Ill. App. 183.

²² *Lester v. Buel*, 49 O. S. 240; 34 Am. St. Rep. 556; 30 N. E. 821.

²³ *Follett v. Saviers*, 8 Ohio S. & C. P. Dec. 669; *Dunn v. Bell*, 85 Tenn. 581; 45 S. W. 41. *Contra*,

under the contract.²⁴ Some of these statutes are held not to allow a professional gambler to recover losses.²⁵ Under some statutes, the realty where gambling was carried on with the knowledge of the owner thereof may be subjected to the lien of a judgment in favor of the loser against the winner for such losses.²⁶ By statute in some states property conveyed in payment of intoxicating liquor can be recovered.²⁷ By statute in some jurisdictions one who has received a valuable consideration for a contract void because made on Sunday cannot defend against such contract on that ground without restoring the consideration.²⁸ Such statutes apply to an action against the indorsee of a note by an indorsee of his indorsee²⁹ to an action for the hire of a team³⁰ or for roofing a building,³¹ and to an action rescinding the sale of a horse for fraud,³² but not to an action for injury to a team hired and used on Sunday.³³

§521. Recovery of payment of usurious interest.

At Common Law usurious interest paid in was held to be a payment under legal compulsion, and hence recovery was allowed.¹ This rule is in force in many states, partly through

where the plaintiff is not the loser, but some one authorized by statute to sue. *Johnson v. McGregor*, 157 Ill. 350; 41 N. E. 558; affirming, 50 Ill. App. 530.

²⁴ *Harper v. Crain*, 36 O. S. 338; 38 Am. Rep. 589.

²⁵ *Stapp v. Mason*, — Ky. —; 72 S. W. 11. (A result turning on the wording of the Kentucky statute.)

²⁶ *Gaby v. Hankins*, 86 Ill. App. 529; *Trout v. Marvin*, 62 O. S. 132; 56 N. E. 655.

²⁷ *Lindt v. Uihlein*, 109 Ia. 591; 79 N. W. 73; 80 N. W. 658.

²⁸ *Wetherell v. Hollister*, 73 Conn. 622; 48 Atl. 826; *Bridges v. Bridges*, 93 Me. 557; 45 Atl. 827; *Wheelden v. Lyford*, 84 Me. 114; 24

Atl. 793; *Bar Harbor, etc., Bank v. Kingsley*, 84 Me. 111; 24 Atl. 794.

²⁹ *Bar Harbor, etc., Bank v. Kingsley*, 84 Me. 111; 24 Atl. 794.

³⁰ *Wheelden v. Lyford*, 84 Me. 114; 24 Atl. 793.

³¹ *Wetherell v. Hollister*, 73 Conn. 622; 48 Atl. 826.

³² *Bridges v. Bridges*, 93 Me. 557; 45 Atl. 827.

³³ *Wheelden v. Lyford*, 84 Me. 114; 24 Atl. 793.

¹ *Clarke v. Shee*, Cowp. 197 (refusing to follow *Tomkins v. Bernet*, 1 Salk. 22, which denied relief on the ground that the parties were *in pari delicto*); *Wheaton v. Hubbard*, 20 Johns. 290; 11 Am. Dec. 284.

Common Law principles and partly through statutes.² If a debt bearing usurious interest has been paid by the transfer of realty, the debtor may recover the difference between the amount due with legal interest, and the actual value of the property conveyed.³ If the creditor has assigned the note of the debtor to a *bona fide* holder, and the defense of usury cannot be set up against such holder, the debtor may, after paying such note, recover the amount of usurious interest thus paid from the original creditor.⁴ If a debtor conveys realty to another in consideration of the assumption by such other of a debt bearing usurious interest, and the grantee pays such debt, the grantor may recover from the original creditor the amount of the usury thus paid.⁵ A debtor who assigns his equity of redemption in property mortgaged to secure a debt bearing usurious interest, may recover the amount of usury paid by his assignee who is compelled by the creditor to pay the full amount of the debt with usurious interest in order to redeem the property.⁶ Under some statutes double the amount of usury interest may be recovered.⁷ Under most of the state statutes recovery can be had only for usurious interest paid. Accordingly no recovery can be had where usurious interest has been charged but has not been paid.⁸ Giving a new note which includes such usury is not

² Baum v. Thoms, 150 Ind. 378; 65 Am. St. Rep. 368; 50 N. E. 357; Green v. Loan Association (Ky.), 64 S. W. 751; Kirkpatrick v. Wherritt, 7 B. Mon. (Ky.) 388; Shannon v. Loan Association, 78 Miss. 955; 84 Am. St. Rep. 657; 57 L. R. A. 800; 30 So. 51; Brown v. McIntosh, 39 N. J. L. 22; Cheek v. Loan Association, 127 N. C. 121; 37 S. E. 150; denying rehearing, 126 N. C. 242; 35 S. E. 463; Smith v. Loan Association, 119 N. C. 249; 26 S. E. 41. (*Contra*, Latham v. Loan Association, 77 N. C. 145.) Wilson v. Selbie, 7 S. D. 494; 64 N. W. 537; Rosetti v. Lozano, 96 Tex. 57; 70 S. W. 204; Bexar, etc., Association v. Robinson, 78 Tex.

163; 22 Am. St. Rep. 36; 9 L. R. A. 292; 14 S. W. 227; Nichols v. Bel lows, 22 Vt. 581; 54 Am. Dec. 85.

³ Paducah Banking Co. v. Ragsdale (Ky.), 69 S. W. 796.

⁴ Anderson v. Trimble (Ky.), 37 S. W. 71.

⁵ Mann v. Bank, 104 Ky. 852; 48 S. W. 413.

⁶ Ellis v. Winlock, 110 Ky. 676; 62 S. W. 495.

⁷ Carter v. Ins. Co., 122 N. C. 338; 30 S. E. 341; Rosetti v. Lozano, 96 Tex. 57; 70 S. W. 204; Smith v. Chilton, 90 Tex. 447; 39 S. W. 287.

⁸ Union, etc., Co. v. Hagood, 97 Fed. 360 (under South Carolina law).

payment.⁹ Under the doctrine of application of payments, in force in most jurisdictions, payments are to be applied to the principal and lawful interest, even if the parties have agreed that it shall apply upon usurious interest. Accordingly no recovery can be had for payments of usurious interest until the amount paid in exceeds the amount lawfully due.¹⁰ The statutes which give a right to recover usurious interest, generally fix a short period of limitations for bringing such action. At the expiration of such period no action will lie.¹¹ Hence in an action brought to recover usury paid in, no recovery can be had for interest paid at a more remote time before the commencement of the action than that fixed by statute.¹² In other states the statutes against usury give only the remedy of forfeiture of executory agreements for usurious interest, or the application of payments made and the part of the original debt remaining unpaid. Under such statutes, after payment of the entire debt, usurious interest paid cannot be recovered;¹³ except that by some statutes the debtor may recover usurious interest where the creditor has assigned a negotiable instrument given by the debtor to a *bona fide* purchaser in whose hands, by the local law, such instrument is free from the defense of usury.¹⁴

⁹ Rushing v. Bivens, 132 N. C. 273; 43 S. E. 798.

¹⁰ Kendall v. Davis, 55 Ark. 318; *sub nomine*, Josey v. Davis, 18 S. W. 185; Alexander v. Bank, — Ky. —; 71 S. W. 883; Crenshaw v. Duff's Executor, — Ky. —; 69 S. W. 962; Cotton States Building Co. v. Peightal, 28 Tex. Civ. App. 575; 67 S. W. 524.

¹¹ One year. Gramling v. Pool, 111 Ga. 93; 36 S. E. 430; Parker v. Zweigart (Ky.), 56 S. W. 678; Ryan v. Bank (Ky.), 55 S. W. 714. Two years. Roberts v. Ins. Co., 118 N. C. 429; 24 S. E. 780.

¹² Roberts v. Ins. Co., 118 N. C. 429; 24 S. E. 780.

¹³ Hadden v. Innes, 24 Ill. 382;

Tompkins v. Hill, 28 Ill. 519; Perkins v. Conant, 29 Ill. 184; 81 Am. Dec. 305; Manny v. Stockton, 34 Ill. 306; Pitts v. Cable, 44 Ill. 103; Lake v. Brown, 116 Ill. 83; 4 N. E. 773; Mason v. Pierce, 142 Ill. 331; 31 N. E. 503; Anderson v. Chicago, etc., Bank, 195 Ill. 341; 63 N. E. 203; affirming 93 Ill. App. 347; Citizens' State Bank v. Frazee, 9 Kan. App. 889; 58 Pac. 280; Thompson v. Ware, 8 B. Mon. (Ky.) 26; Pinch v. Willard, 108 Mich. 204; 66 N. W. 42; Hanson v. Bank, 6 N. D. 212; 69 N. W. 202; Williamson v. Cole, 26 O. S. 207; Hopkins v. West, 83 Pa. St. 109.

¹⁴ Hanson v. Bank, 6 N. D. 212; 69 N. W. 202.

§522. Recovery of payment of usurious interest under National Banking Act.

The statute of the United States which provides for the regulation of national banks, provides for the recovery of the penalty from the national bank which receives usurious interest by the person paying the same, or by his legal representatives, of twice the amount of the usury thus paid.¹ This statute applies to payments by an artificial person, as well as by a natural person.² Under this statute, since only the interest paid may be recovered,³ including usurious interest in the principal in a renewal note,⁴ or charging it in a running account,⁵ or deducting it in advance,⁶ is not payment within the meaning of the statute, and the creditor's remedy is to resist payment of so much of the unpaid debt as exceeds the principal advanced. So if the paper of the party primarily liable is discounted by the national bank at a rate of interest exceeding the maximum legal rate, the mere act of deducting the usurious discount, and placing the balance to the credit of such debtor is not a payment of usurious interest.⁷ Even though "usurious interest has been 'reserved' at the time of the loan or discount there

¹ First National Bank v. Barnett, 51 Neb. 397; 70 N. W. 937.

² Albion National Bank v. Montgomery, 54 Neb. 681; 74 N. W. 1102.

³ Talbot v. National Bank, 185 U. S. 172; Brown v. National Bank, 169 U. S. 416.

⁴ Daingerfield National Bank v. Ragland, 181 U. S. 45; Brown v. National Bank, 169 U. S. 416; Sydnor v. National Bank, 94 Ky. 231; 21 S. W. 1050; Lanham v. National Bank, 42 Neb. 757; 60 N. W. 1041; Osborn v. National Bank, 175 Pa. St. 494; 34 Atl. 858.

⁵ Davey v. National Bank, 8 S. D. 214; 66 N. W. 122.

⁶ Citizens' National Bank v. Gentry, 111 Ky. 206; 56 L. R. A. 673; *sub nom.*, Citizens' National Bank

v. Forman's Assignee, 63 S. W. 454. See 63 S. W. 757 for dissenting opinion. Marion National Bank v. Thompson, 101 Ky. 277; 40 S. W. 903; Haseltine v. National Bank, 155 Mo. 66; 56 S. W. 895; Hade v. McVay, 31 O. S. 231.

⁷ Citizens' National Bank v. Gentry, 111 Ky. 206; 56 L. R. A. 673; *sub nomine*, Citizens' National Bank v. Forman's Assignee, 63 S. W. 454. For dissenting opinion, 63 S. W. 757, Haseltine v. National Bank, 155 Mo. 66; 56 S. W. 895; Lanham v. National Bank, 42 Neb. 757; 60 N. W. 1041; Auburn National Bank v. Lewis, 81 N. Y. 15; 75 N. Y. 516; Higley v. National Bank, 26 O. S. 75; 20 Am. Rep. 759.

is left to the bank a *locus pœnitentiæ*.”⁸ So if usury is contracted for, and is eliminated by the state trial court and judgment rendered for only the principal and lawful interest, usurious interest is not “paid” and there can be no recovery thereafter.⁹ Under this statute recovery can be had only if an action is commenced therefor within two years from the time of payment.¹⁰ No recovery can be had in an action begun after that time.¹¹ This federal statute is exclusive as to the right to recover usury from a national bank, and prevents the application of state laws.¹² Hence, such payments can not be used as a set-off,¹³ nor can they be applied to the principal of the debt.¹⁴ This rule has been held to apply even where the debtor gave a note to the president of the national bank as trustee for the bank as collateral security for his own note held by the bank, and usurious interest was paid upon such collateral note.¹⁵ In some cases the opposite view has been entertained, and it has been held that the debtor may if he pleases rely upon the state statute which provides for the re-

⁸ Higley v. National Bank, 26 O. S. 75, 80; 20 Am. Rep. 759.

⁹ Talbot v. National Bank, 185 U. S. 172.

¹⁰ Talbot v. Bank, 111 Ia. 583; 82 N. W. 963.

¹¹ Talbot v. Bank, 111 Ia. 583; 82 N. W. 963.

¹² Haseltine v. National Bank (No. 2); 183 U. S. 132; affirming 155 Mo. 58; 55 S. W. 1015; Slaughter v. National Bank, 109 Ala. 157; 19 So. 430; Dalton First National Bank v. McEntire, 112 Ga. 232; 37 S. E. 381; Winterset National Bank v. Eyre, 52 Ia. 114; 2 N. W. 995; Peterborough First National Bank v. Childs, 133 Mass. 248; 43 Am. Rep. 509; Central National Bank v. Haseltine, 155 Mo. 58; 55 S. W. 1015; Lanham v. Bank, 46 Neb. 663; 65 N. W. 786; Norfolk National Bank v. Schwenk, 46 Neb. 381; 64 N. W. 1073; Higley v.

Bank, 26 O. S. 75; 20 Am. Rep. 759.

¹³ Stephens v. National Bank, 111 U. S. 197; Driesbach v. National Bank, 104 U. S. 52; Barnet v. National Bank, 98 U. S. 555; Cox v. Beck, 83 Fed. 269; Marion National Bank v. Thompson, 101 Ky. 277; 40 S. W. 903; Higley v. National Bank, 26 O. S. 75; 20 Am. Rep. 759.

¹⁴ Marion National Bank v. Thompson, 101 Ky. 277; 40 S. W. 903.

¹⁵ Schuyler National Bank v. Gadsden, 191 U. S. 451; reversing *sub nom.*, Gadsden v. Thrush, 63 Neb. 881; 89 N. W. 403. For previous decisions in same case, see Schuyler National Bank v. Gadsden, 179 U. S. 681; Gadsden v. Thrush, 58 Neb. 340; 45 L. R. A. 654; 78 N. W. 632; 56 Neb. 565; 76 N. W. 1060.

recovery of usurious payments.¹⁶ The decision of the United States Supreme Court upon this subject¹⁷ must be considered as final. The United States statute provides for the recovery of "twice the amount of interest paid." This has been held to mean twice the amount of all the interest paid, and not merely twice the amount of the excess of the interest paid over the legal interest,¹⁸ since, under the federal statute, no lawful interest can in such cases be exacted; and the statute provides that "in case the greater rate of interest has been paid . . ." twice the amount of interest thus paid "may be recovered."¹⁹

§523. Application of payments of usurious interest.

The effect of payments which by the agreement of debtor and creditor are to be applied in discharge of usurious interest depends to a very great extent upon the specific provisions of the usury statute which controls the transaction. In many states the rule is that such payments are in spite of the agreement of the parties, to be applied to that part of the debt which is lawfully due. Thus if any interest is lawfully due, such payments are to be applied first to such interest and then to the principal.¹ Hence on the one hand if the usurious in-

¹⁶ *Farrow v. National Bank* (Ky), 47 S. W. 594; *Whitehall First National Bank v. Lamb*, 50 N. Y. 95; 10 Am. Rep. 438; *State v. National Bank*, 2 S. D. 568; 51 N. W. 587; 3 S. D. 52; 51 N. W. 780.

¹⁷ *Schuyler National Bank v. Gadsden*, 191 U. S. 451.

¹⁸ *Lake Benton First National Bank v. Watt*, 184 U. S. 151; affirming 79 Minn. 266; 82 N. W. 1118; s. c. 76 Minn. 458; 79 N. W. 509; *Hill v. National Bank*, 15 Fed. 432; *Louisville Trust Co. v. Nat. Bank*, 87 Fed. Rep. 143; s. c. 102 Fed. 442; *Second National Bank v. Fitzpatrick*, 111 Ky. 228; 62 L. R. A. 599; 63 S. W. 459; *Schuyler National Bank v. Bollong*, 24 Neb. 825;

40 N. W. 413; *Lebanon National Bank v. Karmany*, 98 Pa. St. 65; *Boerner v. Nat. Bank*, 90 Tex. 443; 39 S. W. 285; *Colgin v. National Bank*, 16 Tex. Civ. App. 346; 40 S. W. 634; *contra*, *Hintermister v. First National Bank*, 64 N. Y. 212; *Bobo v. People's National Bank*, 92 Tenn. 444; 21 S. W. 888.

¹⁹ R. S. of U. S., § 5198.

¹ *Crenshaw v. Crenshaw* (Ky.), 69 S. W. 711; *Crenshaw v. Duff's Executor*, — Ky. —; 69 S. W. 962. *Hill v. Cornwall's Assignee*, 95 Ky. 512; 26 S. W. 540; *Kendall v. Crouch*, 88 Ky. 199; 11 S. W. 587; *Ellis v. Brannin's Executors*, 1 Duv. (Ky.) 48; *Stone v. McConnell*, 1 Duv. (Ky.) 54.

terest exacted equals or exceeds all the interest lawfully due, a foreclosure suit for an installment of interest in default is premature.² If the amount paid as usurious interest does not exceed the amount of lawful interest due, such payment cannot be applied to the principal.³ So, on the other hand, the creditor must in an accounting allow all payments in excess of lawful interest, if any interest is lawful, and if not, all payments whatever, as credits upon the principal.⁴ Hence when the borrower has repaid the entire sum actually advanced, with lawful interest thereon, he is entitled to have the note and mortgage given by him for such debt returned as paid.⁵ In such case no tender of any amount by the debtor is necessary.⁶ So a surety who has paid usurious interest may treat it as applied on the lawful interest and principal for the purpose of enforcing contribution from the other sureties.⁷ If a note on which different persons are liable is renewed by two notes of equal amounts with different sets of makers, one set is entitled to have credited upon their note one-half of the total amount of usurious interest paid on the original note.⁸ Usurious interest paid on one note cannot be treated as applied to another,⁹ nor can it be set off against such other after the time for bringing

² *Leipziger v. Van Saun*, 64 N. J. Eq. 37; 53 Atl. 1.

³ *Munford v. McVeigh*, 92 Va. 446; 23 S. E. 857.

⁴ *Fowler v. Trust Co.*, 141 U. S. 384 (under Illinois law); *Humphrey v. McCauley*, 55 Ark. 143; 17 S. W. 713; *Madsen v. Whitman*, — Ida. —; 71 Pac. 152; *Woolley v. Alexander*, 99 Ill. 188; *Musselman v. McElhenny*, 23 Ind. 4; 85 Am. Dec. 445; *Alexander v. Bank*, — Ky. —; 71 S. W. 883; *Equitable, etc., Co. v. Smith (Ky.)*, 65 S. W. 609; *New York, etc., Co. v. Davis*, 96 Md. 81; 53 Atl. 669; *Spooner v. Roberts*, 180 Mass. 191; 62 N. E. 4; *Citizens' National Bank, v. Donnell*, 172 Mo. 384; 72 S. W.

925; *Rawles v. Reichenbach*, 65 Neb. 29; 90 N. W. 943; *Knox v. Williams*, 24 Neb. 630; 8 Am. St. Rep. 220; 39 N. W. 786; *Hughson v. Loan Co.*, 57 N. J. Eq. 139; 41 Atl. 492; *Arnold v. Macdonald*, 22 Tex. Civ. App. 487; 55 S. W. 529.

⁵ *Hughson v. Loan Co.*, 57 N. J. Eq. 139; 41 Atl. 492.

⁶ *Jordan v. Warner's Estate*, 107 Wis. 539; 83 N. W. 946.

⁷ *Crenshaw v. Crenshaw (Ky.)*, 69 S. W. 711.

⁸ *Flannery v. Bank (Ky.)*, 52 S. W. 847.

⁹ *Carter v. Farthing*, — Ky. —; 72 S. W. 745; *Maher's Appeal*, 91 Pa. St. 516.

suit to recover such payment has elapsed.¹⁰ In some states the right to have payments of usurious interest applied to the lawful interest or to the principal is looked upon as co-extensive with the statutory right to sue for the recovery of usurious interest, and as governed by the same restrictions.¹¹ In these states application of such payments to the principal can be made during the time that suit for the recovery of usurious interest could be brought,¹² but not afterward.¹³ This is rather the exercise of the right of set-off than true application of payments. It is indeed termed set-off.¹⁴ A purely defensive pleading cannot be the means of recovering such usurious interest, as in case of true application of payments; but affirmative relief must be sought by a pleading in the nature of a cross-petition.¹⁵ In some states the effect of the statute is limited to defeat executory contracts for usurious, and the right to apply such payments is denied.¹⁶

§524. Parties to recovery of usurious interest.

The debtor who has paid usurious interest may, of course, recover it, wherever such recovery is allowed at all. The assignee of a lawful contract may recover usurious interest exacted from him by the creditor and paid by him.¹ Under the statute of the United States controlling national banks, an assignee under a general assignment may recover twice the amount of the interest paid.² So the right to recover interest passes to an assignee in insolvency or bankruptcy.³ Under some of the

¹⁰ *Carter v. Farthing*, — Ky. —; 72 S. W. 745.

¹¹ *Rosetti v. Lozano*, 96 Tex. 57; 70 S. W. 204.

¹² *Exchange Deposit Bank v. Fugate*, 93 Va. 821; 23 S. E. 884.

¹³ *Peterborough Savings Bank v. Hodgdon*, 62 N. H. 300; *Bank v. Kirby*, 100 Va. 498; 42 S. E. 303; *Davis v. Converse*, 35 Vt. 503.

¹⁴ *Bank v. Kirby*, 100 Va. 498; 42 S. E. 303; *Exchange Deposit*

Bank v. Fugate, 93 Va. 821; 23 S. E. 884.

¹⁵ *Rosetti v. Lozano*, 96 Tex. 57; 70 S. W. 204.

¹⁶ *Butler v. Butler*, 62 S. C. 165; 40 S. E. 138.

¹ *Turner v. Loan Association*, 47 S. C. 397; 25 S. E. 278.

² *Louisville Trust Co. v. National Bank*, 87 Fed. 143.

³ *Tamplin v. Wentworth*, 99 Mass. 63; *Corcoran v. Powers*, 6 O. S. 19.

state statutes which do not extend any right of recovery in terms to the executor or administrator of the debtor, the right to recover usurious interest paid, does not survive,⁴ and the executor cannot recover.⁵ If the usury is not paid until after the debtor's death, his administrator or executor can recover it.⁶ The right to recover usury is held, in some states, to be assignable generally. The assignor need not be joined in such action.⁷ A trustee who has borrowed money at usurious interest to purchase a mortgage upon trust property for its protection, and assigns such mortgage to the creditor as security, cannot recover usury paid upon such debt, where the beneficiaries of the trust have reimbursed him for the amount of his own funds advanced for this purpose.⁸ A surety cannot recover usurious interest paid by his principal, nor can he have it applied upon his liability.⁹ Another creditor of the same debtor cannot recover usurious interest paid by his debtor.¹⁰ The creditor who received the usurious interest is liable therefor. If the debtor borrows money from a third person acting in good faith, with which to take up the usurious debt, he cannot recover from such third person the amount of the usury thus paid.¹¹ This is true, even if the two sets of creditors are closely related, as long as the transaction is in fact a loan, and not a cover for a renewal.¹²

§525. Parties not in *pari delicto*.

If the parties to the contract are not in equal fault the maxim *in pari delicto* has no application. If A, by mistake, misrep-

⁴ Butler v. Butler, 62 S. C. 165; 40 S. E. 138.

⁵ Garriss v. Thomas, 66 S. C. 57; 44 S. E. 374.

⁶ Coon v. Swan, 30 Vt. 6. (Usury paid by collection of life insurance policy assigned as collateral.)

⁷ Fidelity, etc., Co. v. Ryan, 109 Ky. 240; 58 S. W. 610.

⁸ Pardoe v. National Bank, 106

Ia. 345; 76 N. W. 800; (under R. S. of U. S. § 5198).

⁹ Roberts v. Coffin, 22 Tex. Civ. App. 127; 53 S. W. 597.

¹⁰ Lee v. Fellowes, 10 B. Mon. (Ky.) 117; *contra*, McKinney v. Hotel Co., 12 Heisk. (Tenn.) 104.

¹¹ Stephenson v. Shirley (Ky.), 60 S. W. 387.

¹² Stephenson v. Shirley (Ky.), 60 S. W. 387.

resentation or fraud, is misled as to some material fact and for this reason does not know that the contract into which he is entering is illegal, he is not *in pari delicto* with the adversary party.¹ Thus one who by a false representation that the British government had authorized the invasion of the South African republic was induced to take part in Dr. Jameson's raid could recover damages for wounds, loss of time and the like.² So if A employs X to make a contract with B and pays him a commission A may recover such commission on subsequently learning that X was also in B's employment.³

In applying this rule foreign law is treated as a fact⁴ and so is the schedule of rates of the Interstate Commerce Commission.⁵ But if A knows the material facts he is *in pari delicto* even though by reason of his ignorance of domestic law he did not know that the contract was illegal.⁶ If a party to the contract knows the material facts, and is under no restraint, breach of the contract by the adversary party, however fraudulent his conduct, does not prevent the former party from being *in pari delicto*. If A enters into an illegal contract with B to defraud X, A can have no relief against B for fraudulently seizing and converting to his own use the proceeds of the fraud on X.⁷ If a statute requires one party to a given kind of contract to do certain things for the benefit of the other party thereto omission

¹ *Burrows v. Rhodes* (1899), 1 Q. B. 816; *Mobile, etc., Ry. v. Dismukes*, 94 Ala. 131; 17 L. R. A. 113; 10 So. 289; *Harper v. Harper*, 85 Ky. 160; 7 Am. St. Rep. 583; 3 S. W. 5; (*Town of*) *Morgan City v. Dalton*, — La. —; 36 So. 208; *Pearl v. Walter*, 80 Mich. 317; 45 N. W. 181; *Hess v. Culver*, 77 Mich. 598; 18 Am. St. Rep. 421; 6 L. R. A. 498; 43 N. W. 994; *Davidson v. Hobson*, 59 Mo. App. 130.

² *Burrows v. Rhodes* (1899), 1 Q. B. 816.

³ *Campbell v. Baxter*, 41 Neb. 729; 60 N. W. 90.

⁴ *Rosenbaum v. Credit System*

Co., 65 N. J. L. 255; 48 Atl. 237; affirming 64 N. J. L. 34; 44 Atl. 966.

⁵ *Mobile, etc., Ry. v. Dismukes*, 94 Ala. 131; 17 L. R. A. 113; 10 So. 289.

⁶ *Missouri, etc., Ry. v. Bowles*, 1 Ind. Ter. 250; 40 S. W. 899.

⁷ *Dent v. Ferguson*, 132 U. S. 50; *Lawton v. Estes*, 167 Mass. 181; 57 Am. St. Rep. 450; 45 N. E. 90; *Dakin v. Rumsey*, 104 Mich. 636; 62 N. W. 990; *Morrison v. Bennett*, 20 Mont. 560; 40 L. R. A. 158; 52 Pac. 553; *Leach v. Devereaux* (Tex. Civ. App.), 32 S. W. 837.

of such things by the first party does not put the second party *in pari delicto*.⁸ Thus the vendee of a patent right under a contract of sale, the statutory requirements whereof, imposed for the vendee's protection, have been omitted, is not *in pari delicto* with the vendor and may rescind.⁹ If the agents of a public corporation make unauthorized loans of public money, contrary to statute, the contract of loan is itself illegal, but the public corporation is not *in pari delicto* and may recover the money loaned.¹⁰ A statute may impose a penalty on a vendor, without imposing any corresponding penalty on vendee. In such cases, while the contract of sale is not valid, the vendee is not *in pari delicto* and if he has not obtained title and possession of the property contracted for he may rescind and recover what he has paid in.¹¹

Some courts attempt to distinguish between offenses which involve moral turpitude and are *mala in se*, and those which are merely *mala prohibita*.¹² Of the cases cited, however, some are

⁸ *Savings Bank v. Burns*, 104 Cal. 473; 38 Pac. 102; *Mason v. McLeod*, 57 Kan. 105; 57 Am. St. Rep. 327; 41 L. R. A. 548; 45 Pac. 76; *Gray v. Roberts*, 2 A. K. Mar. (Ky.) 208; 12 Am. Dec. 383; *Lester v. Bank*, 33 Md. 558; 3 Am. Rep. 211; *Lowell v. R. R. Corporation*, 23 Pick. (Mass.) 24; 34 Am. Dec. 33.

⁹ *Mason v. McLeod*, 57 Kan. 105; 57 Am. St. Rep. 327; 41 L. R. A. 548; 45 Pac. 76.

¹⁰ *Deming v. State*, 23 Ind. 416; (overruling *State v. Bank*, 5 Ind. 353); *Board of Education v. Thompson*, 33 O. S. 321. See § 1054.

¹¹ *Stansfield v. Kunz*, 62 Kan. 797; 64 Pac. 614. (Sale of intoxicating liquor forbidden, but no provision against purchase.) See on this point *Barclay v. Pearson* (1893), 2 Ch. 154; *Bowditch v. Ins. Co.*, 141 Mass. 292; 55 Am. Rep. 474; 4 N. E. 798; *Worcester v. Ea-*

ton, 11 Mass. 368; *Hess v. Culver*, 77 Mich. 598; 18 Am. St. Rep. 421; 6 L. R. A. 498; 43 N. W. 994; *Skinner v. Henderson*, 10 Mo. 205; *Duval v. Wellman*, 124 N. Y. 156; 26 N. E. 343; *Place v. Hayward*, 117 N. Y. 487; 23 N. E. 25; *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132; *Schermerhorn v. Talman*, 14 N. Y. 93; *Cunningham v. Holcomb*, 1 Tex. Civ. App. 331; 21 S. W. 125.

¹² "In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and the courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, though both parties are wrong-doers." *Lowell v. R. R. Corporation*, 23 Pick. (Mass.) 24, 32;

against the weight of authority on the particular questions decided,¹³ and others may be decided without invoking this distinction. The cases discussed later in this section often involve the commission of some act involving moral turpitude, yet relief is given when the parties are not *in pari delicto*.

If one party is subject to undue influence he cannot be said to be *in pari delicto*.¹⁴ "A court of equity will interfere and go to the relief of the less guilty party, whose transgression has been brought about by the imposition, undue influence, etc., of the party on whom the burden of the original blameworthiness principally rests."¹⁵ A woman who has paid money into a matrimonial bureau on a marriage brocage contract is not as a matter of law so *in pari delicto* that she cannot recover the same.¹⁶ So where B's attorney, A, induced B to make a transfer of B's property to A to defeat the claims of creditors of B's father against such property, B is not so *in pari delicto* that he cannot enforce A's promise to reconvey.¹⁷

If A is, by duress exercised on him by B, induced to enter into a contract with B which is illegal, A is not at fault equally with B and he may recover what he has parted with under such contract.¹⁸ Thus money or property extorted by B from

34 Am. Dec. 33. To the same effect see *Logan County National Bank v. Townsend*, 139 U. S. 67; *Pullman, etc., Co. v. Transportation Co.*, 65 Fed. 158; *Atlas Bank v. Bank*, 3 Met. (Mass.) 581; *Manchester, etc., R. R. v. R. R.*, 66 N. H. 100; 49 Am. St. Rep. 582; 9 L. R. A. 689; 20 Atl. 383.

¹³ See Ch. XV.

¹⁴ *Davidson v. Carter*, 55 Ia. 117; 7 N. W. 466; *Peek v. Peek*, 101 Mich. 304; 59 N. W. 604; *Bell v. Campbell*, 123 Mo. 1; 45 Am. St. Rep. 505; 25 S. W. 359; *Duval v. Wellman*, 124 N. Y. 156; 26 N. E. 343; *Place v. Hayward*, 117 N. Y. 487; 23 N. E. 25.

¹⁵ *Bell v. Campbell*, 123 Mo. 1,

16; 45 Am. St. Rep. 505; 25 S. W. 359.

¹⁶ *Smith v. Bruning*, 2 Vern. 392; *Duval v. Wellman*, 124 N. Y. 156; 26 N. E. 343. She is here said to be "under a species of imposition or undue influence." From syllabus in *Duval v. Wellman*, 124 N. Y. 156; 26 N. E. 343.

¹⁷ *Place v. Hayward*, 117 N. Y. 487; 23 N. E. 25.

¹⁸ *Woodham v. Allen*, 130 Cal. 194; 62 Pac. 398; *Sharon v. Gager*, 46 Conn. 189; *Meech v. Lee*, 82 Mich. 274; 46 N. W. 383; *James v. Roberts*, 18 Ohio 548; *Smith v. Blachley*, 188 Pa. St. 550; 68 Am. St. Rep. 887; 41 Atl. 619; *Foley v. Greene*, 14 R. I. 618; 51 Am. Rep.

A by means of duress may be recovered though it was delivered to stifle criminal prosecution.¹⁹

§526. *Locus pœnitentiæ*.

The third exception to the general rule that no recovery can be had by either party to an illegal contract, either on the contract or to recover what he has paid thereunder, exists where the law allows a party to repudiate an illegal contract before the illegal purpose is accomplished, and to recover what he has parted with thereunder.¹

The common application of the doctrine of *locus pœnitentiæ* is found where A intends to make an illegal contract with B, and as a step in that direction deposits a thing of value with X, A's agent or bailee, to be by him thereafter delivered to B under the illegal contract. In such case, unless the mere delivery of the property to X accomplished the illegal purpose, A can recover the property from X at any time before, under previous and unrevoked instructions, he has delivered it to B. Thus one who has placed money in the hands of a stakeholder to abide the result of a wager can recover it,² even where the depositor meant to cheat the other party to the wager.³ So

419; *Coffman v. Bank*, 5 Lea (Tenn.) 232; 40 Am. Rep. 31; *Gorringe v. Reed*, 23 Utah 120; 90 Am. St. Rep. 692; 63 Pac. 902.

¹⁹ *Woodham v. Allen*, 130 Cal. 194; 62 Pac. 398; *James v. Roberts*, 18 Ohio 548; *Smith v. Blachley*, 188 Pa. St. 550; 68 Am. St. Rep. 887; 41 Atl. 619; *Gorringe v. Reed*, 23 Utah 120; 90 Am. St. Rep. 692; 63 Pac. 902.

¹ *Wassermann v. Sloss*, 117 Cal. 425; 59 Am. St. Rep. 209; 38 L. R. A. 176; 49 Pac. 566; *White v. Bank*, 22 Pick. (Mass.) 181; *Adams Express Co. v. Reno*, 48 Mo. 264; *Souhegan National Bank v. Wallace*, 61 N. H. 24. "Seeing the error of his

ways, the law says a party may withdraw from the transaction; and it extends to him a helping hand by offering the inducement of giving back to him anything of value with which he has parted." *Wassermann v. Sloss*, 117 Cal. 425, 428; 59 Am. St. Rep. 209; 38 L. R. A. 176; 49 Pac. 566. "It best comports with public policy to arrest the illegal transaction before it is consummated." *Stacy v. Foss*, 19 Me. 335, 338; 36 Am. Dec. 755.

² *Johnston v. Russell*, 37 Cal. 670.

³ *Bernard v. Taylor*, 23 Or. 416; 37 Am. St. Rep. 693; 18 L. R. A. 859; 31 Pac. 968.

where A puts money in the hands of his agent for betting,⁴ or bribing public officials,⁵ he can recover it from them before it has been so used. So where A pays B money to be used for the benefit of the poor, in order to stifle a criminal prosecution,⁶ or deposits money in a bank to be used in obtaining a pardon for X,⁷ he can recover before the money is thus expended.

Where the thing of value to use in an illegal contract between A and B is not put into the hands of a third person such as X, A's agent or bailee, but is paid by A to B, there is some conflict of authority as to whether the doctrine of *locus pœnitentiæ* has any application. Some authorities allow recovery of what has been paid in under an illegal contract if it is legal on its face, made illegal only by extrinsic facts, not *malum in se* and for the most part unexecuted.⁸ Expressions in the opinions of courts seem to extend this doctrine over a very wide range.⁹ Other courts refuse to recognize the right of one party to a contract to recover property paid by him to the adversary party under an illegal contract if both are *in pari delicto* and no statute provides for a recovery,¹⁰ at least when the contract has been performed in part.¹¹

⁴ Central Stock and Grain Exchange v. Bendinger, 109 Fed. 926; 48 C. C. A. 726; 56 L. R. A. 875; Van Pelt v. Schouble, 68 N. J. L. 638; 54 Atl. 437; Peters v. Grim, 149 Pa. St. 163; 34 Am. St. Rep. 599; 24 Atl. 192.

⁵ Wassermann v. Sloss, 117 Cal. 425; 59 Am. St. Rep. 209; 38 L. R. A. 176; 49 Pac. 566.

⁶ Taylor v. Lendey, 9 East. 49.

⁷ Adams Express Co. v. Reno, 48 Mo. 264.

⁸ Simpson v. Lord Howden, 3 Mylne & C. 99; Congress, etc., Spring Co. v. Knowlton, 103 U. S. 49; McCutcheon v. Capsule Co., 71 Fed. 787; 31 L. R. A. 415. One who deposits money in a bank for a

time certain, contrary to law, can recover the deposit. White v. Bank, 22 Pick. (Mass.) 181.

⁹ "In the minor offences the *locus pœnitentiæ* continues until the money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract, or the illegal purpose has not been put in operation." Tyler v. Carlisle, 79 Me. 210, 212; 1 Am. St. Rep. 301; 9 Atl. 356.

¹⁰ Knowlton v. Spring Co., 57 N. Y. 518.

¹¹ Ullman v. Fair Association, 167 Mo. 273; 56 L. R. A. 606; 66 S. W. 949.

CHAPTER XXXI.

CONTRACTS COLLATERAL TO ILLEGAL CONTRACT.

§527. **Contracts connected with illegal contract.**

A contract may be so closely connected with an illegal contract or transaction as to be itself invalid. On the other hand, though entered into by one party at least for the object of promoting some unlawful object indirectly and collaterally, it may be so far removed from the unlawful object as to be itself legal.¹ What the test is for determining whether the collateral contract is itself legal or illegal, is a question upon which there is some conflict in decisions and more in *dicta*. It is often said that if the contract concerning which the question is raised is so connected with the illegal transaction that the party suing thereon cannot make out a *prima facie* case without disclosing the illegality, the contract is itself unenforceable, but that otherwise it is not invalid on account of such connection.² This rule is undoubtedly correct as far as it refers to the nature of the facts upon which plaintiff bases his recovery. If the illegal transaction is in no way necessary to establish plaintiff's right to recover, it cannot be invoked to defeat such recovery. Thus the illegality of a lease of property in the Indian Territory cannot be invoked to prevent the lessor from regaining pos-

¹ *Rogers v. Waller*, 4 Hayw. 353; 20 So. 836; *Gallagher v. Cornelius*, 23 Mont. 27; 57 Pac. 447; *Green v. Corrigan*, 87 Mo. 359; *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 310; *Woodworth v. Bennett*, 43 N. Y. 273; 3 Am. Rep. 706; *Oliphant v. Markham*, 79 Tex. 543; 23 Am. St. Rep. 363; 15 S. W. 569; *Buck v. Albee*, 26 Vt. 184; 62 Am. Dec. 564; *Hardy v. Stonebraker*, 31 Wis. 640.

² *Farmer v. Russell*, 1 Bos. & P. 296; *Simpson v. Bloss*, 7 Taunt. 246; *Phalen v. Clark*, 19 Conn. 421; 50 Am. Dec. 253; *Clarke v. Brown*, 77 Ga. 606; 4 Am. St. Rep. 98; *Ingram v. Mitchell*, 30 Ga. 547; *Barwick v. Moyse*, 74 Miss. 415; 60 Am. St. Rep. 512; 21 So. 238; *Snider v. Woodenware Co.*, 74 Miss.

session when the lease expires.³ This is, however, an unfortunate way of stating a generally sound proposition, as it makes the form in which plaintiff states the case and his success in suppressing the illegality in presenting it to court or jury that determines his right to recover. A safer and more accurate form of stating this rule is that "The test of a violation of rules of public policy is whether the plaintiff requires the aid of the illegal transaction to establish his right."⁴ It is not the question of the form in which plaintiff states his case or the judicious selection of evidence which he makes that determines his right to recover, but of the essential facts on which the plaintiff bases his case whether he wishes to disclose such facts in their entirety or not. Thus A conveyed realty to B, taking notes for the purchase price. A's motive in making such conveyance was to leave the state with her son and her husband to keep them from criminal prosecution for felony. B then conveyed to her parents X and Y to defraud B's creditors. A then sued B on the notes and obtained judgment. A then sued X and Y to have such conveyance set aside. It was held that A could maintain such action, as her right to recover was based on her judgment and not on the original transaction.⁵

§528. Ignorance of illegal intent.

If A does not in fact know of B's unlawful intent, though he had reason to believe that such intent existed, the courts are practically unanimous in holding that the contract between A and B is valid.¹ If A sells liquor to B and B knows that he has not paid his tax and filed his bond, which by law are conditions precedent to his engaging in such traffic, but A does not

³ Sittell v. Wright, 122 Fed. 434; 58 C. C. A. 416.

⁴ Robson v. Hamilton, 41 Or. 239, 245; 69 Pac. 651; (Springfield, etc.) Ins. Co. v. Hull, 51 O. S. 270; 46 Am. St. Rep. 571; 25 L. R. A. 37; 37 N. E. 1116; Nester v. Brewing Co., 161 Pa. St. 473; 41 Am. St.

Rep. 894; 24 L. R. A. 247; 29 Atl. 102.

⁵ Robson v. Hamilton, 41 Or. 239; 69 Pac. 651.

¹ Barnard v. Field, 46 Me. 526; Adams v. Coulliard, 102 Mass. 167; Finch v. Mansfield, 97 Mass. 89; Gallagher v. Cornelius, 23 Mont. 27; 57 Pac. 447.

know of such omission, A can recover from B for liquors sold, but B cannot set off damages for A's breach of a covenant to give B the exclusive sale of liquor manufactured by A.² If A enters into a contract which appears to be a lawful one, not knowing of the unlawful intent of B, A may enforce such contract.³ So a sale of property by one who does not know to what use it is to be put is valid, even though it is used for wagering or gambling.⁴ But if it is made a crime to have possession of a gambling machine no recovery can be had for a sale thereof.⁵ So a contract for the sale of property to a monopoly is valid at the suit of the vendor, where he did not know that vendee was forming a monopoly.⁶

§529. Collateral contract requiring illegal act.

If a contract collateral to an illegal act requires by its terms that one of the parties thereto shall perform the illegal act, such contract is unenforceable.¹ Thus if A sells intoxicating liquor to B under a contract whereby B is to resell the same in a manner contrary to law, the contract between A and B is illegal.² No recovery can be had for intoxicating liquors sold to a vendee who has no license to sell the same under a contract requiring the vendee to resell the same,³ even where

² *Niagara Falls Brewing Co. v. Wall*, 98 Mich. 158; 57 N. W. 99.

³ Contract used by B to defraud C. *Fox v. State*, 63 Neb. 185; 88 N. W. 176.

⁴ *Wile v. Improvement Co.*, 24 Ind. App. 422; 56 N. E. 928; *Washington Glass Co. v. Mosbaugh*, 19 Ind. App. 105; 49 N. E. 178. So a loan by one who does not know that the proceeds are to be used to pay a gambling debt may be recovered. *H. O. Hurlburt & Son v. Straub*, — W. Va. —; 46 S. E. 163.

⁵ *Price v. Burns*, 101 Ill. App. 418. (Sale of a slot machine contrary to a city ordinance.)

⁶ *Carter-Crume Co. v. Peurrung*, 86 Fed. 439; 30 C. C. A. 174; *Houck v. Brewing Association*, 88 Tex. 184; 30 S. W. 869; affirming 27 S. W. 692.

¹ *Woodford v. Hamilton*, 139 Ind. 481; 39 N. E. 47; *Raymond v. Leavitt*, 46 Mich. 447; 41 Am. Rep. 170; 9 N. W. 525; *Storz v. Finklestein*, 46 Neb. 577; 30 L. R. A. 644; 65 N. W. 195.

² *Woodford v. Hamilton*, 139 Ind. 481; 39 N. E. 47; *Storz v. Finklestein*, 46 Neb. 577; 30 L. R. A. 644; 65 N. W. 195; *Buck v. Albee*, 26 Vt. 184; 62 Am. Dec. 564.

³ *Woodford v. Hamilton*, 139 Ind.

such unlawful sale is disguised by the pretense that vendee is operating a bottling department for his vendor who is licensed.⁴ So no recovery can be had on an entire contract whereby a brewing company lends money to one to start an unlawful saloon and he agrees to buy beer exclusively of the brewing company.⁵ A contract, the consideration whereof is to be paid in illegal warrants, is void.⁶ So if the contract requires use of the property in illegal wagering or gambling no recovery can be had on such contract of sale.⁷ Thus notes given for a dice-throwing machine for gambling were held void in the hands of a *bona fide* holder, it appearing that, as part of the sale, vendor put the machines up, showed vendee how to work them and posted a reward for the apprehension of anyone robbing or tampering with them;⁸ and a sale of privileges on a race-course, including "betting booths" is unenforceable.⁹ But after the lessee has enjoyed such privileges for a time and paid for them he cannot recover payments so made.¹⁰ So a sale of lots to several vendees, who were by the contract of sale to determine by lot which tract each should receive, a chance for a prize lot being thrown in,¹¹ or a sale of land to be used in a lottery,¹²

481; 39 N. E. 47; *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596; 49 N. E. 864.

⁴ *Storz v. Finklestein*, 46 Neb. 577; 30 L. R. A. 644; 65 N. W. 195.

⁵ *Falk v. Brewing Co.*, 10 Kan. App. 248; 62 Pac. 716.

⁶ *Pomerene v. School District*, 56 Neb. 126; 76 N. W. 414.

⁷ *Kuhl v. Press Co.*, 123 Ala. 452; 82 Am. St. Rep. 135; 26 So. 535; *St. Louis Fair Association v. Carmody*, 151 Mo. 566; 74 Am. St. Rep. 571; 52 S. W. 365.

⁸ *Kuhl v. Press Co.*, 123 Ala. 452; 82 Am. St. Rep. 135; 26 So. 535.

⁹ *St. Louis Fair Association v. Carmody*, 151 Mo. 566; 74 Am. St. Rep. 571; 52 S. W. 365. The court said in 151 Mo. 566, 574: "A

scheme lawful in itself cannot be made a cover for one that is unlawful. The plaintiff's race track and grandstand were lawful to be kept, but when it adds to those the gambling booth, and runs them together, and then makes a contract that is appurtenant to either and appurtenant to both, courts will not entertain it merely because in its application it was not limited entirely to the unlawful purpose."

¹⁰ *Ullman v. Fair Association*, 167 Mo. 273; 56 L. R. A. 606; 66 S. W. 949.

¹¹ *Lynch v. Rosenthal*, 144 Ind. 86; 55 Am. St. Rep. 168; 31 L. R. A. 835; 42 N. E. 1103.

¹² *Hooker v. De Palos*, 28 O. S. 251. To the same effect, see *Skiff v. Johnson*, 57 N. H. 475; *Hull v.*

are both illegal. So if a contract of loan obliges the borrower to use it in wagering, and such wagers are illegal,¹³ as where the lender is to be paid out of the profits of the wager,¹⁴ or where the lender acts as banker for the parties who are gambling,¹⁵ such contract of loan is illegal and no recovery can be had thereon. Thus where men working in A's lumber camp wished to gamble at poker, and had no money, and A agreed to allow the winners to draw goods up to the amounts of their winnings and charge them to the loser, which was done, it was held that A could not deduct from the wages of the losers the amounts thus paid by him to the winners.¹⁶ So a note given to secure the payee for margins advanced by him is invalid in future wagering sales.¹⁷ In some jurisdictions by statute a promise to repay money lent at the time and for the purpose of

Ruggles, 56 N. Y. 424; in which the vendee did some further act to aid the illegal purpose.

¹³ Singleton v. Bank, 113 Ga. 527; 38 S. E. 947; Benson v. Warehouse Co., 99 Ga. 303; 25 S. E. 645; Shaffner v. Pinchback, 133 Ill. 410; 23 Am. St. Rep. 624; 24 N. E. 867; affirming 30 Ill. App. 355; Plank v. Jackson, 128 Ind. 424; 26 N. E. 568; affirmed on rehearing, 27 N. E. 1117; Alfriend v. Hughes, 4 Bush. (Ky.) 40; Tyler v. Carlisle, 79 Me. 210; 1 Am. St. Rep. 301; 9 Atl. 356; Raymond v. Leavitt, 46 Mich. 447; 41 Am. Rep. 170; 9 N. W. 525; Virden v. Murphy, 78 Miss. 515; 28 So. 851; Williamson v. Baley, 78 Mo. 636; Appleton v. Maxwell, 10 N. M. 748; 55 L. R. A. 93; 65 Pac. 158; Lloyd v. Leisenring, 7 Watts (Pa.) 294; Bates v. Watson, 1 Sneed. (Tenn.) 376; Machir v. Moore, 2 Gratt. (Va.) 257. To make a contract of lending illegal there must be "such combination of intention between the lender and borrower that the money furnished

should be used in aid of and to promote the unlawful enterprise that the former became *particeps criminis*." Sondheim v. Gilbert, 117 Ind. 71, 76; 10 Am. St. Rep. 23; 5 L. R. A. 432; 18 N. E. 687; citing Tyler v. Carlisle, 79 Me. 210; 1 Am. St. Rep. 301; 9 Atl. 356; Tracy v. Talmage, 14 N. Y. 162; 67 Am. Dec. 132; Arnot v. Coal Co., 68 N. Y. 558; 23 Am. Rep. 190; Waugh v. Beck, 114 Pa. St. 422; 60 Am. Rep. 354; 6 Atl. 923.

¹⁴ Marden v. Phillips, 103 Fed. 196; Virden v. Murphy, 78 Miss. 515; 28 So. 851.

¹⁵ Olson v. Goodman Co., 110 Wis. 149; 53 L. R. A. 648; 85 N. W. 640.

¹⁶ Olson v. Goodman Co., 110 Wis. 149; 53 L. R. A. 648; 85 N. W. 640. The statute in force provided that promises on consideration of money lent at the time and for the purpose of any game should be void.

¹⁷ Benson v. Warehouse Co., 99 Ga. 303; 25 S. E. 645; Davis v. Davis, 119 Ind. 511; see § 453.

any game is void.¹⁸ But such statute does not invalidate a loan by A to B, which money B means to use to start a gambling house.¹⁹ So where A cashes B's certificate of deposit, knowing that B intends to use the proceeds in gaming, it is not lending money at the time of the play, within the meaning of the statute.²⁰ If A loses to B at gaming, and pays, and A at once borrows it from B and gives his note therefor, such note is invalid.²¹

§530. Collateral contract intended to aid illegal act.

If A agrees with B to do an act in itself lawful, though intended by B to aid in some illegal transaction, and A agrees as part of such contract to do some other and further act in aid of B's unlawful purpose, the entire contract is illegal.¹ Thus a contract to lease premises for the illegal sale of liquor, the landlord to supply the ice necessary in such business;² a contract for the lawful sale of liquor, whereby the vendor is to conceal the character of the property by the form of shipment, and furnish false invoices to enable vendee to commit perjury

¹⁸ Carney v. Plimmer (1897), 1 Q. B. 634; Olson v. Goodman Co., 110 Wis. 149; 53 L. R. A. 648; 85 N. W. 640; Schoenberg v. Adler, 105 Wis. 645; 81 N. W. 1055.

¹⁹ Longnecker v. Shields, 1 Colo. App. 264; 28 Pac. 659.

²⁰ Kinney v. Hynds, 7 Wyom. 22; 49 Pac. 403; 52 Pac. 1081.

²¹ Stanford v. Howard, 103 Tenn. 24; 76 Am. St. Rep. 635; 52 S. W. 140. (A case of peaceable recaption.) But reclaiming the lost stake by violence may be robbery. Carroll v. State, 42 Tex. Cr. App. 30; 57 S. W. 99.

¹ Kohn v. Melcher, 43 Fed. 641; 10 L. R. A. 439; Tracy v. Talmage, 14 N. Y. 162; 67 Am. Dec. 132;

Kelly v. Courter, 1 Okla. 277; 30 Pac. 372; Aiken v. Blaisdell, 41 Vt. 655; Gaylord v. Soragen, 32 Vt. 110; 76 Am. Dec. 154. "If the vendor has knowledge of the immoral or illegal design of the vendee and in any way aids or participates in that design, or if, the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vendor cannot recover." Standard Furniture Co. v. Van Alstine, 22 Wash. 670, 674; 79 Am. St. Rep. 960; 51 L. R. A. 589; 62 Pac. 145.

² Kelly v. Courter, 1 Okla. 277; 30 Pac. 372.

successfully;³ or any sale where by false marking,⁴ or packing⁵ vendee is aided in escaping detection in his violation of the law;⁶ or a sale of candy put up in prize packages to use in an unlawful lottery⁷ are all invalid. Thus contracts which tend directly to promote illegal wagers are unenforceable.⁸ It has, however, been held that the mere doing of an act to aid the adversary party to violate the law does not make the entire transaction illegal unless the doing of such act was required by the contract.⁹ Thus shipping intoxicating liquors in "fake" barrels¹⁰ or in plain boxes¹¹ has been held not to make the contract of sale necessarily illegal.

§531. Mere knowledge of illegal intent.—Crime of great magnitude.

If a contract is entered into between A and B, and B intends thereby to aid in perpetrating a crime of great magnitude, the mere knowledge on A's part of B's unlawful intention makes such contract unenforceable. While there are obiter to the effect that in a contract in aid of murder, mere knowledge on A's part of B's purpose makes the contract illegal, the actual

³ Kohn v. Melcher, 43 Fed. 641; 10 L. R. A. 439.

⁴ Fisher v. Lord, 63 N. H. 514; 3 Atl. 927; Materne v. Horwitz, 101 N. Y. 469; 5 N. E. 331; Gaylord v. Soragen, 32 Vt. 110; 76 Am. Dec. 154; Aiken v. Blaisdell, 41 Vt. 655.

⁵ Feineman v. Sachs, 33 Kan. 621; 7 Pac. 222; 52 Am. Rep. 547; Fisher v. Lord, 63 N. H. 514; 3 Atl. 927; Aiken v. Blaisdell, 41 Vt. 655; Gaylord v. Soragen, 32 Vt. 110; 76 Am. Dec. 154.

⁶ As where goods are sold to smugglers and packed and marked so as to aid them. Waymell v. Reed, 5 T. R. 599; Clugas v. Penaluna, 4 T. R. 466; Biggs v. Lawrence, 3 T. R. 454.

⁷ Skiff v. Johnson, 57 N. H. 475;

Hull v. Ruggles, 56 N. Y. 424.

⁸ Embrey v. Jemison, 131 U. S. 336; Kuhl v. Press Co., 123 Ala. 452; 82 Am. St. Rep. 135; 26 So. 535; Carland v. Telegraph Co., 118 Mich. 369; 74 Am. St. Rep. 394; 43 L. R. A. 280; 76 N. W. 762; Helber v. Schantz, 109 Mich. 669; 67 N. W. 913; St. Louis Fair Association v. Carmody, 151 Mo. 566; 74 Am. St. Rep. 571; 52 S. W. 365.

⁹ McWhorter v. Bluthenthal, 136 Ala. 568; 96 Am. St. Rep. 43; 33 So. 552.

¹⁰ McWhorter v. Bluthenthal, 136 Ala. 568; 96 Am. St. Rep. 43; 33 So. 552.

¹¹ Williams v. Davidson, 64 Kan. 707; 68 Pac. 650.

decisions in cases of this class involve the crime of treason.¹ Thus A's sale of property to B, knowing that B means to employ it in aid of a rebellion, is illegal.² To make a contract of this sort illegal it must at least appear that the one party knew of the purpose of the other to make such use of the property. Thus a loan of money to a general in an army engaged in rebellion is not invalid where it does not appear that any use was to be made or was made thereof in aiding the rebellion.³ Where the action is not on the contract, but for conversion in disregard of the contract, recovery is allowed even if the illegal purpose was known.⁴ If the sale is compulsory and in reality is a conversion the vendor can recover.⁵

§532. Mere knowledge of illegal intent.—Crime of small magnitude.

If a contract is entered into between A and B, and B intends thereby to aid in perpetrating a crime of small magnitude, the mere knowledge on A's part of B's unlawful intention does not make such contract unenforceable.¹ No hard and fast line can

¹ Hanauer v. Doane, 12 Wall. (U. S.) 342.

² Hanauer v. Doane, 12 Wall. (U. S.) 342; Milner v. Patton, 49 Ala. 423 (cloth for uniforms); Oxford Iron Co. v. Quinchett, 44 Ala. 487; Shepherd v. Reese, 42 Ala. 329 (sale of horse); Tatum v. Kelley, 25 Ark. 209; 94 Am. Dec. 717 (sale of guns); Schmidt v. Barker, 17 La. Ann. 261; 87 Am. Dec. 527. (Deposit payable only in Confederate currency.) Lewis v. Latham, 74 N. C. 283 (sale of horse); Roquemore v. Alloway, 33 Tex. 461 (sale of horse); *contra*, that mere knowledge of vendee's treasonable purpose does not make the sale illegal, Wallace v. Lark, 12 S. C. 576; 32 Am. Rep. 516; Tedder v. Odum, 2 Heisk. (Tenn.) 68; 5 Am. Rep. 25.

³ Cooper v. Thompson, 20 La. Ann. 182; 18 Am. Dec. 392.

⁴ Oxford Iron Co. v. Quinchett, 44 Ala. 487; McKinney v. Andrews, 41 Tex. 363.

⁵ Ruckman v. Lightner, 24 Gratt. (Va.) 19.

¹ Lloyd v. Johnson, 1 Bos. & P. 340; Bowry v. Bennett, 1 Camp. 348; Clark v. Hagar, 22 Can. S. C. 510; Planters' Bank v. Bank, 16 Wall. (U. S.) 483; Brooks v. Martin, 2 Wall. (U. S.) 80; McBlair v. Gibbes, 17 How. (U. S.) 232; Armstrong v. Toler, 11 Wheat. (U. S.) 258; Hanover National Bank v. Bank, 109 Fed. 421; 48 C. C. A. 482; Jefferson v. Burhans, 85 Fed. 949; 29 C. C. A. 481; Rose v. Mitchell, 6 Colo. 102; 45 Am. Rep. 520; Schankel v. Moffatt, 53 Ill. App. 382; Frohlich v. Alexander, 36 Ill. App. 428; Brunswick v. Valteau, 50 Ia. 120; 32 Am. Rep. 119; Whitlock v. Workman, 15 Ia. 351; Mahood

be drawn as to the exact degree of proximity and the exact magnitude of the offense necessary to make the collateral contract illegal. "The line of proximity will vary somewhat according to the gravity of the evil apprehended."² Thus in a contract of sale, mere knowledge on the part of the vendor that vendee means to make an unlawful use of the property bought does not make the contract invalid.³ A sale of goods may be valid, though they are bought to be smuggled.⁴ So if A sells liquor to B, the contract not being itself unlawful, and A knows

v. Tealza, 26 La. Ann. 108; 21 Am. Rep. 546; Sampson v. Townsend, 25 La. Ann. 78; Hubbard v. Moore, 24 La. Ann. 591; 13 Am. Rep. 128; Frank v. O'Neil, 125 Mass. 473; Adams v. Coulliard, 102 Mass. 167; Savage v. Mallory, 4 Allen (Mass.) 492; M'Intyre v. Parks, 3 Met. (Mass.) 207; Gambs v. Sutherland, 101 Mich. 355; 59 N. W. 652; Webber v. Donnelly, 33 Mich. 469; Sprague v. Rooney, 82 Mo. 493; 52 Am. Rep. 383; Michael v. Bacon, 49 Mo. 474; 8 Am. Rep. 138; Hill v. Spear, 50 N. H. 253; 9 Am. Rep. 205; Smith v. Godfrey, 28 N. H. 379; 61 Am. Dec. 617; Tracy v. Talmage, 14 N. Y. 162; 67 Am. Dec. 132; Williams v. Carr, 80 N. C. 294; Powell v. Smith, 66 N. C. 401; Armfield v. Tate, 29 N. C. 258; Patrick v. Littell, 36 O. S. 79; 38 Am. Rep. 552; Waugh v. Beck, 114 Pa. St. 422; 60 Am. Rep. 354; 6 Atl. 923; Thomas v. Brady, 10 Pa. St. 164; Lestapies v. Ingraham, 5 Pa. St. 71; Allen v. Keilly, 18 R. I. 197; 30 Atl. 965; Lewis v. Alexander, 51 Tex. 578; Kottwitz v. Alexander, 34 Tex. 689; Bishop v. Honey, 34 Tex. 245; Gerhard v. Neese, 30 Tex. 635; House v. Soder, 36 Tex. 629; Aiken v. Blaisdell, 41 Vt. 655; Backman v. Wright, 27 Vt. 187; 65 Am. Dec. 187; McConihe v. McMann, 27 Vt.

95. "The mere fact that a contract the consideration and performance of which are lawful incidentally assists one in evading a law is no bar to its enforcement." Hanover National Bank v. Bank, 109 Fed. 421, 425; 48 C. C. A. 482.

² Graves v. Johnson, 179 Mass. 53, 58; 88 Am. St. Rep. 355; 60 N. E. 383; citing Hanauer v. Doane, 12 Wall. (U. S.) 342; Bickel v. Sheets, 24 Ind. 1; Steele v. Curle, 4 Dana (Ky.) 381.

³ Hodgson v. Temple, 5 Taunt. 181; Parsons Oil Co. v. Boyett, 44 Ark. 230; Rose v. Mitchell, 6 Colo. 102; 45 Am. Rep. 520; Schankel v. Moffatt, 53 Ill. App. 382; Frohlich v. Alexander, 36 Ill. App. 428; Bickel v. Sheets, 24 Ind. 1; Dater v. Earl, 3 Gray (Mass.) 482; M'Intyre v. Parks, 3 Met. (Mass.) 207; Gambs v. Sutherland, 101 Mich. 355; 59 N. W. 652; Webber v. Donnelly, 33 Mich. 469; Delavina v. Hill, 65 N. H. 94; 19 Atl. 1000; Braunn v. Keally, 146 Pa. St. 519; 28 Am. St. Rep. 811; 23 Atl. 389; Labbe v. Carbett, 69 Tex. 503; 6 S. W. 808; McKinney v. Andrews, 41 Tex. 363; Tuttle v. Holland, 43 Vt. 542.

⁴ Holman v. Johnson, Cowp. 341; Pellicatt v. Angell, 2 Cr. M. & R. 311.

that B means to resell the same unlawfully, the contract is valid if A has done nothing further to aid such unlawful purpose.⁵ A contract to sell ice is not rendered invalid because the vendee intends to sell such ice to persons who sell liquor contrary to law.⁶ So a contract to lease property is not rendered illegal by lessor's knowledge that lessee means to use the dining room for the illegal sale of liquor on Sunday.⁷ So A can recover for painting a bar-room for B, though A knows that B means to sell liquor therein unlawfully.⁸ So where A acts as B's agent to place a loan, and takes a deed to secure the loan, which is a mortgage in equity, A can recover for his services though A knew that B's object in taking such form of security was to avoid taxation.⁹ So if the vendor knows that vendee will use the thing sold in a wager, but the contract of sale does not require such use, the contract of sale is valid¹⁰ as where A takes notes for an interest in a race-horse, which the vendees mean to use in racing for money illegally;¹¹ or A sells lottery tickets to B where such sale is legal, knowing that B will resell them where

⁵ *McWhorter v. Bluthenthal*, 136 Ala. 568; 96 Am. St. Rep. 43; 33 So. 552; *Frohlich v. Alexander*, 36 Ill. App. 428; *Moore v. Winstead*, 24 Ind. App. 56; 55 N. E. 777; *Feineman v. Sachs*, 33 Kan. 621; 52 Am. Rep. 547; 7 Pac. 222; *Fuller v. Hunt*, 182 Mass. 299; 65 N. E. 390; *Graves v. Johnson*, 179 Mass. 53; 88 Am. St. Rep. 355; 60 N. E. 383; *Dater v. Earl*, 3 Gray (Mass.) 482; *Webber v. Donnelly*, 33 Mich. 469; *Anheuser Busch Brewing Ass'n v. Mason*, 44 Minn. 318; 20 Am. St. Rep. 580; 9 L. R. A. 506; 46 N. W. 558; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205; *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617; *Tuttle v. Holland*, 43 Vt. 542; *Aiken v. Blaisdell*, 41 Vt. 655; *Gaylord v. Soragen*, 32 Vt. 110; 76 Am. Dec. 154; *McConihe v. McMann*, 27 Vt. 95; *Backman v. Wright*, 27 Vt. 187;

65 Am. Dec. 187; *Territt v. Bartlett*, 21 Vt. 184.

⁶ *Crystal Ice Co. v. Wylie*, 65 Kan. 104; 68 Pac. 1086.

⁷ *Allen v. Keilly*, 18 R. I. 197; 30 Atl. 965.

⁸ *Bryson v. Haley*, 68 N. H. 337; 38 Atl. 1006.

⁹ *Patrick v. Littell*, 36 O. S. 79; 38 Am. Rep. 552.

¹⁰ *Rose v. Mitchell*, 6 Colo. 102; 45 Am. Rep. 520; *Biegler v. Trust Co.*, 164 Ill. 197; 45 N. E. 512; affirming 62 Ill. App. 560; *Bickel v. Sheets*, 24 Ind. 1; *Harris v. Woodruff*, 124 Mass. 205; 26 Am. Rep. 658.

¹¹ *Biegler v. Trust Co.*, 164 Ill. 197; 45 N. E. 512; affirming 62 Ill. App. 560. (The notes here involved were in the hands of a bona fide holder.)

such sale is illegal;¹² or one dealer sells to another a machine which the vendee means to sell to a customer to use in gambling,¹³ or a billiard table which might be used for betting or gaming.¹⁴ So a shipper can recover on his contract for the loss of a slot-machine meant to be used in gambling.¹⁵ So, recovery may be had on a contract to train a race horse though his owner means to run him to win wagers;¹⁶ or on a contract to fit up a house, though it is to be used for gambling in.¹⁷ So a loan of money to one who means to use it in wagering is valid as long as the borrower is not obliged by the contract of lending, to make such use of the loan, even if the lender knows of such intended use.¹⁸ Other courts have taken a contrary position, holding that A's knowledge of B's unlawful purpose makes the contract between A and B invalid.¹⁹ Where this view is taken a vendor's knowledge that vendee means to make an unlawful use of the property sold makes the contract of sale

¹² Jameson v. Gregory, 4 Met. (Ky.) 363; McIntyre v. Parks, 3 Met. (Mass.) 207.

¹³ Rose v. Mitchell, 6 Colo. 102; 45 Am. Rep. 520.

¹⁴ Brunswick v. Valteau, 50 Ia. 120; 32 Am. Rep. 119. Even if the vendor knows that vendee means to use it in gambling. Bickel v. Sheets, 24 Ind. 1.

¹⁵ Edwards v. Express Co., 121 Ia. 744; 96 N. W. 740.

¹⁶ Harris v. Woodruff, 124 Mass. 205; 26 Am. Rep. 658. *Contra*, recovery allowed for feed and shoeing, but not for training. Mosher v. Griffin, 51 Ill. 184; 99 Am. Dec. 541.

¹⁷ Michael v. Bacon, 49 Mo. 474; 8 Am. Rep. 138. *Contra*, no recovery was allowed for building a nine-pin alley as an addition to a coffee house, the use thereof being unlawful. Spurgeon v. McElwain, 6 Ohio 442; 27 Am. Dec. 266.

¹⁸ White v. Yarbrough, 16 Ala. 109; Corbin v. Wachhorst, 73 Cal. 411; 15 Pac. 22; Poorman v. Mills, 39 Cal. 345; 2 Am. Rep. 451; Longnecker v. Shields, 1 Colo. App. 264; 28 Pac. 659; Charleston State Bank v. Edman, 99 Ill. App. 235; Jackson v. Bank, 125 Ind. 347; 9 L. R. A. 657; 25 N. E. 430; Tyler v. Carlisle, 79 Me. 210; 1 Am. St. Rep. 301; 9 Atl. 356; Waugh v. Beck, 114 Pa. St. 422; 60 Am. Rep. 354; 6 Atl. 923.

¹⁹ Langton v. Hughes, 1 Maule & S. 593; Terre Haute Brewing Co. v. Hartman, 19 Ind. App. 596; 49 N. E. 864; Spurgeon v. McElwain, 6 Ohio 442; 27 Am. Dec. 266.

Suit v. Woodhall, 113 Mass. 391, has been cited on this point. But in Graves v. Johnson, 179 Mass. 53; 88 Am. St. Rep. 355; 60 N. E. 383, it was held that this question was assumed in Suit v. Woodhall, and not raised or decided therein.

invalid.²⁰ If A sells intoxicating liquor to B knowing that B means to resell it unlawfully,²¹ or if A sells drugs to B knowing that B meant to use them in beer unlawfully,²² such contracts are invalid. On this theory no recovery can be had on a bond for rent for premises on which lessor knew that lessee meant to sell liquor unlawfully.²³ By statute, in some jurisdictions, no recovery can be had for rent for premises which lessor knew were used for illegal gambling.²⁴ Such a provision includes a lease of land for horse-racing and betting thereon.²⁵ So A cannot recover from B for building a nine-pin alley where the use of the building for that purpose is unlawful.²⁶ So where a machine sold can be used only for gambling it has been held that the price cannot be recovered in a sale on credit.²⁷ So it has been held that one who rides on a railway under a contract to transport him to Johnston's army to serve against the United States,²⁸ or an illegal pass,²⁹ cannot recover for injuries suffered during such transportation by reason of the negligence of the carrier.

In other cases a position is taken intermediate to these extremes. Thus A's knowledge is said to be a fact for the jury tending to show A's participation in B's illegal plan.³⁰

²⁰ *Davis v. Bronson*, 6 Ia. 410; *Webster v. Munger*, 8 Gray (Mass.) 584; *McConihe v. McMann*, 27 Vt. 95.

²¹ *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596; 49 N. E. 864. The vendor's knowledge of the vendee's intention has been presumed from the fact that the vendee was a hotel keeper and purchased more than five hundred dollars worth of intoxicating liquor at one time. *Oakes v. Merrifield*, 93 Me. 297; 45 Atl. 31.

²² *Langton v. Hughes*, 1 Maule & S. 593.

²³ *Mound v. Barker*, 71 Vt. 253; 76 Am. St. Rep. 767; 44 Atl. 346.

²⁴ *Boddie v. Brewing Co.*, 204 Ill.

352; 68 N. E. 394; affirming 107 Ill. App. 357; *Heidenrich v. Raggio*, 88 Ill. App. 521; *McDonald v. Tree*, 69 Ill. App. 134; *Ryan v. Potwin*, 62 Ill. App. 134.

²⁵ *McDonald v. Tree*, 69 Ill. App. 134.

²⁶ *Spurgeon v. McElwain*, 6 Ohio 442; 27 Am. Dec. 266.

²⁷ *Ohlsen v. Wilson*, 31 Tex. Civ. App. 178; 71 S. W. 768.

²⁸ *Turner v. R. R.*, 63 N. C. 522.

²⁹ *McNeill v. R. R.*, 132 N. C. 510; 95 Am. St. Rep. 641; 44 S. E. 34.

³⁰ *Tegler v. Shipman*, 33 Ia. 194; 11 Am. Rep. 118. "Mere knowledge on the part of the vendor may not vitiate the sale, yet it is a fact from which the jury might infer an in-

In other cases the test of the legality of the contract between A and B is said to be whether A not only knows of B's unlawful intent but desires to help him to his end.³¹

§533. Illustration of foregoing principles.—Contracts aiding sexual immorality.

A contract which tends to aid unlawful intercourse is always invalid;¹ but the practical difficulty in these cases arises over what contracts do, in fact, aid unlawful intercourse. A lease of property knowing that it is to be used for purposes of prostitution has been held illegal;² and no accounting will be had arising out of a partnership for letting rooms for prostitution, even if such rooms are in a part of the city chiefly devoted to such purposes,³ nor can recovery be had for board and lodging furnished

tent to violate such law." *Wind v. Iler*, 93 Ia. 316, 322; 27 L. R. A. 219; 61 N. W. 1001.

³¹ *Graves v. Johnson*, 156 Mass. 211, 214; 32 Am. St. Rep. 446; 15 L. R. A. 834; 30 N. E. 818. In this case the court said (156 Mass. 211, 214): "If the sale is made with the desire to help him to his end although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it or disapproves of it, it may be doubtful whether the connection is sufficient." Citing *Webster v. Munger*, 8 Gray (Mass.) 584. On a re-trial it appeared that the vendor did not care what vendee did with the liquor and that vendee knew such fact. The contract of sale was held valid. *Graves v. Johnson*, 179 Mass. 53; 88 Am. St. Rep. 355; 60 N. E. 383.

¹ *Pearce v. Brooks*, 1 L. R. 1 Ex. 213; *Chateau v. Singla*, 114 Cal. 91;

55 Am. St. Rep. 63; 33 L. R. A. 750; 45 Pac. 1015; *Dougherty v. Seymour*, 16 Colo. 289; 26 Pac. 823; *Postelle v. Rivers*, 112 Ga. 850; 38 S. E. 109; *Ernst v. Crosby*, 140 N. Y. 364; 35 N. E. 603; *Reed v. Brewer*, 90 Tex. 144; 37 S. W. 418; affirming 36 S. W. 99; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459; 23 S. W. 294; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670; 79 Am. St. Rep. 960; 51 L. R. A. 889; 62 Pac. 145.

² *Chateau v. Singla*, 114 Cal. 91; 55 Am. St. Rep. 63; 33 L. R. A. 750; 45 Pac. 1015; *Ralston v. Boady*, 20 Ga. 449; *Ernst v. Crosby*, 140 N. Y. 364; 35 N. E. 603; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459; 23 S. W. 294. How far this is due to the fact that the landlord is to be paid out of the wages of prostitution is not expressly indicated in the cases.

³ *Chateau v. Singla*, 114 Cal. 91; 55 Am. St. Rep. 63; 33 L. R. A. 750; 45 Pac. 1015.

to enable a woman to lead a life of prostitution,⁴ nor for carriage hire for such purpose.⁵ No recovery can be had for money paid under a contract, to enable one of the parties to operate a house of prostitution.⁶ A sale of realty, on the other hand, is valid though the vendor knows that the vendee means to use it for purposes of prostitution,⁷ or as a residence for his mistress,⁸ as long as such use is not an essential feature of the contract of sale. A sale of furniture to fit out a house of prostitution has been held valid where such use was not required by the contract of sale.⁹ Courts differ as to the effect of such a sale of furniture, however, and some authorities hold such a sale invalid including a promise to pay for such furniture,¹⁰ especially where vendor reserves title to himself until payment, knowing that in the meanwhile it is to be used for immoral purposes.¹¹ In any event if the vendor does not know that furniture sold is to be used in furnishing a house of prostitution he may recover though he had knowledge of facts sufficient to put him on inquiry.¹² A sale of beer to the keeper of a house of prostitution has been held valid so that the vendor can recover, though

⁴ *Postelle v. Rivers*, 112 Ga. 850; 38 S. E. 109. In this case it was contemplated by both parties that she should lead such life and pay for her board out of the wages of prostitution. Where these elements are lacking a contract to furnish a prostitute, known to vendor to be such, with the means of living, such as clothing. *Bowry v. Bennett*, 1 Campb. 348; or washing. *Lloyd v. Johnson*, 1 Bos. & P. 340; is valid.

⁵ *Pearce v. Brooks*, L. R. 1 Ex. 213.

⁶ *McDonald v. Born*, — Mich. —; 97 N. W. 693.

⁷ *Sprague v. Rooney*, 82 Mo. 493; 52 Am. Rep. 383. A contract for building a house which the contractor knows is to be used as a house of prostitution has been held valid. *Bishop v. Honey*, 34 Tex. 245.

⁸ *Armfield v. Tate*, 29 N. C. 258.

⁹ *Mahood v. Tealza*, 26 La. Ann. 108; 21 Am. Rep. 546; *Sampson v. Townsend*, 25 La. Ann. 78; *Hubbard v. Moore*, 24 La. Ann. 591; 13 Am. Rep. 128.

¹⁰ *Reed v. Brewer*, 90 Tex. 144; 37 S. W. 418; affirming 36 S. W. 99.

¹¹ *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670; 79 Am. St. Rep. 960; 51 L. R. A. 889; 62 Pac. 145. In this case A sold B furniture knowing that it was to be used to fit up a house of prostitution, reserving title to himself. X sued B, got judgment, and levied on the property as B's. In a replevin suit between A and X it was held that A's contract with B was illegal. Here again payment was to be made out of the wages of prostitution.

¹² *Ramsey v. Smith*, 138 Ala. 333; 35 So. 325.

vendor had reason to believe that the beer was to be used in such house.¹³

§534. Loans to pay off usurious debt.

If a debtor under a usurious contract borrows money from a third person in order to pay the usurious debt in full, such third person may recover from such debtor the amount of the loan, even though applied upon the usurious debt, and though the lender has full knowledge of such facts.¹ The lender may even be the president of a loan association which is the original creditor.² The debtor may even borrow from the creditor to the usurious contract, and apply the proceeds of the loan in discharging a usurious debt, as long as this is not "merely colorable and designed as a cloak to cover up usury."³ To make such a loan free from usury, however, the borrower must be perfectly free under the contract of the loan to apply the proceeds as he pleases. If the transaction requires the borrower to apply the proceeds to the discharge of the usurious debt, this is not a new loan, but a renewal of the usurious contract.⁴

§535. Collateral security for usurious debt.

The question of the validity of securities given to secure usurious debts depends to a large extent upon the wording and construction of local statutes. The security is treated as merely collateral to the usurious debt. Accordingly, the holder of the security cannot enforce it for any amount greater than that lawfully due upon the usurious contract.¹ In jurisdictions where securities are not negotiable, the assignee of a security for usu-

¹³ *Anheuser Busch Brewing Association v. Mason*, 44 Minn. 318; 20 Am. St. Rep. 580; 9 L. R. A. 506; 46 N. W. 558.

¹ *Lanier v. Trust Co.*, 64 Ark. 39; 40 S. W. 466; *Thompson v. Bank*, 99 Ga. 651; 26 S. E. 79; *Pence v. Christman*, 15 Ind. 257; *Trimble v. Thorson*, 80 Ia. 246; 45 N. W. 742; *Cottrell v. Southwick*, 71 Ia. 50; 32 N. W. 22; *Vaught v. Rider*, 83 Va. 659; 5 Am. St. Rep. 305; 3 S.

E. 293; *Drake v. Chandler*, 18 Gratt. (Va.) 909; 98 Am. Dec. 762.

² *Ratliffe v. Buckler* (Ky.), 61 S. W. 472.

³ *Bates v. Harris*, 112 Ga. 32, 35; 37 S. E. 105. To the same effect see *Steen v. Stretch*, 50 Neb. 572; 70 N. W. 48.

⁴ *Hinkson v. Wigglesworth* (Ky.), 48 S. W. 1079.

¹ *Central Trust Co. v. Burton*, 74 Wis. 329; 43 N. W. 141.

rious debt cannot enforce it for more than the amount that is lawfully due upon the usurious contract.² Whether the security for the usurious debt has any validity, depends largely upon local statute. In the absence of a specific statute, such security is valid up to the amount legally due upon the usurious contract.³ Hence, if security is given for two debts, one of which is usurious and the other not, it will be enforceable at least up to the amount of the debt which is not usurious.⁴ Conversely, since a mortgage securing a usurious debt is not totally void, a mortgagor may maintain an action under a statute providing for a penalty in case the mortgagee refuses to release the mortgage after payment or tender of the amount of the debt, provided the mortgagor has tendered the amount lawfully due.⁵ By a statute in some jurisdictions, securities for usurious debts are totally void.⁶ This statute applies to mortgages of realty,⁷ chattel mortgages,⁸ and pledges of personal property.⁹ In some jurisdictions, while mortgages are valid though given to secure usurious debts, conveyances to secure or pay usurious debts are by statute void.¹⁰

§536. Partnership in illegal contracts.

No accounting can be had for a partnership in an illegal transaction, according to the weight of authority.¹ Thus no

² Realty mortgage: Southern Home, etc., Association v. Riddle, 129 Ala. 562; 29 So. 667; Scott v. Austin, 36 Minn. 460; 32 N. W. 89, 864. Chattel mortgage: Gates v. Storage Co., 22 Ohio C. C. 724.

³ Smith v. Myers, 41 Md. 425.

⁴ Atkinson v. Burt, 65 Ark. 316; 53 S. W. 404; Smith v. Neeley, 2 Ind. Ter. 651; 53 S. W. 450; Mahn v. Hussey, 28 N. J. Eq. 546.

⁵ Portneuf Lodge v. Savings Co., 6 Ida. 673; 59 Pac. 362.

⁶ Hendrickson v. Godsey, 54 Ark. 155; 15 S. W. 193; Scott v. Reid, 83 Minn. 203; 85 N. W. 1012; Puckett v. Fore, 77 Miss. 391; 27 So.

381; Western, etc., Co. v. Glasner, 169 Mo. 38; 68 S. W. 917.

⁷ Hendrickson v. Godsey, 54 Ark. 155; 15 S. W. 193.

⁸ Puckett v. Fore, 77 Miss. 391; 27 So. 381; Deane v. Houser, 83 Mo. App. 609.

⁹ Scott v. Reid, 83 Minn. 203; 85 N. W. 1012; Western, etc., Co. v. Glasner, 169 Mo. 38; 68 S. W. 917.

¹⁰ *In re* Howell, 110 Fed. 110; (Ga.); Lanier v. Olliff, 117 Ga. 397; 43 S. E. 711; Stone v. Trust Co., 107 Ga. 524; 33 S. E. 861; Burdette v. Robertson, 97 Ga. 612; 25 S. E. 349.

¹ Saffery v. Mayer (1901), 1 Q.

action between partners can be maintained on a partnership agreement to make wagers with a third person,² as to buy lottery tickets.³ Neither money advanced,⁴ profits made,⁵ nor losses paid,⁶ can be recovered; nor can an accounting be had.⁷ If one partner converts to his own use money furnished to use in bribing public officials no recovery can be had.⁸ No recovery can be had on a contract of partnership which is in effect a monopoly contract.⁹

In some jurisdictions, however, it is laid down as a general principle that one who receives property to another's use cannot thereafter avoid liability to such other on the ground that the original transaction was illegal.¹⁰ Under the latter theory some courts have held that A cannot interpose the defense of illegality

B. 11; McMullen v. Hoffman, 174 U. S. 639; Chateau v. Singla, 114 Cal. 91; 55 Am. St. Rep. 63; 33 L. R. A. 750; 45 Pac. 1015; Meyers v. Merillion, 118 Cal. 352; 50 Pac. 662; Wright v. Cudahy, 168 Ill. 86; 48 N. E. 39; Shaffner v. Pinchback, 133 Ill. 410; 23 Am. St. Rep. 624; 24 N. E. 867; affirming 30 Ill. App. 355; Miller v. Davidson, 3 Gilman (Ill.) 518; 44 Am. Dec. 715; Texas, etc., Ry. v. Ry. Co., 41 La. Ann. 970; 17 Am. St. Rep. 445; 6 So. 888; Spies v. Rosenstock, 87 Md. 14; 39 Atl. 268; Dakin v. Rumsey, 104 Mich. 636; 62 N. W. 990; Roselle v. Bank, 141 Mo. 36; 64 Am. St. Rep. 501; 39 S. W. 274; Morrison v. Bennett, 20 Mont. 560; 40 L. R. A. 158; 52 Pac. 553; Goodrich v. Houghton, 134 N. Y. 115; 31 N. E. 516; Atwater v. Manville, 106 Wis. 64; 81 N. W. 985; Fairbank v. Leary, 40 Wis. 637.

² Roselle v. Bank, 141 Mo. 36; 64 Am. St. Rep. 501; 39 S. W. 274; Morrison v. Bennett, 20 Mont. 560; 40 L. R. A. 158; 52 Pac. 553; Atwater v. Manville, 106 Wis. 64; 81 N. W. 985; *contra*, Owen v. Davis,

1 Bailey (S. C.) 315.

³ Roselle v. Bank, 141 Mo. 36; 64 Am. St. Rep. 501; 39 S. W. 274; Goodrich v. Houghton, 134 N. Y. 115; 31 N. E. 516.

⁴ Shaffner v. Pinchback, 133 Ill. 410; 23 Am. St. Rep. 624; 24 N. E. 867; Plank v. Jackson, 128 Ind. 424; 26 N. E. 568; affirmed on rehearing, 27 N. E. 1117.

⁵ Central Trust Co. v. Respass, 112 Ky. 606; 56 L. R. A. 479; 66 S. W. 421.

⁶ Saffery v. Mayer (1901), 1 Q. B. 11; Wright v. Cudahy, 168 Ill. 86; 48 N. E. 39; Spies v. Rosenstock, 87 Md. 14; 39 Atl. 268; Atwater v. Manville, 106 Wis. 64; 81 N. W. 985. *Contra*, where one partner in a bet gives the other his note for his share of their loss. Brooks v. Brady, 53 Ill. App. 155.

⁷ Morrison v. Bennett, 20 Mont. 560; 40 L. R. A. 158; 52 Pac. 553.

⁸ Smith v. Richmond (Ky.), 70 S. W. 846.

⁹ McMullen v. Hoffman, 174 U. S. 639.

¹⁰ See §§ 537, 538.

in an action by B on a partnership contract between A and B under which A has received profits.¹¹ Thus where A and B were partners in playing at faro, and lost, and A paid the losses, B giving him his note for his share, it was held that A could recover on such note.¹² So an accounting has been allowed under a contract of partnership in smuggling cotton through the Federal lines during the Civil War.¹³

§537. Agency in illegal contracts.

Under the principles already given,¹ if A makes an illegal contract with B, and under such contract B voluntarily pays X as agent of A, there is much authority for holding that A can recover such payment from X, and that X cannot in such action set up the illegality of the original contract.² Thus in contracts

¹¹ *Planters' Bank v. Bank*, 16 Wall. (U. S.) 483; *Brooks v. Martin*, 2 Wall. (U. S.) 70; *Crescent Ins. Co. v. Bear*, 23 Fla. 50; 11 Am. St. Rep. 331; 1 So. 318; *Gilliam v. Brown*, 43 Miss. 641; *De Leon v. Trevino*, 49 Tex. 88; 30 Am. Rep. 101. "A partner in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract." Syllabus of *Brooks v. Martin*, 2 Wall. (U. S.) 70. "When an illegal contract has been executed by the parties themselves and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied and the court will not unravel the transaction to discover its origin." *Planters' Bank v. Bank*, 16 Wall. (U. S.) 483, 500.

¹² *Boggess v. Lilley*, 18 Tex. 200.

¹³ *Gilliam v. Brown*, 43 Miss. 641.

¹ See § 527 *et seq.*

² *Tenant v. Elliott*, 1 Bos. & P.

3; *Farmer v. Russell*, 1 Bos. & P. 296; *Daniels v. Barney*, 22 Ind. 207; *Chinn v. Chinn*, 22 La. Ann. 599; *Hovey v. Storer*, 63 Me. 486; *Andrews v. Brewing Association*, 74 Miss. 362; 60 Am. St. Rep. 509; 20 So. 837; *Gilliam v. Brown*, 43 Miss. 641; *Norton v. Blinn*, 39 O. S. 145; *Hertzler v. Geigley*, 196 Pa. St. 419; 79 Am. St. Rep. 724; 46 Atl. 366 (unlawful sale of whiskey); *Tate v. Pegues*, 28 S. C. 463; 6 S. E. 298. (Sale of fertilizer without tag showing analysis.) *Baldwin v. Potter*, 46 Vt. 402; *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149; 42 N. W. 259; *Lemon v. Grosskopf*, 22 Wis. 447; 99 Am. Dec. 58. "If money has been actually paid to an agent for the use of his principal, the legality of the action of which it is the fruit does not affect the right of the principal to recover." *Hertzler v. Geigley*, 196 Pa. St. 419, 422; 79 Am. St. Rep. 724; 46 Atl. 366. "After the illegal contract has been executed one party in possession of all the gains and profits resulting

to transport and deliver counterfeit money,³ for the sale of whiskey without a license,⁴ to sell cotton during the Civil War contrary to law,⁵ and wager contracts,⁶ it has been held that the agent must account to his principal for money received by him on his principal's account under such illegal contracts. So an agent cannot retain property of his principal and refuse to account therefor under the claim that it is used in a monopoly.⁷ So the agent of a foreign express company which has not complied with statutes which prescribe on what terms it may do business in the state is liable to such company for money received on its account, though his bond is held to be illegal.⁸ Thus where a draft, representing the winnings of lottery tickets was sent to a bank, the payee thereof and such bank agreed with the other parties having an interest in the winnings of such tickets to cash the draft and divide the proceeds among the parties interested, the bank on cashing the draft is liable on such promise.⁹ Where A employed B to sell lottery tickets contrary to law, and B sold some and collected the money and C also sold some and paid the money over to B, it was held that A could recover from B the money paid in by C, but not the money received by B for tickets sold by himself.¹⁰ If the agent has

from the illegal traffic and transaction will not be tolerated to interpose the objection that the business which produced the fund was in violation of law." *Gilliam v. Brown*, 43 Miss. 641; 664; followed in *Howe v. Jolly*, 68 Miss. 323; 8 So. 513; *Andrews v. Brewing Association*, 74 Miss. 362; 60 Am. St. Rep. 509; 20 So. 837.

³ *Farmer v. Russell*, 1 Bos. & P. 296.

⁴ *Hertzler v. Geigley*, 196 Pa. St. 419; 79 Am. St. Rep. 724; 46 Atl. 366.

⁵ *Gilliam v. Brown*, 43 Miss. 641.

⁶ *Brady v. Harvath*, 167 Ill. 610; 47 N. E. 757; affirming 64 Ill. App. 254; *Bryan v. Lamson*, 88 Ill. App. 261; *Roselle v. Beckemeir*, 134 Mo.

380; 35 S. W. 1132; *Hatch v. Hanson*, 46 Mo. App. 323; *Norton v. Blinn*, 39 O. S. 145; *Baldwin v. Potter*, 46 Vt. 402; *Lemon v. Grosskopf*, 22 Wis. 447; 99 Am. Dec. 58; *Floyd v. Patterson*, 72 Tex. 202; 13 Am. St. Rep. 787; 10 S. W. 526; s. c. (Tex.), 18 S. W. 654.

⁷ *Gilbert v. Surety Co.*, 121 Fed. 499; 61 L. R. A. 253; 57 C. C. A. 619; *Star Brewery v. United Breweries Co.*, 121 Fed. 713; 58 C. C. A. 133.

⁸ *United States Express Co. v. Lucas*, 36 Ind. 361.

⁹ *Roselle v. Beckemeier*, 134 Mo. 380; 35 S. W. 1132.

¹⁰ *Lemon v. Grosskopf*, 22 Wis. 447; 99 Am. Dec. 58.

paid over the profits to the winner, his principal, and has the original deposit left, he is clearly liable to the principal therefor.¹¹ There is, however, some authority for holding that the agent cannot be compelled to account to his principal, on the ground that the principal cannot show title to the property in question without setting up the illegal contract, and the law will not allow him to use this to make out his case.¹² Thus if an agent has collected rent for land located in a jurisdiction in which by statute the principal's possession was illegal, the principal cannot recover from the agent.¹³

If the agent has made advances to his principal or rendered services to him under the illegal contract, his right to recover turns on whether or not the agent knew the facts which made the contract illegal. If he did, he cannot recover;¹⁴ but if he did not, he can.¹⁵ So in wager contracts, the agent may recover his commissions, wages and advances, if he does not know of his principal's illegal intent,¹⁶ and his principal cannot recover money paid to the agent for advances, and services, or on margin and the like, even under a statute giving the loser a right to recover.¹⁷ If the agent knows that the contracts which

¹¹ *In re Cronmire* (1898) 2 Q. B. 383.

¹² *Clarke v. Brown*, 77 Ga. 606; 4 Am. St. Rep. 98; *Samuels v. Oliver*, 130 Ill. 73; 22 N. E. 499; *Nave v. Wilson*, 12 Ind. App. 38; 38 N. E. 876; *Alexander v. Barker*, 64 Kan. 396; 67 Pac. 829; *Helber v. Schantz*, 109 Mich. 669; 67 N. W. 913; *Mexican International Banking Co. v. Lichtenstein*, 10 Utah 338; 37 Pac. 574.

¹³ *Alexander v. Barker*, 64 Kan. 396; 67 Pac. 829. (The land was part of that allotted to an Indian tribe whose statutes made it illegal for anyone to exercise ownership until his rights of citizenship had been established.)

¹⁴ *Embrey v. Jemison*, 131 U. S. 336; *Dudley v. Collier*, 87 Ala. 431;

13 Am. St. Rep. 55; 6 So. 304; *Walters v. Comer*, 79 Ga. 796; 5 S. E. 292; *Rogers v. Marriott*, 59 Neb. 759; 82 N. W. 21; *Leonard v. Poole*, 114 N. Y. 371; 11 Am. St. Rep. 667; 4 L. R. A. 728; 21 N. E. 707; *Kahn v. Walton*, 46 O. S. 195; 20 N. E. 203; *Smith v. Kammerer*, 152 Pa. St. 98; 25 Atl. 165.

¹⁵ *Rumsey v. Berry*, 65 Me. 570; *Cover v. Smith*, 82 Md. 586; 34 Atl. 465; *Donovan v. Daiber*, 124 Mich. 49; 82 N. W. 848.

¹⁶ *Parker v. Moore*, 115 Fed. 799; reversing 111 Fed. 470; *Ponder v. Cotton Co.*, 100 Fed. 373; 40 C. C. A. 416; *Cover v. Smith*, 82 Md. 586; 34 Atl. 465; *Donovan v. Daiber*, 124 Mich. 49; 82 N. W. 848.

¹⁷ See § 520.

he is making are wagers, his right to recover depends on whether such wager contracts are treated as illegal, or as merely void. If the wager is illegal as well as void, the agent cannot recover for services or advances, since, properly speaking, there is no agency in illegal acts but all are joint wrong-doers.¹⁸ If the wager is illegal, and the principal loses, the question of his right to recover margins and advances from the agent depends further on the question whether the statute allowing a loser to recover is so framed as to include the contract in question. If it does, the principal can recover from the agent;¹⁹ otherwise not.²⁰ So

¹⁸ *Bibb v. Allen*, 149 U. S. 481; *Embrey v. Jemison*, 131 U. S. 336; *Irwin v. Williar*, 110 U. S. 499; *Waldron v. Johnston*, 86 Fed. 757; *Cashman v. Root*, 89 Cal. 373; 23 Am. St. Rep. 482; 12 L. R. A. 511; 26 Pac. 883; *Walters v. Comer*, 79 Ga. 796; 5 S. E. 292; *National Bank v. Cunningham*, 75 Ga. 366; *Cunningham v. Bank*, 71 Ga. 400; 51 Am. Rep. 266; *Pope v. Hanke*, 155 Ill. 617; 28 L. R. A. 568; 40 N. E. 839; *Foss v. Cummings*, 149 Ill. 353; 36 N. E. 553; affirming 47 Ill. App. 665; *Cothran v. Ellis*, 125 Ill. 496; 16 N. E. 646; *Wheeler v. McDermid*, 36 Ill. App. 179; *Whitesides v. Hunt*, 97 Ind. 191; 49 Am. Rep. 441; *First National Bank v. Packing Co.*, 66 Ia. 41; 23 N. W. 255; *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159; 5 L. R. A. 200; 22 N. E. 49; *Connor v. Black*, 119 Mo. 126; 24 S. W. 184; *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745; 4 S. W. 713; *Rogers v. Marriott*, 59 Neb. 759; 82 N. W. 21; *Kahn v. Walton*, 46 O. S. 195; 20 N. E. 203; *Fareira v. Gabell*, 89 Pa. St. 89; *Riordan v. Doty*, 50 S. C. 537; 27 S. E. 939; *Allen v. Dunham*, 92 Tenn. 257; 21 S. W.

898; *Oliphant v. Markham*, 79 Tex. 543; 23 Am. St. Rep. 363; 15 S. W. 569; *Lowry v. Dillman*, 59 Wis. 197; 18 N. W. 4.

¹⁹ *Parker v. Otis*, 130 Cal. 322; 92 Am. St. Rep. 56; 62 Pac. 571, 927; *Clarke v. Brown*, 77 Ga. 606; 4 Am. St. Rep. 98. (Under a statute that no rights grow out of an agency for an illegal purpose.) *Kruse v. Kennett*, 181 Ill. 199; 54 N. E. 965; reversing 69 Ill. App. 566; *Jamieson v. Wallace*, 167 Ill. 388; 59 Am. St. Rep. 302; 47 N. E. 762; affirming 60 Ill. App. 618; *Elder v. Talcott*, 43 Ill. App. 439; *Lester v. Buel*, 49 O. S. 240; 34 Am. St. Rep. 556; 30 N. E. 821; *Rogers v. Edmund*, 21 Ohio C. C. 675; 12 Ohio C. D. 291.

²⁰ *Northrup v. Buffington*, 171 Mass. 468; 51 N. E. 7. (Since changed by the statute of 1890. See *Bingham v. Scott*, 177 Mass. 208; 58 N. E. 687. Though in this last case the statute did not apply as the contract was not one of "employment" and the suit was against the agent of the plaintiff's broker, who was allowed to show his agency as the proceeding was not a criminal one.)

if the principal puts money²¹ or property²² into his agent's hands for an illegal purpose, the agent must account for any unexpended surplus.²³ Thus where A as accountant of an organization for operating a disguised gambling scheme receives money from its members, he must account therefor.²⁴ If A advances money to his agent X to use in buying property for A at a judicial sale, A being a party to a contract to stifle competition at such sale, and X uses part of such fund in buying such property, A can make X account for the residue.²⁵

§538. Cases outside of agency.

Where no agency exists, still if A pays X money to be by him paid to B, X cannot set up the illegality of the contract between A and B, and thus retain such money.¹ The same principle applies where B defrauds A out of the proceeds of an unlawful transaction to which B was not a party. Thus if A buys a lottery ticket contrary to law and B obtains it from A by fraud and converts the proceeds to his own use it has been held that A can recover such proceeds from B.²

§539. Stakeholders.

A stakeholder is one in whose hands the property staked by one or both parties to the wager is placed as a bailment to be delivered to the winner.¹ Either party, including of course, the loser, may rescind the wager and recover the property from

²¹ *Benton v. Singleton*, 114 Ga. 548; 58 L. R. A. 181; 40 S. E. 811; *Hardy v. Jones*, 63 Kan. 8; 88 Am. St. Rep. 223; 64 Pac. 969.

²² *Hertzler v. Geigley*, 196 Pa. St. 419; 79 Am. St. Rep. 724; 46 Atl. 366; *Tate v. Pegues*, 28 S. C. 463; 6 S. E. 298.

²³ *Repplier v. Jacobs*, 149 Pa. St. 167; 24 Atl. 194; *Peters v. Grim*, 149 Pa. St. 163; 34 Am. St. Rep. 599; 24 Atl. 192; *Roth v. Holmes* (Tenn. Ch. App.), 52 S. W. 699.

²⁴ *Roth v. Holmes* (Tenn. Ch. App.), 52 S. W. 699.

²⁵ *Hardy v. Jones*, 63 Kan. 8; 88 Am. St. Rep. 223; 64 Pac. 969.

¹ *Barker v. Parker*, 23 Ark. 390; *Fairbanks v. Blakington*, 9 Pick. (Mass.) 93.

² *Martin v. Richardson*, 94 Ky. 183; 42 Am. St. Rep. 353; 19 L. R. A. 692; 21 S. W. 1039.

¹ *Pabst Brewing Co. v. Liston*, 80 Minn. 473; 81 Am. St. Rep. 275; 83 N. W. 448.

the stakeholder while it is still in his hands,² even after the event is determined.³ If the loser repudiates the contract and demands the return of his property while it is in the stakeholder's hands, the latter is liable if, after such notice, he pays it to the winner.⁴ A promise by the stakeholder to the loser not to pay the money, dispenses with notice.⁵ A notice by the loser not to pay, which is given in affirmance of the contract, claiming that the event is not settled, is not sufficient to hold the stakeholder.⁶ If no demand is made until the stakeholder has paid the winner, the loser cannot recover in the absence of statute;⁷ nor can the party to whom the money was not paid

² *Wise v. Rose*, 110 Cal. 159; 42 Pac. 569; *Taylor v. Moore*, 20 Ind. App. 654; 50 N. E. 770; *Adkins v. Flemming*, 29 Ia. 122; *Fisher v. Hildreth*, 117 Mass. 558; *Vandolah v. McKee*, 99 Mo. App. 342; 73 S. W. 233; *Bernard v. Taylor*, 23 Or. 416; 37 Am. St. Rep. 693; 18 L. R. A. 859; 31 Pac. 968; *Dauler v. Hartley*, 178 Pa. St. 23; 35 Atl. 857.

³ *Burge v. Ashley* (1900), 1 Q. B. 744; *Logue v. McCuish*, 21 N. S. 75; *Lewis v. Burton*, 74 Ala. 317; 49 Am. Rep. 816; *Hale v. Sherwood*, 40 Conn. 332; 16 Am. Rep. 37; *Pettillon v. Hipple*, 90 Ill. 420; 32 Am. Rep. 31; *Pollock v. Agner*, 54 Kan. 618; 38 Pac. 781; *Turner v. Thompson*, 107 Ky. 647; 55 S. W. 210; *Hutchings v. Stilwell*, 18 B. Mon. (Ky.) 776; *Gilmore v. Woodcock*, 69 Me. 118; 31 Am. Rep. 255; *Pabst Brewing Co. v. Liston*, 80 Minn. 473; 81 Am. St. Rep. 275; 83 N. W. 448; *Wilkinson v. Towsley*, 16 Minn. 299; 10 Am. Rep. 139; *Deaver v. Bennett*, 29 Neb. 812; 26 Am. St. Rep. 415; 46 N. W. 161; *M'Allister v. Hoffman*, 16 Serg. & R. (Pa.) 147; 16 Am. Dec. 556; *Perkins v. Hyde*, 6 Yerg. (Tenn.) 288. *Contra*, that notice to the stakeholder after the event is too

late; *Dooley v. Jackson*, — Mo. App. —; 78 S. W. 330; *Cutshall v. McGowan*, 98 Mo. App. 702; 73 S. W. 933.

⁴ *Burge v. Ashley* (1900), 1 Q. B. 744; *Logue v. McCuish*, 21 N. S. 75; *Taylor v. Moore*, 20 Ind. App. 654; 50 N. E. 770; *Turner v. Thompson*, 107 Ky. 647; 55 S. W. 210; *Pabst Brewing Co. v. Liston*, 80 Minn. 473; 81 Am. St. Rep. 275; 83 N. W. 448; *Bernard v. Taylor*, 23 Or. 416; 37 Am. St. Rep. 693; 18 L. R. A. 859; 31 Pac. 968.

⁵ *Turner v. Thompson*, 107 Ky. 647; 55 S. W. 210.

⁶ *Maher v. Van Horn*, 15 Colo. App. 14; 60 Pac. 949; *Hale v. Sherwood*, 40 Conn. 332; 16 Am. Rep. 37; *Patterson v. Clark*, 126 Mass. 531. But under the Kentucky statute notice not to pay the winner seems sufficient without adding a demand to return the stake to the loser. *Turner v. Thompson*, 107 Ky. 647; 55 S. W. 210. (In such action the plaintiff may show that the stakeholder paid over the money under a bond of indemnity.)

⁷ *Howson v. Hancock*, 8 T. R. 575; *Morris v. Philpot*, 11 Ind. 447; *Frybarger v. Simpson*, 11 Ind. 59; *Trenery v. Goudie*, 106 Ia. 693; 77 N.

maintain an action against the stakeholder after the event and payment on the ground that the stakeholder paid the wrong party.⁸ Under some statutes a stakeholder is liable absolutely to each party for his stake.⁹ A bet on a horse-race with B; C was stakeholder; A won. To induce C to pay him A agreed with X as surety to indemnify C against liability to B. X was obliged to pay C. It was held that X could not enforce the liability against A.¹⁰ Under some statutes it is a misdemeanor to act as stakeholder.¹¹

§540. Right of third person to attack monopoly contract.

If the parties to the monopoly contract are satisfied therewith and are willing to perform it, but some third party seeks to take advantage of its illegality, in the absence of statute, such third persons cannot compel parties to the monopoly contract to break it.¹ Thus, where members of an association agree to deal only with parties who comply with their rules, such as not to deal with wholesalers who sell at retail,² or who sell to persons out-

W. 467; *Okerson v. Crittenden*, 62 Ia. 297; 17 N. W. 528; *Goldberg v. Feiga*, 170 Mass. 146; 48 N. E. 1073; *Riddle v. Perry*, 19 Neb. 505; 27 N. W. 721; *Bates v. Lancaster*, 10 Humph. (Tenn.) 134; 51 Am. Dec. 696; *West v. Holmes*, 26 Vt. 530.

⁸ *Trenery v. Goudie*, 106 Ia. 693; 77 N. W. 467; *Okerson v. Crittenden*, 62 Ia. 297; 17 N. W. 528.

⁹ *Hensler v. Jennings*, 62 N. J. L. 209; 41 Atl. 918; *Columbia, etc., Co. v. Holdeman*, 7 W. & S. (Pa.) 233; 42 Am. Dec. 229; *Ferguson v. Yunt*, 13 S. D. 120; 82 N. W. 509; *Harnden v. Melby*, 90 Wis. 5; 62 N. W. 535. The stakeholder is liable to a person only for the amount deposited by him and not for the amount deposited by a third person in his name. *Harnden v. Melby*, 90 Wis. 5; 62 N. W. 535.

¹⁰ *Ferguson v. Yunt*, 13 S. D. 120; 82 N. W. 509.

¹¹ *Walsh v. Trebilcock*, 23 Can. S. C. 695.

¹ *Mogul Steamboat Co. v. McGregor*, L. R. 23 Q. B. D. 598; *American Livestock Commission Co. v. Livestock Exchange*, 143 Ill. 210; 36 Am. St. Rep. 385; 18 L. R. A. 190; 32 N. E. 274.

² *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; 40 Am. St. Rep. 319; 55 N. W. 1119; 21 L. R. A. 337. *Contra*, *Jackson v. Stanfield*, 137 Ind. 592; 23 L. R. A. 588; 36 N. E. 345; 37 N. E. 14, which cites *Delz v. Winfree*, 80 Tex. 400; 16 S. W. 111, and holds that a dealer outside the association, whose business is injured by having wholesalers refuse to sell to him under fear of being fined by the retailers, may have an action against the members

side the association,³ a third person who does not comply with their rules cannot enjoin the secretary of such association from notifying the members thereof of such non-compliance.⁴ If goods are sold or services rendered by a monopoly or trust recovery can be had therefor, if such transaction is a part of the business in which such monopoly exists and is not a step towards the formation of such monopoly.⁵ An executed contract for the sale of good-will cannot be avoided even if made to create a monopoly.⁶ A patent owned by a monopoly cannot be infringed.⁷ So a monopolistic combination of common carriers may enjoin a broker from the unlawful sale of railroad tickets issued by such combination.⁸ So if A is liable to B in contract and B assigns such contract to X in pursuance of a monopolistic contract A cannot, as against X, set up such illegality.⁹ But a monopoly association formed to control prices cannot maintain an action in its partnership name for goods sold by it.¹⁰ The price fixed by a monopoly is "not a market price within the

of the association who threaten such wholesalers with fine and prevent them from dealing with such outside retailer; and *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; 40 Am. St. Rep. 319; 21 L. R. A. 337; 55 N. W. 1119, is criticised and not followed. This discussion runs beyond the domain of contract law and into that of torts. See ch. lxi.

³ *Macauley v. Tierney*, 19 R. I. 255; 61 Am. St. Rep. 770; 37 L. R. A. 455; 33 Atl. 1; citing *Bohn Mfg. Co. v. Hollis*, *supra*, and *Heywood v. Tillson*, 75 Me. 225; 46 Am. Rep. 373; *Cote v. Murphy*, 159 Pa. St. 420; 39 Am. St. Rep. 686; 23 L. R. A. 135; 28 Atl. 190; *Payne v. R. R.* 81 Tenn. 507; 49 Am. Rep. 666.

⁴ These cases are also based by the court on the theory that the contracts are valid. Their validity as between the parties thereto was not involved, however.

⁵ *Union Sewer Pipe Co. v. Con-*

nelly, 99 Fed. 354; *The Charles E. Wiswall*, 86 Fed. 671; 30 C. C. A. 339; 42 L. R. A. 85; affirming *sub nomine The Chas. E. Wisewall*, 74 Fed. 802; *Dennehy v. McNulta*, 86 Fed. 825; 30 C. C. A. 422; 41 L. R. A. 609; *Saguache County v. Skinner*, 8 Colo. App. 272; 45 Pac. 514; *Houck v. Wright*, 77 Wis. 476; 27 So. 616; *National Distilling Co. v. Importing Co.*, 86 Wis. 352; 39 Am. St. Rep. 902; 56 N. W. 864.

⁶ *Metcalfe v. School Furniture Co.*, 122 Fed. 115.

⁷ *General Electric Co. v. Wise*, 119 Fed. 922.

⁸ *Kinner v. R. R.*, 69 O. S. 339; 69 N. E. 614; affirming 23 Ohio C. C. 294.

⁹ *California Cured Fruit Association v. Stelling*, 141 Cal. 713; 75 Pac. 320.

¹⁰ *Jackson v. Brick Association*, 53 O. S. 303; 53 Am. St. Rep. 638; 35 L. R. A. 287; 41 N. E. 257.

contemplation of the law.”¹¹ Some anti-trust statutes go further and prevent a monopolistic combination from recovering for goods sold by it. Thus, an accounting has been refused in case of sale of beer by a trust.¹² The right of the state to interfere with the formation or performance of monopoly contracts where the parties thereto are ready and willing to perform such contract is given by some statutes.¹³ If a corporation is a party to such illegal contract, the state may interfere by means of a proceeding in *quo warranto*,¹⁴ or injunction.¹⁵

The act of congress¹⁶ which forbids combinations, monopolies and trusts, applies only to interstate commerce.¹⁷ It applies to combinations of railroads engaged in interstate commerce, for fixing rates,¹⁸ and to combinations of manufacturers in several different states, fixing the rates at which they will sell their product and making a pooling arrangement therefor, as far as such arrangement affects interstate commerce,¹⁹ and to an association formed by residents of different states to fix the price of tiles, the manufacturers of tiles living in a different state

¹¹ *Lovejoy v. Michels*, 88 Mich. 15; 13 L. R. A. 770; 49 N. W. 901.

¹² *Wiggins v. Bisso*, 92 Tex. 219; 71 Am. St. Rep. 837; 47 S. W. 637.

¹³ *Addyston, etc., Co. v. United States*, 175 U. S. 211; modifying 85 Fed. 271; 29 C. C. A. 141; 46 L. R. A. 122; *United States v. Joint Traffic Association*, 171 U. S. 505; *United States v. Freight Association*, 166 U. S. 290; *American Fire Ins. Co. v. State*, 75 Miss. 24; 22 So. 99.

¹⁴ *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121; *People v. Stock Exchange*, 170 Ill. 556; 62 Am. St. Rep. 404; 39 L. R. A. 373; 48 N. E. 1062; *People v. Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; 8 L. R. A. 497; 22 N. E. 798; *State v. Standard Oil Co.*, 49 O. S. 137; 34 Am. St. Rep. 541;

15 L. R. A. 145; 30 N. E. 279. Such topics are beyond the scope of a work on the elements of contract. The subject is merely referred to here for a complete presentation of this subject.

¹⁵ *Queen Ins. Co. v. State*, 86 Tex. 250; 22 L. R. A. 483; 24 S. W. 397.

¹⁶ 26 Statutes 209.

¹⁷ *Hopkins v. United States*, 171 U. S. 578; *United States v. E. C. Knight Co.*, 156 U. S. 1.

¹⁸ *United States v. Joint Traffic Association*, 171 U. S. 505; *United States v. Freight Association*, 166 U. S. 290.

¹⁹ *Addyston, etc., Co. v. United States*, 175 U. S. 211; modifying 85 Fed. 271; 29 C. C. A. 141; 46 L. R. A. 122; because the decree was so broad as to apply to commerce within a state as well as to interstate commerce.

from the dealers,²⁰ but does not apply to a live-stock exchange,²¹ or to a manufacturing corporation formed to buy up or crush out competition,²² since such organizations do not necessarily affect interstate commerce. A monopoly is, of course, subject to the general rules on the subject of interference with contract.²³

§541. Property rights acquired illegally.

If A acquires property under an illegal contract with B, X cannot seize such property, convert it to his own use, and in an action by A, set up the illegality of the contract whereby A acquired such property.¹ Thus if A has acquired property in an illegal business, he can recover it from B if B embezzles it.² Thus where A agreed to donate certain cotton to a military company to aid the rebellion, and the agent of the company sold the cotton to B, B paying A and A agreeing to hold the cotton to B's order, it was held that though the agreement between A and the company was illegal, the contract between A and B was valid.³ So where A by fraud obtains from B a lottery ticket which has drawn the prize, A is liable to B for the proceeds thereof.⁴

§542. Contracts of indemnity.

If A requests B to do a certain act and agrees to indemnify him against any liability to which he may subject himself by reason thereof, the legality of such contract of indemnity

²⁰ *Montague v. Lowry*, 193 U. S. 38; affirming 115 Fed. 27; which affirmed 106 Fed. 38.

²¹ *Hopkins v. United States*, 171 U. S. 578.

²² *United States v. E. C. Knight Co.*, 156 U. S. 1.

²³ See Ch. LXI.

¹ *Brooks v. Martin*, 2 Wall. (U. S.) 70; *Planters' Bank v. Bank*, 16 Wall. (U. S.) 483; *Willson v. Owen*, 30 Mich. 474; *Portsmouth Brewing Co. v. Mudge*, 68 N. H. 462; 44 Atl.

600; *German Congregation v. Stegner*, 21 O. S. 488; *Mohney v. Cook*, 26 Pa. St. 342; 67 Am. Dec. 419.

² *Willson v. Owen*, 30 Mich. 474; *Portsmouth Brewing Co. v. Mudge*, 68 N. H. 462; 44 Atl. 600; *German Congregation v. Stegner*, 21 O. S. 488.

³ *Holt v. Barton*, 42 Miss. 711; 2 Am. Rep. 640.

⁴ *Martin v. Richardson*, 94 Ky. 183; 42 Am. St. Rep. 353; 19 L. R. A. 692; 21 S. W. 1039.

depends in some jurisdictions upon whether the act to be done is known to B to be wrongful.¹ If B knows or must know that the act which he agrees to do is illegal, he cannot enforce the contract to indemnify him from the liability therefor;² while if he does not know or have reason to know that such acts are illegal, he can enforce such contract, even if the act is in fact illegal.³ Thus a promise by an author to indemnify the publisher against damages for the publication of a libel is invalid,⁴ while a similar promise is valid where it does not appear that a libel is intended.⁵ So a promise to indemnify an officer for making a levy apparently lawful, or for selling property taken on execution, though the judgment debtor claims it as exempt,⁶ or a promise to indemnify a garnishee against loss from payment of the fund garnisheed,⁷ is valid; while a promise to indemnify an officer for refusing to execute regular legal process is invalid.⁸ But if there is a doubt as to the ownership

¹ *Coventry v. Barton*, 17 Johns (N. Y.) 142; 8 Am. Dec. 376; *Davis v. Arledge*, 3 Hill Law (S. C.) 170; 30 Am. Dec. 360.

² *Buffendeau v. Brooks*, 28 Cal. 642; *Nelson v. Cook*, 17 Ill. 443; *Wright v. Gardner*, 98 Ky. 454; 33 S. W. 622; rehearing denied, 98 Ky. 463; 35 S. W. 1116; *Ayer v. Hutchins*, 4 Mass. 370; 3 Am. Dec. 232; *Harrington v. Crawford*, 136 Mo. 467; 58 Am. St. Rep. 653; 35 L. R. A. 477; 38 S. W. 80; *Harrington v. Crawford*, 61 Mo. App. 221; *Riley v. Whittiker*, 49 N. H. 145; 6 Am. Rep. 474; *Webbers v. Blunt*, 19 Wend. (N. Y.) 188; 32 Am. Dec. 445; *Ferguson v. Yunt*, 13 S. D. 120; 82 N. W. 509.

³ *Smith v. Delaney*, 64 Conn. 264; 42 Am. St. Rep. 181; 29 Atl. 496; *Marcy v. Crawford*, 16 Conn. 549; 41 Am. Dec. 158; *Nelson v. Cook*, 17 Ill. 443; *Jacobs v. Pollard*, 10 Cush. (Mass.) 287; 57 Am. Dec. 165; *Avery v. Halsey*, 14 Pick.

(Mass.) 174; *Klock v. Pack*, 112 Mich. 670; 71 N. W. 461; *Wirt v. Schuman*, 67 Mo. App. 163; *Ives v. Jones*, 3 Ired. Law (N. C.) 538; 40 Am. Dec. 421; *Mays v. Joseph*, 34 O. S. 22; *Miller v. Rhoades*, 20 O. S. 494; *Smith v. Robinson*, 2 Ohio C. D. 146.

⁴ *Lea v. Collins*, 4 Sneed. (Tenn.) 393; *Atkins v. Johnson*, 43 Vt. 78; 5 Am. Rep. 260.

⁵ *C. F. Jewett Publishing Co. v. Butler*, 159 Mass. 517; 22 L. R. A. 253; 34 N. E. 1087; *Smith v. Ashley*, 11 Met. (Mass.) 367; 45 Am. Dec. 216.

⁶ *Mays v. Joseph*, 34 O. S. 22; *Miller v. Rhoades*, 20 O. S. 494.

⁷ *Klock v. Pack*, 112 Mich. 670; 71 N. W. 461.

⁸ *Ayer v. Hutchins*, 4 Mass. 370; 3 Am. Dec. 232; *Harrington v. Crawford*, 136 Mo. 467; 58 Am. St. Rep. 653; 35 L. R. A. 477; 38 S. W. 80; *Harrington v. Crawford*, 61 Mo. App. 221; *Webbers v. Blunt*,

of chattels on which an officer is about to levy, a promise by one not a party to the writ who claims to be the real owner to indemnify the officer against loss from leaving such chattels with such claimant is valid.⁹ Where it is a misdemeanor to act as stakeholder in a bet on a trial of speed, a contract to indemnify a stakeholder against liability from surrendering the stakes is invalid.¹⁰ It has been held, however, that in a contract of indemnity for making an arrest, the promisee cannot recover if the arrest was illegal, even though he thought that it was legal.¹¹ A contract to indemnify the master of a ship against all legal expenses which may arise from his chastising the crew has been construed to mean lawful chastisement; and indemnity against the expenses of groundless suits has been enforced.¹² A bond given by a deputy sheriff to whom the sheriff has made an illegal assignment of all unearned fees in a given district has been held valid.¹³

§543. Contracts collateral to void contract.

If a contract is merely void as distinguished from illegal, a contract collateral to it and in aid of it is not thereby invalidated. This follows from the rule that a void covenant in an inseverable contract does not invalidate the remaining valid covenants. Thus in jurisdictions in which wagers are merely void, an agent may recover for services rendered or expenses incurred in making wagers for his principal.¹ He must act as agent however; and must not, under guise of agency, be the real adversary party.² So a contract employing an agent to

19 Wend. (N. Y.) 188; 32 Am. Dec. 445.

⁹ Smith v. Robinson, 2 Ohio C. D. 146.

¹⁰ Ferguson v. Yunt, 13 S. D. 120; 82 N. W. 509.

¹¹ Cumpston v. Lambert, 18 Ohio 81; 51 Am. Dec. 442 (by a divided court).

¹² Babcock v. Terry, 97 Mass. 482.

¹³ White v. Cook, 51 W. Va. 201;

90 Am. St. Rep. 775; 57 L. R. A. 417; 41 S. E. 410.

¹ Thompson v. Maddux, 117 Ala. 468; 23 So. 157; Peet v. Hatcher, 112 Ala. 514; 57 Am. St. Rep. 45; 21 So. 711.

² Pratt v. Boody, 55 N. J. Eq. 175; 35 Atl. 1113; Oliphant v. Markham, 79 Tex. 543; 23 Am. St. Rep. 363; 15 S. W. 569.

work in the business of indemnifying against losses on credits in a state where such insurance cannot be effected lawfully, is valid.³

³ Rosenbaum v. Credit System
Co., 65 N. J. L. 255; 53 L. R. A.
449; 48 Atl. 237.

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